IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

HERMAN LEE WILLIAMS — APPELLANT

VS. — NO. 2007-KA-0270

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

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STATEMENT OF THE ISSUES

I. THE DEFENDANT WAS NOT DENIED HIS RIGHT TO A SPEEDY TRIAL.

II. THE TRIAL COURT HAD JURISDICTION.

III. THE DEFENDANT'S SENTENCE WAS NOT UNCONSTITUTIONAL OR DISPROPORTIONATE.

IV. THE DEFENDANT OPENED THE DOOR REGARDING HIS PRIOR CONVICTIONS AND THE STATE WAS PROPERLY ALLOWED TO QUESTION HIM REGARDING SAID CONVICTIONS.

V. THE DEFENDANT WAS NOT DENIED THE ADVICE OF COUNSEL OR DUE PROCESS.

VI. THE VERDICT WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

VII. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN RULING ON THE PROPOSED JURY INSTRUCTIONS.

STATEMENT OF THE FACTS

After dark on July 10, 2005, the Defendant, Herman Lee Williams, and a friend, Renee White, were sitting in a parked car at the scenic overlook in Vicksburg which is also known as Navy Circle. (Transcript p. 252). Officer Jeremy Brassard of the Vicksburg Police Department was patrolling the area and saw two vehicles at the overlook even though the area was closed after dark. (Transcript p. 178 - 179). One of the two vehicles left the park as the officer pulled into the area. (Transcript p. 179). The other vehicle remained parked with its windows up and lights off. (Transcript p. 179). Officer Brassard turned his spot light on the vehicle and approached it, knocking on the window. (Transcript p. 180). The Defendant rolled down the window and gave the officer his information. (Transcript p. 180). Officer Brassard then asked the Defendant to step outside the vehicle. (Transcript p. 180). The Defendant exited the vehicle and took off running down the hill. (Transcript p. 180). As he was running, the officer noticed that the Defendant dug in his pockets and pulled out a cellophane bag. (Transcript p. 181). The Defendant threw the bag down as he ran. (Transcript p. 181). The officer was eventually able to catch the Defendant and search him. (Transcript p. 181). Additional officers came to the scene to assist and the cellophane bag the Defendant threw was located and photographed. (Transcript p. 181 - 182). The substance in the bag was later determined to be cocaine. (Transcript p.223 - 224).

The Defendant was arrested, tried, and convicted of possession of cocaine in an amount more than 10 grams but less than 30 grams. He was sentenced as a habitual offender to twenty-four years in the custody of the Mississippi Department of Corrections without the possibility of parole.

SUMMARY OF THE ARGUMENT

The trial court had proper jurisdiction over this matter and the Defendant was not denied his right to a speedy trial. There were no reversible errors in that the Defendant opened the door to his being questioned regarding prior convictions and he was not denied his right to counsel. Further, the trial court did not err in its rulings regarding the various jury instructions of which the Defendant now complains. Moreover, the verdict was not against the overwhelming weight of the evidence and the Defendant's sentence was within the statutory guidelines and was not unconstitutional or disproportionate.

ARGUMENT

I. THE DEFENDANT WAS NOT DENIED HIS RIGHT TO A SPEEDY TRIAL.

"Alleged speedy trial violations are examined and determined on a case-by-case basis due to the factual specifics of each action." *Brengettcy v. State,* 794 So.2d 987, 991 (Miss. 2001) (citing *Sharp v. State*, 786 So.2d 372, 377 (Miss. 2001)). The Mississippi Supreme Court has held the following with regard to claims of violation of a defendant's constitutional right to a speedy trial:

> In reviewing such a constitutional challenge, we have not set a specific length of time as being per se unconstitutional, but instead have applied the four-part balancing test articulated by the U.S. Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). *(Citation omitted)*. The four Barker factors to consider are: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) the prejudice to the defendant. *Barker*, 407 U.S. at 530, 92 S.Ct. 2182. None of the four factors is determinative; rather, a totality of the circumstances test is used. *(Citation omitted)*. "We are mindful indeed that no one factor is dispositive of the question. Nor is the balancing process restricted to the *Barker* factors to the exclusion of any other relevant circumstances." *(Citation omitted)*.

Brengettcy, 794 So.2d at 992. The following is a time line of the pertinent events in this case:

July 10, 2005	Defendant arrested and taken to Warren County Jail. Mississippi Department of Corrections put a hold on him because of an earned release supervision violation.

	(Transcript p. 44 - 45).
July 14, 2005	Mississippi Department of Corrections Officers transported him to the Central Mississippi Correctional Facility in Pearl. (Transcript p. 45).
August 16, 2005	Transferred to the South Mississippi Correctional Institution in Leaksville. (Transcript p. 45).
October 19, 2005	Indicted. Warren County District Attorney learned that the Defendant was in the custody of the Department of Corrections. (Transcript p. 45).
October 31, 2005	Detainer filed. (Transcript p. 45).
February 28, 2006	Released to Warren County Authorities (Transcript p. 46).
March 1, 2006	Defendant released on bond. (Transcript p. 48).
June 15, 2006	Defendant arrested for Sale of Cocaine. (Transcript p. 53 - 54).
July 21, 2006	Arraignment. (Transcript p. 48). Defendant first asserted his right to a speedy trial. (Transcript p. 2).
August 10, 2006	Defendant filed Motion to Dismiss for Denial of Speedy Trial. (Record p. 17).
September 18, 2006	Trial begins.

Thus, the Defendant's trial began fourteen months after he was arrested. While this delay is sufficient to warrant examination of the remaining *Barker* factors, "this delay, standing alone, is not enough to establish a violation of the defendant's constitutional right to a speedy trial." *State v. Magnusen*, 646 So.2d 1275 (Miss. 1994). In the case at hand, the Defendant's right to a speedy trial was not violated as he did not timely assert his right to a speedy trial and as he can show no prejudice as a result of the delay.

"A defendant 'has no duty to bring himself to trial.... Still he gains far more points under this prong of the Barker test where he has demanded a speedy trial.'" *Brengettcy,* 794 So.2d at 994 (quoting *Jaco v. State*, 574 So.2d 625, 632 (Miss.1990)). The Defendant waited one full year before asserting his right to a speedy trial. He first asserted this right at his arraignment by noting that he would "also like to preserve [his] right to a speedy trial." (Transcript p. 2). He never actually requested that he receive a speedy a trial. The Defendant's trial was then set for September of 2006 without objection from the Defendant. (Transcript p. 3). The Defendant then filed a Motion to

Dismiss for Denial of Speedy Trial on August 10, 2006. (Record p. 17). This Motion was properly denied as the Defendant's trial commenced on September 18, 2006, only two months after he first "preserved" his right to a speedy trial. *See Wall v. State,* 718 So.2d 1107, 1113 (Miss.1998) (holding that it weighed against Wall that he did not assert his right to a speedy trial until two months before he received a trial). Accordingly, the period of time prior to the Defendant's "preservation" of his right to a speedy trial should not be counted against the State. *See Noe v. State,* 616 So.2d 298 (Miss 1993) (holding that the "defendant's assertion of his right was late" when he waited "nearly an entire year" after his arrest before asserting his right to a speedy trial.); *Adams v. State*, 583 So.2d 165, 169-70 (Miss.1991) (holding that a demand for dismissal coupled with a demand for an instant trial was insufficient to weigh this factor in favor of the defendant, where the motion came after the bulk of the entire period of delay had elapsed.); and *Murray v. State,* 967 So.2d 1222, 1231 -1232 (Miss. 2007) (holding that this factor weighed in favor of the State when 808 days had passed from the time of his arrest to the filing of his motion, and the motion preceded the jury trial by only 57 days).

Furthermore, the Defendant was not prejudiced because of the delay. The Defendant first claims that he was prejudiced because "he was imprisoned over ten months of the thirteen-month delay." (Appellant's Brief p. 10). However, a hold was placed on the Defendant by the Mississippi Department of Corrections on July 10, 2005, the day of his arrest, because of an earned release supervision violation. (Transcript p. 44 - 45). He was incarcerated as a result of that violation from July 14, 2005 through February 28, 2006. He was then released to Warren County authorities and bonded out on March 1, 2006. (Transcript p. 46 and 48). He was later arrested on a subsequent charge on June 15, 2007 and remained incarcerated until the date of the trial. (Transcript p. 53 - 54). Thus, the Defendant was, at most, in custody as a direct result of this charge for only 5 days (July

10, 2005 - July 14, 2005 and February 28, 2006 - March 1, 2006). "Obviously if [the defendant] was already in jail on unrelated charges, any prejudice that could have arisen merely from interference with his liberty is alleviated. . ." *Brengettcy v. State,* 794 So.2d 987, 995 (Miss. 2001). *See also Hicks v. State*, 812 So.2d 179, 187 (Miss. 2002); *Winder v. State,* 640 So.2d 893, 895 (Miss.1994); and *Thompson v.* State, 773 So.2d 955, 960 (Miss. Ct. App. 2000).

The Defendant also claims that he was prejudiced because he "lost contact with two of his witnesses." (Appellant's Brief p. 10). He further claims that these two witnesses "would have testified at trial that they were there and that they did not see Herman Williams throw any drugs." (Appellant's Brief p. 11). However, as this Court noted in *Woodson v. State,* "[t]he evidence about which [the defendant] complains he was unable to present was cumulative to the evidence which he did present." 845 So.2d 740 (Miss. Ct. App. 2003). The Defendant, Renee White, the lady with him in the vehicle at the time police arrived, and Lash Rogers, another man at the Overlook on the night in question all testified that Williams did not throw any drugs. Thus, the testimony of the two missing witnesses would be merely cumulative of the testimony of the Defendant's other witnesses.

The Defendant also claims that his "ability to monitor and keep up with these witnesses was greatly hampered by his incarceration." (Appellant's Brief p. 11). However, as noted above the vast majority of his incarceration was due to other charges and therefore, cannot be counted against the State. Accordingly, the Defendant was not prejudiced by the delay. As such, this issue is without merit.

II. THE TRIAL COURT HAD JURISDICTION.

The Defendant claims that the "trial court lacked territorial jurisdiction to prosecute the charge against Herman Williams," noting that "the United States did not convey concurrent jurisdiction to Mississippi" and "Mississippi never retained concurrent jurisdiction." (Appellant's Brief p. 12). However, the United States Supreme Court has held that:

> It is not unusual for the United States to own within a state lands which are set apart and used for public purposes. Such ownership and use without more do not withdraw the lands for the jurisdiction of the state. On the contrary, the lands remain a part of her territory and within the operation of her laws, save the latter cannot affect the title of the United States or embarrass it in using the lands or interfere with its right of disposal.

Surplus Trading Co. v. Cook, 281 U.S. 647, 650, 50 S.Ct. 455, 456, 74 L.Ed 1091 (1930) (*emphasis added*). Furthermore, as set forth in *California Coastal Com'n v. Granite Rock Co.*, the United States Supreme Court stated that it is "clear that 'the State is free to enforce its criminal and civil laws' on federal land so long as those laws do not conflict with federal law." 480 U.S. 572, 580, 107 S.Ct. 1419, 1425, 94 L.Ed.2d 577 (1987) (quoting *Kleppe v. New Mexico*, 426 U.S. 529, 539, 96 S.Ct. 2285, 2293, 49 L.Ed.2d 34 (1976)). Accordingly, the State of Mississippi had jurisdiction over the Defendant's case and the Defendant's second issue is without merit.

III. THE DEFENDANT'S SENTENCE WAS NOT UNCONSTITUTIONAL OR DISPROPORTIONATE.

"Sentencing is within the complete discretion of the trial court and not subject to appellate review if it is within the limits prescribed by statute." *Gibson v. State,* 731 So.2d 1087, 1097 (Miss. 1998) (citing *Hoops v. State*, 681 So.2d 521, 537 (Miss.1996)). Further, it has been held that "as general rule, a sentence will not disturbed on appeal so long as it does not exceed the maximum term allowed by statute." *Stromas v. State*, 618 So.2d 116, 122 -124 (Miss.1993) (*citations omitted*). Moreover, "[d]eclaring a sentence violative of the Eighth Amendment to the U.S. Constitution

carries a heavy burden and only in rare cases should this Court make such a finding." *Id*, at 123. (*Emphasis added*).

The Defendant argues that his sentence is "unconstitutional and disproportionate." (Appellant's Brief p. 15). However, the Defendant's sentence is within the statutory guidelines. He was sentenced according to Mississippi Code Annotated §99-19-81 which states as follows:

> Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to separate terms of one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere, shall be sentenced to the maximum term of imprisonment prescribed for such felony, and such sentence shall not be reduced to suspended nor shall such person be eligible for parole or probation.

(*Emphasis added*). The Defendant was convicted under Mississippi Code Annotated §41-29-139(c) which provides that the maximum term of imprisonment for his felony is twenty-four years. The Defendant was sentenced to serve twenty-four years without the possibility of parole. As §99-19-81 requires that the Defendant receive the maximum term of imprisonment without parole or probation, the Defendant was properly sentenced thereunder.

The Defendant, relying on *Clowers v. State*, 522 So.2d 762 (Miss. 1988), also asserts that his sentence was disproportionate to his crime. (Appellant's Brief p. 15). This Court has previously held that "the holding in *Clowers v. State*, is not the rule, but the exception," noting that "the Mississippi Supreme Court in *Clowers* clearly stated that it was establishing no litmus test for proportionality and noted that 'outside the context of capital punishment, successful challenges to the proportionality of a particular sentence will be exceedingly rare.'" *Bell v. State*, 769 So.2d 247, 249 (Miss. Ct. App. 2006) (quoting *Clowers*, 522 So.2d at 765). Moreover, this Court in *Everett v. State*, held that "the ruling in *Clowers* is limited to its 'own distinctive facts and procedural posture.'" 835 So.2d 118, 124 (Miss. Ct. App. 2003) (quoting *Barnwell v. State,* 567 So.2d 215, 221

(Miss. 1990)). Additionally, the Defendant's sentence was not grossly disproportionate to his crime. *See Tate v. State*, 912 So.2d 919, 933 (Miss. 2005) (court upheld a sixty-year sentence without the possibility of parole for a drug offense when none of his prior convictions involved crimes of violence); *Tate v. State*, 946 So.2d 376, 387 (Miss. Ct. App. 2006) (court upheld a sixty-year sentence for possession of marijuana); *Oby v. State*, 827 So.2d 731, 734 (Miss. Ct. App. 2002) (court upheld a life sentence without the possibility of parole for possession of .55 grams of cocaine); and *Wall v. State*, 718 So.2d 1107, 1114-15 (Miss. 1998) (court upheld a life sentence without the possibility of parole for possession of a controlled substance conviction).

The Defendant further argues in his brief that "the war on drugs is all but lost" and that "as a society, we need to begin trying to treat this illness rather than locking people up, ruining their lives, making it where they will remain in criminal activities, and be a liability on tax payer's dollars by being locked in jails." (Appellant's Brief p. 16). However, the Mississippi Supreme Court has stated that:

> Drug offenses are very serious, and the public has expressed grave concern with the drug problem. The legislature has responded in kind with stiff penalties for drug offenders. It is the legislature's prerogative, and not this Court's, to set the length of sentences. Because this sentence was within the statutory guidelines, and because this State's legislature, as a matter of public policy, has called for stiff penalties for drug offender, *Solem v. Helm* is not implicated in this case.

Stromas v. State, 618 So.2d 116, 122 -124 (Miss.1993) (*Emphasis added*). Accordingly, as the Defendant's sentence was within the statutory guidelines and was not grossly disproportionate to the crime charged, this issue is without merit.

IV. THE DEFENDANT OPENED THE DOOR REGARDING HIS PRIOR CONVICTIONS AND THE STATE WAS PROPERLY ALLOWED TO QUESTION HIM REGARDING SAID CONVICTIONS.

The Defendant also argues that the trial court "improperly found that Herman Williams had opened the door on his prior conviction." (Appellant's Brief p. 19). "The admissibility of evidence is within the discretion of the trial court, and absent abuse of that discretion, the trial court's decision on the admissibility of evidence will not be disturbed on appeal." *Porter v. State*, 869 So.2d 414, 417(Miss. Ct. App. 2004) (citing *McCoy v. State*, 820 So.2d 25, 30 (Miss. Ct. App.2002)). "When the trial court stays within the parameters of the Rules of Evidence, the decision to exclude or admit evidence will be afforded a high degree of deference." *Id.*

Mississippi law is clear that "[w]here an accused, on direct examination, seeks to exculpate himself, such testimony is subject to normal impeachment via cross-examination, and this is so though it would bring out that the accused may have committed another crime." *Johnson v. State*, 666 So.2d 499, 503 (Miss. 1995)(quoting *Stewart v. State*, 596 So.2d 851, 853 (Miss. 1992)). Further, "[n]ormal impeachment applies when the defendant, on direct examination, makes blanket statements which open the door for impeachment." *Id.* (citing *Quinn v. State*, 479 So.2d 706, 708-09 (Miss. 1985) and *Pierce v. State*, 401 So.2d 730 (Miss. 1981)). In the case at hand, the following exchange took place during the Defendant's direct examination:

> Q: All right. [Officer Brassard] says you threw - - dug in your pockets and threw drugs out.
>
> A: No, sir, I didn't. I've been working on a job for 15 years. I don't smoke drugs.

(Transcript p. 272). At the end of the Defendant's direct examination, the State moved the trial court to allow it to question the Defendant regarding his prior conviction for possession of cocaine since the Defendant opened the door. The trial court found that the Defendant opened the door and

allowed the State to cross-examine the Defendant regarding his prior conviction. As set forth above, the case at hand is a classic example of when the State is allowed to question the Defendant regarding his prior convictions in that he made a blanket statement that he did not use drugs in order to exculpate himself and the State then questioned him about his prior conviction for possession of drugs.

The Defendant attempts to argue that his statement that he does not smoke drugs does not necessarily mean that he was saying that he did not use drugs. (Appellant's Brief p. 19 - 20). He further asserts that cocaine is snorted and crack is smoked and that therefore, the Defendant's statement "could very well be exactly true." (Appellant's Brief p. 19 - 20). However, as noted by the trial judge, crack cocaine is smoked and that is exactly what the Defendant was convicted of possessing. (Transcript p. 276 and 181). As the trial judge properly held that the Defendant opened the door to cross-examination regarding his prior convictions, this issue is without merit.

V. THE DEFENDANT WAS NOT DENIED THE ADVICE OF COUNSEL OR DUE PROCESS.

The Defendant additionally argues that he "was denied advice of counsel and due process" in that he "was denied access to his attorney to advise him what the court had ruled, the ramifications and preparation of questions which Herman Williams believed he was not going to be questioned about." (Appellant's Brief p. 20). The Defendant, however, admits that he was "unable to find a criminal case on point where a court has ruled that Defendant had a right to confer with counsel while on cross examination on an issue that was allegedly waived." (Appellant's Brief p. 21). However, the Mississippi Supreme Court's has held that "[a] defendant and his attorney do not have a right to consult indiscriminately without leave of the court as one must adhere to orderly courtroom decorum and procedure." *Simmons v. State,* 805 So.2d 452, 486 (Miss. 2001) (citing *Pendergraft*

v. State, 191 So.2d 830, 839 n. 1 (Miss.1966)). Furthermore, the Mississippi Supreme Court has also held that:

> . . .when a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying. He has an absolute right to such consultation before he begins to testify, but neither he nor his lawyer has a right to have the testimony interrupted in order to give him the benefit of counsel's advice. . . . Accordingly, it is entirely appropriate for a trial judge to decide, after listening to the direct examination of any witness, whether the defendant or a nondefendant, that cross-examination is more likely to elicit truthful responses if it goes forward without allowing the witness an opportunity to consult with third parties, including his or her lawyer.

Puckett v. State, 879 So.2d 920, 956 (Miss. 2004) (quoting *Perry v. Leeke*, 488 U.S. 272, 280-82, 109 S.Ct. 594, 102 L.Ed.2d 624 (1989)) (*emphasis added*). As such, this issue is also without merit.

VI. THE VERDICT WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

The Defendant's sixth issue is that "the finding of guilt was against the overwhelming weight of the credible evidence and/or is contrary to the law or the weight of the evidence." (Appellant's Brief p. 22). As part of his argument in this regard, the Defendant asserts that "the State failed to prove beyond a reasonable doubt that Herman Williams was guilty of the crime of possession of cocaine" and that "the only direct evidence against Herman Williams was Officer Brassard." (Appellant's Brief p. 22). The appellate standard of review for claims that a conviction is against the overwhelming weight of the evidence is as follows:

> [This 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. A new trial will not be ordered unless the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an "unconscionable injustice."

Pierce v. State, 860 So.2d 855 (Miss. Ct. App. 2003) (quoting *Smith v. State*, 802 So.2d 82, 85-86 (Miss. 2001)). On review, the Court must accept as true all evidence favorable to the State.

McClain v. State, 625 So.2d 774, 781 (Miss.1993).

In the case at hand, the State proved beyond a reasonable doubt that the Defendant possessed more than 10 grams but less than 30 grams of cocaine. The following facts were established in this regard:

a. Officer Brassard of the Vicksburg Police Department witnessed the Defendant pull a cellophane bag from his pocket and throw it on the ground before running on foot from the officer. (Transcript p. 181).
b. After the officers caught the Defendant, they found, photographed, and collected the cellophane bag the Defendant threw to the ground. (Transcript p. 181 - 182).
c. Adrian Hall of the Mississippi Crime Lab confirmed that the substance in the cellophane bag was cocaine and that it weighed 10.7 grams. (Transcript p. 224).

However, the Defendant claims that the testimony of Officer Brassard should not be believed over the testimony of the Defendant and his passenger on the night in question, both of whom testified that the Defendant did not have cocaine and did not throw down any drugs from his pocket. (Appellant's Brief p. 23). This Court has held that "[i]t is the responsibility of the jury to resolve conflicts in testimony. 'They may believe or disbelieve, accept or reject the utterances of any witness.'" *Long v. State,* 934 So.2d 313, 317 (Miss. Ct. App. 2006) (quoting *Groseclose v. State*, 440 So.2d 297, 300 (Miss.1983)). The jury obviously believed the testimony of Officer Brassard and not the testimony of the Defendant and his passenger. As "the jury is the sole judge of the weight and credibility of the witnesses" and as the State proved that the Defendant possessed more than 10 grams but less than 30 grams of cocaine, the Defendant's sixth issue is also without merit. *Thomas v. State*, 754 So.2d 579, 582 (Miss. Ct. App. 2000) (citing *Miller v. State*, 634 So.2d 127, 129 (Miss.1994)).

VII. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN RULING ON THE PROPOSED JURY INSTRUCTIONS.

The Defendant's issues VII - X are with regard to jury instructions. For simplification purposes, the State has combined these issues. Jury instructions are within the sound discretion of the trial court. *Shumpert v. State,* 935 So.2d 962 (Miss. 2006) (citing *Goodin v. State,* 787 So.2d 639, 657 (Miss. 2001)). "In determining whether error lies in the granting or refusal of various instructions, the instructions actually given must be read as a whole. When so read, if the instructions fairly announce the law of the case and create no injustice, no reversible error will be found." *Berry v. State*, 859 So.2d 399, 404 (Miss. Ct. App. 2003) (quoting *Johnson v. State*, 823 So.2d 582, 584 (Miss. Ct. App. 2002)) (*emphasis added*).

A Jury Instruction D-2

The Defendant contends that the "trial court erred in modifying jury instruction D-2." (Appellant's Brief p. 23). The trial court gave the proposed instruction (sometimes referred to as the "single juror" instruction or "one juror" instruction) as written except that it redacted the language, "even though it may cause a mistrial in this case." (Record p. 51). The Defendant relies on *Edland v. State*, 523 So.2d 42 (Miss. 1988) to support its contention that the trial judge erred in redacting this language. However, the Mississippi Supreme Court reversed the *Edland* conviction because the so called "single juror" instruction was not given at all after it was requested. This case does not in any way support the Defendant's contention that the trial court's redaction of this language was reversible error. Furthermore, this Court in *Berry v. State*, upheld a trial court's decision to refuse a "single juror" instruction as the rule of law was covered in another similar instruction that was given noting that the only difference between the two instructions was that the instruction given did not contain the very language in which the Defendant claims was error to redact. 859 So.2d 399, 405

(Miss. Ct. App. 2003). Accordingly, the trial court did not commit reversible error in redacting said language from the proposed instruction.

B. Jury Instruction D-3

The Defendant argues that "the court manifestly erred when redacting language from jury instruction D-3." (Appellant's Brief p. 24). The following language was redacted: "there is always a reasonable doubt of the defendant's guilty when the evidence simply makes it probable that the defendant is guilty, mere probability of guilt will never warrant you to convict the defendant." (Appellant's Brief p. 24) and (Record p. 52). The trial judge indicated that the language was removed because its "an attempt to define reasonable doubt." (Transcript p. 290). The *Berry* Court held that "reasonable doubt defines itself; it therefore needs no definition by the court." *Berry*, 859 So.2d at 404 (quoting *Barnes v. State*, 532 So.2d 1231, 1235 (Miss. 1988)). Moreover, Instruction D-3 as given more than adequately "informed the jury that before it could return a verdict of guilty it had to believe beyond a reasonable doubt that [the Defendant] was guilty." *Id.* As such, it was not reversible error for the trial court to redact said language from the proposed instruction.

C. Jury Instruction D-4

The Defendant also argues that "the trial court manifestly erred in striking part of Jury Instruction D-4." (Appellant's Brief p. 24). The following language was struck from the proposed instruction: "the presumption of innocence attends Herman Williams throughout the trial and prevails at its close unless overcome by evidence which satisfied the jury of Herman Williams guilt beyond a reasonable doubt." (Appellant's Brief p. 24 and Record p. 53). However, this instruction was properly denied as the principle of law that the defendant is presumed innocent was covered elsewhere in the instructions. *See Durdin v. State*, 924 So.2d 562 (Miss. Ct. App. 2005). Jury instruction D-4 as read fully explained the principle of law that a defendant is innocent until proven

guilty:

> The law presumes every person charged with the commission of a crime to be innocent. This presumption places upon the State the burden of proving Herman Williams guilty of every material element of the crime which he is charged. Before you can return a verdict of guilty, the State must prove to your satisfaction beyond a reasonable doubt that Herman Williams is guilty. Herman Williams is not required to prove his innocence.

(Record p. 53). As such, the trial court did not err in redacting the language at issue.

D. Proposed Jury Instruction D-6

The Defendant's last argument is that "the trial court improperly granted jury instruction S-1 and refused jury instruction D-6." (Appellant's Brief p. 25). He argues that "by granting S-1 and refusing D-6, the trial court essentially allowed the jury to find Herman Lee Williams guilty of possession of [cocaine] without the State proving the element 'knowingly or intentionally.'" (Appellant's Brief p. 25). Jury Instruction S-1 as given read:

> The Court instructs the Jury that Herman Lee Williams is charged with the crime of possession of cocaine more than 10 grams, but less than 30 grams to-wit: 10.8 grams.
>
> If you find from the evidence in this case beyond a reasonable doubt that:
>
> 1. Herman Lee Williams on July 10, 2005, in Warren County, Mississippi,
> 2. Did willfully and feloniously possess cocaine, which is a controlled substance, having a weight of more than 10 grams, but less than 30 grams to-wit: 10.8 grams
>
> then you shall find Herman Lee Williams guilty of possession of cocaine having a weight of more than 10 grams, but less than 30 grams to-wit: 10.8 grams as charged in the Indictment.
>
> If the State has failed to prove to you beyond a reasonable doubt in one or more of the above listed elements, then you shall find the Defendant not guilty of possession of cocaine.

(Record p. 48). The trial court ruled that "'wilfully' in S-1 incorporates 'knowingly and intentionally'" and refused it as "cumulative to S-1." (Transcript p. 294). Black's Law Dictionary defines "willful" as follows: "proceeding from a conscious motion of the will; voluntary; knowingly;

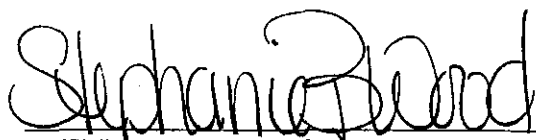
deliberate. Intending the result which actually comes to pass; designed; intentional; purposeful; not accidental or involuntary." Black's Law Dictionary 1599 (6th ed. 1990). (*emphasis added*). The definition of willful includes the terms "knowingly" and "intentional." Conversely, the definition of "knowingly" contains the terms "willfully" and "intentionally." *See* Black's Law Dictionary 872 (6th ed. 1990) (defining "knowingly" as "with knowledge, consciously; intelligently; willfully; intentionally"). Accordingly, the jury was properly instructed regarding the elements of the crime in jury instruction S-1. Proposed jury instruction D-6 was merely cumulative of S-1 and was therefore properly denied. *See Berry*, 859 So.2d at 405 (quoting *Montana v. State*, 822 So.2d 954, 961 (Miss. 2002)) (holding that "the refusal to grant an instruction which is similar to one already given does not constitute reversible error"). As such, the trial court did not err in allowing jury instruction S-1 and refusing proposed jury instruction D-6.

CONCLUSION

The State of Mississippi respectfully requests that this Honorable Court affirm the conviction of Herman Lee Williams as the Defendant was not denied his right to a speedy trial, the trial court had proper jurisdiction, the verdict was not against the overwhelming weight of the evidence, there were no reversible errors, and the Defendant's sentence was not unconstitutional or disproportionate.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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CERTIFICATE OF SERVICE

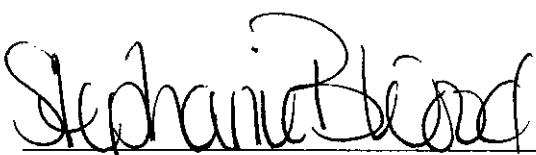
I, Stephanie B. Wood, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Frank G. Vollor
Circuit Court Judge
P. O. Box 351
Vicksburg, MS 39181-0351

Honorable G. Gilmore Martin
District Attorney
P. O. Box 648
Vicksburg, MS 39181

Lee D. Thames, Jr., Esquire
Attorney At Law
Varner, Parker & Sessums, P.A.
Post Office Box 1237
Vicksburg, Mississippi 39181-1237

This the 22nd day of January, 2008.



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