IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DENNIS DARNELL HOWARD — APPELLANT

VS. — NO. 2007-KA-0671-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: BILLY L. GORE
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DENNIS DARNELL HOWARD **APPELLANT**

VERSUS **NO. 2007-KA-00671-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

The targets in this criminal appeal from a conviction of armed robbery are supplemental instructions and the weight of the evidence.

Craig Smith, hourly manager at a Kosciusko Burger King, identified Howard as the man who attempted to rob him at gunpoint while Smith was making a deposit at a local bank of the days proceeds.

Cassandra Weatherby, a fellow employee who followed Smith to the bank, also identified Howard as the man who approached Smith's truck and began hitting Smith.

To Burger King's good fortune, Smith had just dropped the money bag containing $1300 into the night depository when Howard rushed up to Smith's truck, pointed a gun, and demanded the money.

DENNIS HOWARD, a 27-year-old African-America male and resident of Kosciusko (R. 74; C.P. at 57), prosecutes a criminal appeal from the Circuit Court of Attala, Joseph H. Loper,

Circuit Judge, presiding.

Howard, in the wake of an indictment returned on August 4, 2005, was convicted of armed robbery and sentenced to serve twenty-five (25) years in the custody of the MDOC. (C.P. at 56)

The indictment, omitting its formal parts, alleged

> "[t]hat **DENNIS DARNELL HOWARD** [o]n or about the 27TH day of June 2005, . . . did willfully, unlawfully, and feloniously, take or attempted to take approximately Thirteen Hundred Dollars ($1300.00) in good and lawful United States money, contain[ed] in a bank deposit bag, the personal property of Nobles Incorporated d/b/a Burger King, the said felonious attempted taking being in the presence of, from the person and against the will of the Craig Smith, an agent or employee of Nobles Incorporated d/b/a Burger King by putting the said Craig Smith in fear of immediate injury to his person by the exhibition of a deadly weapon, to wit: a gun, and striking the said Craig Smith in the head and demanding said bags, but did not get the money since the bags were already placed in the night depository . . ." (C.P. at 1)

Following a trial by jury conducted on March 12, 2007, and after submitting to the trial judge two handwritten requests for further guidance, the jury returned a verdict of, "We, the Jury, find the defendant, guilty as charged." (C.P. at 72)

By virtue of §97-3-79, a finding that Howard *attempted* to take at gunpoint is, by definition, a conviction of armed robbery.

Immediately after the verdict, the trial judge sentenced Howard to serve twenty-five (25) years in the custody of the MDOC. (C.P. at 55)

Two (2) issues, articulated by Howard as follows, are raised on appeal to this Court:

I. "Whether the trial judge gave confusing supplemental jury instruction[s] to the jury."

II. "Whether the verdict of the jury was against the overwhelming weight of the evidence." (Appellant's Brief on the Merits at 1)

STATEMENT OF FACTS

During the nighttime hours on June 27th, 2005, Craig Smith a shift manager at a Burger King in Kosciusko, closed up shop and took the day's proceeds to the Citizens Bank where he placed the money bag in the night depository. (R. 21-22)

Smith testified he climbed back into his truck at which time Dennis Howard, a life-long acquaintance, came running toward Smith with a pistol in his hand and shouting, "Give me the bag, MF. Give me the bag." (R. 22-23, 27)

It was too late. The bag had already been placed inside the night depository.

According to Smith, Howard was hitting Smith in the head repeatedly with the pistol while making his demands. (R. 24-25)

> Q. What did he do then?
>
> A. Then after he kept hitting me, I glanced over and looked at him. And when I glanced over and looked at him, I guess he realized who I was, and he quit and ran back to the woods. (R. 23)

Cassandra Weatherby, Smith's co-worker, an eye and ear witness to the incident, identified Howard as the robber. (R. 37-39)

Three (3) witnesses testified on behalf of the State during its case-in-chief, including the victim, **Craig Smith** (R. 19-35), who had known Howard all of Smith's life and who positively identified Howard as the man who struck him in the head repeatedly with a silver handgun (R. 21-22) while demanding surrender of the money. (R. 23-24)

> Q. [BY PROSECUTOR:] When he was hitting you, what did he have - - did he have anything in his hand?
>
> A. [BY SMITH:] Yes, sir. He had a gun in his hand, hitting me upside my head with it.
>
> Q. When was the first time you saw that gun?

A. I seen him when he - - when he got - - arrived at the truck, and he started jut swinging with it.

Q. What did the gun look like? What color was it?

A. It looked like a - - it looked like a small pistol, something that a woman would carry.

Q. A small handgun?

A. It was silver.

Q. A silver handgun?

A. Uh-huh.

Q. You said you went out there with your co-worker. Who was your co-worker?

A. Cassandra Weatherby. (R. 21-22)

Cassandra Weatherby, Smith's co-worker, followed Smith to the bank and, likewise, identified Howard as the man who approached Smith truck and began hitting him. (R. 38-39)

Brady Richardson, an emergency room physician, treated Smith the night of the robbery for a contusion to the scalp. (R, 43) The wound, a raised tender area that required no suturing (R. 28, 46-48), would be consistent with being struck in the head with a handgun. (R. 46, 49)

At the close of the State's case-in-chief, the defendant moved for a directed verdict of acquittal on the ground, *inter alia*, there was insufficient proof of intent as well as some type of weapon. (R. 52)

The motion was overruled. (R. 52-53

After being personally advised of his right to testify or not (R. 51-52), Howard elected not to testify. (R. 53)

The jury retired to deliberate at 2:16 p.m. (R. 68) An hour later at 3:14 p.m. the jury sent the

following note to the trial judge:

> "Both Mr. Howard's lawyers as well as the prosecution stated that Mr. Howard was present and had a gun of some type. Can this be used as evidence since Mr. Howard never stated this himself? (C.P. at 68)

Counsel for Howard stated that the answer should be "no." (R. 69)

Judge Loper elected to write them back and say: "The court instructs the jury that you have heard all the evidence and that you must base your verdict on the evidence that has been presented." (R. R. 68-69; C.P. at 52)

At 5:17 p.m. the jury submitted a second request as follows:

> We are having discussion (still) over whether or not Mr. Howard's lawyers' admission of his being there w/a gun is evidence or is that simply counsel remarks? See section marked. (C.P. at 53)

Judge Loper responded with this note to the jury: "The jury instruction that you have made reference to [C-1] is self-explanatory and your verdict should be based on the evidence that was presented from the witness stand." (R. 70-71; C.P. at 54)

Shortly thereafter, at 5:30 p.m. the jury returned with the following verdict:"We, the jury, find the defendant guilty as charged." (R. 72)

A poll the jury, individually, reflected the verdict returned was unanimous. (R. 73-74)

Howard was immediately sentenced to serve twenty-five (25) years in the custody of the MDOC. (R. 75)

No motion for new trial was made, *ore tenus*, post-verdict. It does not appear that a motion for a new trial was ever requested and filed at all.

Notice of appeal was filed on April 10, 2007. (C.P. at 58)

SUMMARY OF THE ARGUMENT

1. The trial judge's supplemental instructions to the jury fully comport with the requirements found in **Girton v. State,** 446 So.2d 570 (Miss. 1984).

2. Regrettably, Howard's weight of the evidence argument is procedurally barred because the record fails to reflect that Howard moved for a new trial.

The weight of the evidence must be distinctly assigned as a ground for relief in a motion for a new trial else the issue is barred on appeal. **Howard v. State,** 507 So.2d 58, 63 (Miss. 1987); **Wooten v. State,** 811 So.2d 355 (Ct.App.Miss. 2001).

ARGUMENT

1.

THE TRIAL JUDGE DID NOT GIVE CONFUSING SUPPLEMENTAL JURY INSTRUCTIONS TO THE JURY.

During defense counsel's opening argument to the jury the following statement was made by Mr. Patrick:

> You know, my client - - this is all that's going to come out - - came out, saw the guy make the deposit, and asked him what - - and asked him, "Why did you make that pass at me today? And my client became infuriated and hit him. Not with a gun, with a water gun. That's what he said that night. (R. 18)

Howard did not testify and give his version of the incident. He argues the trial judge gave confusing supplemental instructions to the jury when, after retiring to deliberate, it twice sent notes to the judge asking the following questions, respectfully:

> Both Mr. Howard's lawyer, as well as the prosecution, stated that Mr. Howard was present and had a gun of some type. Can this be used as evidence since Mr. Howard never stated this himself? (C.P. at 51)

* * * * * *

> We are having discussion (still) over whether or not Mr. Howard's lawyers' admission of his being there w/a gun is evidence or is that simply counsel remarks? See section marked.
> (C.P. at 53)

The trial judge answered these inquiries in writing as follows:

> The court instructs the jury that you have heard all the evidence and that you must base your verdict on the evidence that has been presented. (C.P. at 52)
>
> * * * * * *
>
> The jury instruction that you have made reference to is self-explanatory and your verdict should be based on the evidence that was presented from the witness stand. (C.P. at 54)

The instruction marked by the jury and referred to by the jury instruction C-1 (C.P. 38-40) a portion of which was underscored by the jury as follows:

> * * * * * *
>
> Arguments, statements, and remarks of counsel are intended to help you understand the evidence and apply the law, but are not evidence. If any argument, statement, or remark has no basis in evidence, then you should disregard that argument, statement, or remark.
>
> * * * * * *
>
> C.P. at 39)

What could be more clear than that?

Howard claims there is doubt as to whether or not the jury fully understood the supplemental instructions and that a new trial is required. (Appellant's Brief on the Merits at 11) He relies primarily upon **Girton v. State,** 446 So.2d 570, 573 (Miss. 1984).

We sincerely doubt there was any doubt about whether or not Howard had a pistol when he approached Smith and began to hit him with it. The defendant did not testify, and the evidence

against Howard was overwhelming. If not overwhelming, it was at least "whelming" and was certainly enough.

Judge Loper adhered to the two recommendations made in **Girton,** *supra*.

First, there can be no doubt he completely understood what was meant by the jury's inquiry.

Second, he basically determined that no further clarification was necessary because the C-1 instruction was self-explanatory and fully answered the request.

The principle of law dealing with the subject matter had been thoroughly covered by the C-1 instruction, and that is precisely what Judge Loper told the jury in his written responses.

The C-1 charge informed the jury, *inter alia*, that "[t]he evidence which you are to consider consists of the testimony and statements of the witnesses and the exhibits offered and received." (C.P. at 39)

This is exactly what Judge Loper told the jury in his two written responses. A defendant cannot complain about supplemental instructions that tell the jury they have heard all the evidence and must base its verdict on the evidence that has been presented from the witness stand.

Instruction C-1, as Judge Loper observed, was self-explanatory and fully answered the inquiries presented by the jury after they had retired to deliberate.

A trial judge is not required to instruct the jury over and over on a principle of law, even though some variations are used in the different instructions. **Calhoun v. State,** 526 So.2d 531 (Miss. 1988); **Davis v. State,** 431 So.2d 468 (Miss. 1983); **McWilliams v. State,** 338 So.2d 804 (Miss. 1976); Stated differently, "[t]he trial court is not required to grant several instructions on the same question in a different verbiage . . ." **Jones v. State,** 381 So.2d 983, 991 (Miss. 1980); **Ragan v. State,** 318 So.2d 879, 882 (Miss. 1975). Where the gist of an instruction is included in another instruction, the charge is duplicitous and the court is correct in refusing it. **Evans v. State,** 315

So.2d 1 (Miss. 1975).

"It is a familiar rule that instruction must be taken as one body, and announce the law, not the law of the State or the defendant, but the law of the case." **Sample v. State,** 320 So.2d 801, 805 (Miss. 1975). Stated differently, "[i]nstructions granted both the state and the accused are to be read together. When considered together, if the instructions adequately instruct the jury there is no reversible error present." **Rush v. State,** 278 So.2d 456, 458 (Miss. 1973). *See also* **Wilson v. State,** 592 So.2d 993 (Miss. 1991) [Jury instructions are reviewed as a whole and not individually.] When the totality of the jury instructions given to the jury are considered as a whole and this Court cannot say that the jury was misled by the granting of any or all of them, no error ensues. **Maroone v. State,** 317 So.2d 25, 27 (Miss. 1975); **Shannon v. State,** 321 So.2d 1 (Miss. 1975); **Rayburn v. State,** 312 So.2d 454 (Miss. 1975).

The jury was instructed in plain and ordinary English that "[t]he evidence which [it was] to consider consists of the testimony and statements of the witnesses and the exhibits offered and received" and further that "arguments, statements, and remarks of counsel . . . are not evidence" of the lawyers was not evidence. (C.P. at 39)

It was not necessary for the trial judge to elaborate any further, only to direct the jury's attention to that which had already been given. There was no necessity for granting another instruction for the sake of clarifying that which was already clear.

2.

HOWARD'S WEIGHT OF THE EVIDENCE COMPLAINT IS PROCEDURALLY BARRED BECAUSE THE APPELLATE RECORD DOES NOT CONTAIN A MOTION FOR NEW TRIAL DISTINCTLY ASSIGNING "WEIGHT" AS A GROUND FOR RELIEF.

In this appeal, Howard seeks a new trial on the ground the jury verdict was against the overwhelming weight of the evidence. (Appellant's Brief On the Merits at 13) Howard correctly states that a motion for a new trial tests the weight of the evidence presented at trial. (Appellant's Brief On the Merits at 13)

His argument has no appeal on appeal because the appellate record does not reflect that a motion for a new trial was ever made. We have found neither a motion nor an order overruling same in the clerk's papers, and Howard, insofar as we can tell, never moved, *ore tenus*, for a new trial either post-verdict or post-sentencing, (R. 73-76)

This is fatal to Howard's weight of the evidence argument.

Where, as here, one of the targets of the defendant's appeal is the "weight" of the evidence, as opposed to its "legal sufficiency," such implicates the denial of a motion for a new trial.

The "weight" of the evidence, however, is not a viable issue on appeal unless the defendant has included as a ground therein a claim the verdict of the jury is against the overwhelming weight of the evidence. **Howard v. State**, 507 So.2d 58, 63 (Miss. 1987); **Jackson v. State**, 423 So.2d 129, 131 (Miss. 1982), quoting with approval "the proper procedure and rule" found in **Colson v. Sims**, 220 So.2d 345, 346, fn. 1 (Miss. 1969).

The record in this cause does not reflect that a motion for a new trial was ever made. "A trial judge cannot be put in error on a matter which was presented to him for decision." **Howard v. State,** *supra*, 507 So.2d at 63.

The rules are very clear.

"On a motion for a new trial, certain errors must be brought to the attention of the trial judge so that he may have an opportunity to pass upon their validity before this Court is called upon to review them." **Metcalf v. State**, 629 So.2d 558, 561 (Miss. 1993). A post-trial

denial by the trial judge of a "weight" of the evidence argument is one of those errors.

In **Howard v. State**, *supra*, 507 So.2d 58, 63 (Miss. 1987), Howard, much like the Howard presently at bar, contended "the verdict of the jury was contrary to the overwhelming weight of the evidence." This Court asserted, i.e., it stated positively:

> "However, this assignment of error is procedurally barred because it was not assigned as a ground for a new trial in the lower court. See: *Ponder v. State*, 335 So.2d 885, 886 (Miss. 1976); *Freeland v. State*, 285 So.2d 895, 896 (Miss. 1973). A trial judge cannot be put in error on a matter which was not presented to him for decision. *Cooper v. Lawson*, 264 So.2d 890 (Miss. 1972)."

See also **Wooten v. State,** *supra*, 811 So.2d 355 (Ct.App.Miss. 2001); **Colson v. Sims**, *supra*, 220 So.2d 345, 346 (Miss.1969), fn 1.

More recently, the Supreme Court reaffirmed this rule in **Wilson v. State,** 904 So.2d 987, 994-95 (Ct.App.Miss. 2004), as follows:

> A motion for new trial challenges the weight of the evidence. *Sheffield v. State*, 749 So.2d 123, 127 (Miss. 1999). A reversal is warranted only if the trial court abuse its discretion in denying a motion for a new trial.
>
> * * * * * *
>
> It is true that, if an "[a]ppellant's contention that the verdict of the jury was contrary to the overwhelming weight of the evidence was not assigned as a ground for new trial in the lower court, and it may not be raised [on appeal] for the first time. A trial judge cannot be put in error on a matter which was not presented to him for decision."

The Court of appeals fully concurs. In **Beckum v. State,** 917 So.2d 808, 813 (Ct.App.Miss. 2005), we find the following:

> "The contention that the verdict is against the overwhelming weight of the evidence must first be raised in the defendant's motion for a new trial." *Carr,* 774 So.2d at

(¶15) citing URCCC 10.05).

> "The trial court has substantial discretion in ruling on a motion for a new trial and should only grant the motion where allowing the verdict to stand would result in an unconscionable injustice." *Carr*, 774 So.2d at 813)
>
> * * * * * *
>
> Beckam's motion for a new trial simply stated that "the jury's verdict. . .[was] against the overwhelming weight of the evidence." Beckum's challenge of the weight of the evidence merely concluded that the verdict was against the overwhelming weight of the evidence. Unquestionably, this is a vague and general statement. Beckum's brief, generalized, and conclusory argument failed to distinguish any particular deficiency in the proof, or to assert how the verdict is contrary to the overwhelming weight of the evidence. Accordingly, this issue is procedurally barred. *Stack*, 860 So.2d at (¶20). **That being the case, we will not consider the merits of Beckum's claims.** [emphasis supplied]

Nor should it here.

Howard's weight of the evidence complaint is procedurally barred, and appellee declines to waive the bar.

We will say, however, that Howard's claims are devoid of merit on the merits. We find in **Smoot v. State,** 780 So.2d 660, 664 (Ct.App.Miss. 2001), a prosecution for aggravated assault, the following language:

> * * * Basically, Smoot calls into question his whole ordeal before the trial court. Still, he has not shown how an unconscionable injustice has resulted, as all the evidence points to the guilty verdict. The evidence consisted primarily of Clark's testimony positively identifying Smoot as one of his assailants, but also included Williams's eyewitness testimony which implicated Smoot. Smoot presented no evidence whatsoever, called no witnesses, and offered no proof to contradict the State's convincingly made case. The jury verdict reflected the facts presented and no unconscionable injustice resulted in Smoot's being convicted. This issue is without merit.

Howard, like Smoot, did not testify. Thus, the evidence certainly does not preponderate in favor of Howard because his version of the incident is not in the record, only in Howard's brief. (Appellant's Brief on the Merits at 2-3)

The following observations made in **Groseclose v. State**, 440 So.2d 297, 300 (Miss. 1983), are worth repeating here:

> We will not order a new trial unless convinced that the verdict is so contrary to the overwhelming weight of the evidence that, to allow it to stand, **would be to sanction an unconscionable injustice.** *Pearson v. State*, 428 So.2d 1361, 1364 (Miss. 1983). Any less stringent rule would denigrate the constitutional power and responsibility of the jury in our criminal justice system. [emphasis supplied]

In short, this Court will not set aside a guilty verdict unless the verdict is manifestly against the weight of credible evidence [**Maiben v. State,** 405 So.2d 87, 88 (Miss. 1981)] and unless this Court is convinced that to allow the verdict to stand, would be to sanction an unconscionable injustice. **Hilliard v. State,** 749 So.2d 1015, 1016 (Miss. 1999); **Groseclose v. State**, 440 So.2d 297, 300 (Miss. 1983).

Contrary to any suggestion by Howard, the case at bar simply does not exist in this posture.

CONCLUSION

Howard's weight of the evidence argument is procedurally barred.

But even if not, "[t]his Court will not set aside a conviction without concluding that the evidence, taken in the most favorable light could not have supported a reasonable juror's conclusion that the defendant was guilty beyond a reasonable doubt." **Rainer v. State**, 473 So.2d 172, 173 (Miss. 1985).

In the case at bar it could, and he was.

The jury was properly instructed, including the supplemental instructions which were both proper and correct.

Appellee respectfully submits that no reversible error, if error at all, took place during the trial of this cause and that the judgment of conviction of armed robbery and the twenty-five (25) year sentence imposed by the trial court should be forthwith affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: _____

BILLY L. GORE
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-368

CERTIFICATE OF SERVICE

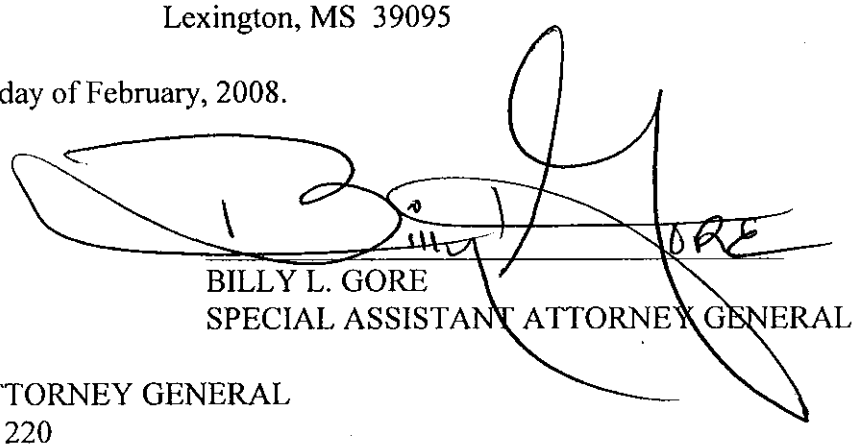
I, Billy L. Gore, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Joseph H. Loper, Jr.
Circuit Court Judge, District 5
Post Office Box 616
Ackerman, MS 39735

Honorable Doug Evans
District Attorney, District 5
Post Office Box 1262
Grenada, MS 38902-1262

Antwyn Patrick, Esquire
Attorney At Law
Post Office Box 27
Lexington, MS 39095

This the 29th day of February, 2008.



BILLY L. GORE
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680