IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

TRENT DORA A/K/A SUB — APPELLANT

VS. — NO. 2008-KA-1914-COA

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



STATE RULES

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## BRIEF FOR THE APPELLEE

## STATEMENT OF THE CASE

In this criminal appeal from his conviction of strong-arm robbery in the wake of an indictment for armed robbery, **TRENT DORA**, testified at trial he telephoned 911 and told the dispatcher he had ". . . just seen Katina Brooks [sic] get robbed" and he " . . . wanted to let the police know what I saw . . . a crime being committed." (R. 273. 276)

That was then and there.

Here and now Dora asserts he is " . . . serving a prison term of fifteen years day for day for a simple robbery that did not occur." (Brief of Appellant at 3)

The sufficiency of the evidence, prosecutorial malfeasance, and the effectiveness of trial counsel are the primary issues presented in this appeal from a conviction of strong-arm robbery following Dora's indictment charging him with armed robbery.

Appellant claims the State failed to prove any intent to steal and that his lawyer was ineffective in the constitutional sense because counsel failed to request a lesser offense instruction

on simple assault by physical menace.

We disagree on both fronts.

TRENT DORA, is a thirty-five (35) year old married African-American male with a 12th grade education. He is the father of six (6) daughters (R. 268-70; C.P. at 56; volume 1 of 1 at 9, 15, 18) and was a testifying defendant during his trial for armed robbery. (R. 268-303)

Dora, who denied having anything to do with the crime (R. 281), prosecutes a criminal appeal from his convictions of strong-arm robbery and recidivism following trial by jury and judge, respectively, conducted on September 15-17, 2008, in the Circuit Court of Noxubee County, James T. Kitchens, Jr., Circuit Judge, presiding.

Dora, in the wake of a pre-sentence investigation and report (C.P. at 55-63) and any facts proffered in extenuation and mitigation, was sentenced on September 17th to serve a term of fifteen (15) years, day for day, in the custody of the MDOC. (R. 358-65; C.P. at 70-71)

Dora was indicted on March 20, 2008, for armed robbery in violation of Miss.Code. Ann. §97-3-79. (C.P. at 2)

The indictment, omitting its formal parts, charged

> "[t]hat TRENT DORA . . . on or about the 23RD day of October, 2007, . . . did unlawfully, willfully, and feloniously, take, steal, and carry away or attempt to take, steal and carry away, the personal property of Tem's Food Market, to wit: Money, from the person or presence of Katina Black, against the will of the said Katina Black, by putting the said Katina Black in fear of immediate injury to her person by the exhibition of a deadly weapon, to-wit: a firearm; contrary to the form of the statutes in such cases made and provided . . ." (C.P. at 2)

In view of Dora's two previous convictions for the sale of cocaine, his indictment was subsequently amended to reflect an additional charge of recidivism brought under Miss.Code Ann. §99-19-81. (C.P. at 25-26, 72, 359)

Dora, a recidivist, assails the effectiveness of his trial lawyer as well as the sufficiency of the evidence convicting him of strong-arm robbery. He seeks "reversal" of his conviction and a new trial. (Brief of the Appellant at 16, 18)

Five (5) individual issues are raised by Dora on appeal to this Court, *viz.*, the sufficiency and weight of the evidence, prosecutorial misconduct, ineffective assistance of counsel, and cumulative error. (Brief of the Appellant at 12)

## STATEMENT OF FACTS

On October 23, 2007, around 9:20 a.m., Phyllis Hudson, a 911 dispatcher, received a call from a person who said she had just been robbed at Tem's Food Market in Brooksville. (R. 150) Hudson immediately dispatched a city officer to the scene. (R. 150)

Ten minutes later (R. 154) Hudson received another 911 call from a man identifying himself only as "Tony" who " . . . said he had witnessed a female being robbed near Tem's Food Market in Brooksville." (R. 151-52) The telephone number the man said he was calling from did not match the number that appeared on Hudson's caller ID. (R. 152)

In addition to this, the caller gave out false information concerning the direction of travel of the cream colored automobile used by the robber in his flight from the area. (R. 223, 227)

The first caller was later identified as Katina Black, assistant manager at Tem's Food Market and the victim of the robbery. (R. 103, 110)

The second caller was later identified as Dora who testified he gave the dispatcher erroneous information because he did not want to get involved in the crime and did not want his wife to know he was in this particular area. (R. 275-77)

According to Deputy Triplett, Dora had told Tina Williams, Chief of Police in Brooksville, the reason he gave out false information was because " . . . he didn't want to get involved because

he was married and down there seeing his girlfriend, a nurse at the clinic." (R. 171)

Chief Williams testified to essentially the same thing. (R. 224-227, 236-37)

Seven (7) witnesses testified for the State of Mississippi during its case-in-chief, including the victim, **Katina Black**, and **Byron Winters,** a self-confessed accomplice, at least of sorts. (R. 102-128; 174-217, respectively)

**Katina Black,** an employee for sixteen (16) years at Tem's Food Market in Brooksville and Tem's assistant manager on October 23, 2007, testified she knew Trent Dora from high school but had no contact with him until a few days prior to the robbery and the day of the robbery. (R. 103-04)

A few days prior to the robbery, Black, while en route to the bank to deposit proceeds from the day before, observed Dora seated in his car in the parking lot. On Friday before the robbery on Tuesday (R. 106), Black observed Dora inside the market. (R. 104)

On Tuesday, the 23rd, Black was robbed by a dark complexioned black man with a scraggly beard (R. 108) who had in his waistband what Black perceived to be the handle of a gun. Her description of the robbery is quoted as follows:

> Q. [BY PROSECUTOR HAYES-ELLIS:] And then at sometime that morning, did you leave out of the store?
>
> A. Yes, ma'am, I left out of the store after I finished my deposit to go and take the money to the bank.
>
> Q. Okay. And what do you carry the money in, ma'am?
>
> A. I carry it in a red NBC bag.
>
> Q. Okay. And do you – that morning, when you left out of the store, just describe your actions you took.
>
> A. Well, that morning, when I got ready to go to the bank, I let my cashier know that I was going to the ban, and I told her, I said, "Well, Jennifer, I"m on my way to the bank."

So when I got outside, I saw one of the customers that I know, Ms. Williams. I spoke to her on my way out, and she was talking. And I spoke, and I said, "Well, okay, I'll see you later."

I got to the end of the store where the paper machine sits on the right-hand side of the store as you step around the corner.

I saw a black male get out of a car, and the car was a white Avalon, and he started walking towards me. So at the time I felt a little funny, because he was walking kind of fast.

So I exited to go to the back of my car, because I park west, which my car is facing west, going out of the parking lot.

So as I started toward the back of my car, he started around the front. He turned around and went to the front of my car. By the time I got to the back door, he had made it to the front of my - - front end of my car, and he was walking toward me fast, so I started walking backwards.

And as I started backing up, he started walking faster. And I saw - - he went to pull his jacket up, and I saw the handle part of a gun. So when I saw the gun, I closed my eyes, because I felt like I was fixing to die.

I started running - - started running, and I ran backwards until, and I threw the money bag, and I tripped and fell on the sidewalk.

When I tripped and fell, that's when he got the money bag and he started to run, and customers and the people in the store came outside to see was I okay.

So once they saw that I was okay, I got up and I ran into the store, and I called 911 and I called my boss.

* * * * * *

Q. Okay. And as he was approaching you in the manner which you described, what did you believe was about to happen?

A. I thought I was fixing to die.

Q. And did you - - did you see a weapon ma'am?

A. I saw the handle of a gun.

Q. Okay. And did he make any motions or anything of that nature?

A. He pulled up the jacket, and his hand went down, and at that time I closed my eyes.

My boss always said not to argue, not to fuss, just do whatever. Just always give the money, because money can be replaced, but my life can't.

* * * * * *

Q. Okay. Now, when you - - what did you do with the bag, ma'am, as he approached you?

A. As he approached me and I started running backwards, once I saw that he went to pull his jacket up, and I saw the handle part of the gun, I started running backward, and I threw the bag. (R. 107-09)

Immediately after the robbery, Katina Black observed a black automobile following the white vehicle being driven by the robber. (R. 112)

The robber, who was never identified by Katina Black, was Byron Winters, a self-confessed accomplice.

**Dustin Jourdan**, part owner of Tem's Food Market in Brooksville, testified that approximately $3,100 was taken in the robbery. (R. 130)

The testimony of **Byron Winters** is fairly and accurately summarized by Dora in his brief, and we do not feel compelled to plow that ground again here. (Brief of the Appellant at 10-11)

It is enough to say that while Dora was seated inside his automobile observing the crime scene from a distance, Winters approached Black on foot with his hands extended after Katina Black exited Tem's Food Market with the intent to go to the bank and deposit the previous days receipts. Winters ended up with the money bag after Black relinquished possession by tossing it on the ground. Winters picked up the bag, left the scene in a hurry, and later met up with Dora in Starkville

where the two men split the loot.

According to Dora, the highlight of Winters's testimony is his claim he had no intention of robbing Katina Black. Winters wanted the jury to believe he was an innocent pawn, a mere patsy, if you please, duped by Dora into believing that Black was simply going to hand the money bag to Winters, an innocent recipient.

Following the testimony of **Tina Williams,** Brooksville, Mississippi, chief of police who testified about Dora's deception in a 911 telephone call received by Phyllis Hudson (R. 150-51, 223-25), the State rested its case-in-chief. (R. 250)

Dora's motion for a directed verdict based upon the failure of the State to prove armed robbery was implicitly, if not expressly, overruled. (R. 251-53, 256, 257-58, 259)

After being advised of his right to testify or not (R. 259-60), **Trent Dora,** the defendant, testified in his own behalf. Not surprisingly, he denied any involvement in the robbery and pointed the fickle finger of guilt squarely at Byron Winters. (R. 268-303)

At the close of all the evidence, the defendant moved for peremptory instruction which was denied. (R. 307; C.P. at 44) After closing arguments by both litigants, the jury retired to deliberate at a time not reflected by the record. (R. 358) The jury subsequently returned a verdict of "We, the jury, find the defendant guilty of robbery." (R. 352; C.P. at 53)

A poll of the jurors reflected the verdict returned was unanimous. (R. 353)

Following a sentence-enhancement proceeding conducted on September 17, 2008, Judge Kitchens adjudicated Dora a habitual offender (R. 362-63) and sentenced him " . . . to serve a term of 15 years in the custody of the Mississippi Department of Corrections, without the possibility of parole, early release, earned good time, any kind of weekend passes, or anything such as that." (R. 358-365)

On September 19, 2008, Dora filed his motion for judgment of acquittal notwithstanding the verdict or, in the alternative, for a new trial, alleging, *inter alia*, the verdict of the jury was against the overwhelming weight of the evidence. (C.P. at 64-66) Following a hearing and oral argument addressing the merits of the motion (R. 365-372), the motion was overruled by court order filed on September 19, 2008. (R. 369; C.P. at 75)

Notice of appeal was filed on September 29, 2008. (C.P. at 80-81)

James E. Brown, Jr., a practicing attorney in Starkville, represented Dora with a great deal of skill and expertise during the trial of this cause. Brown was permitted to withdraw as counsel of record shortly after trial. (C.P. at 67-69, 76)

Lisa M. Ross, a practicing attorney in Jackson, has been substituted on appeal. (C.P. at 76, 80) Having accepted the record of trial in the posture she found it, Ms Ross's representation of Dora has been equally effective.

## SUMMARY OF THE ARGUMENT

**Points 1 and 2. Sufficiency and Weight of the Evidence.**

It is elementary that all proof need not be direct, and the jury is entitled to draw reasonable inferences from all the evidence in the case.

After viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime of strong-arm robbery, including an intent to steal on Dora's behalf. A reasonable and fair-minded juror could have found beyond a reasonable doubt that Dora hatched a scheme to rob Tem's Food Market in Brooksville using Winters as either a knowing accomplice or a patsy duped into believing this was not a robbery at all but merely an innocent handoff of a money bag from Katina Black to Winters.

**Point 3. Prosecutorial Misconduct.**

Dora's allegations of a deal or leniency with respect to Winters, a self-confessed accomplice, appear to be bare boned and conclusory. We cannot find in the record any support for Dora's position that "[o]ne day after Dora was sentenced, Winters entered a guilty plea and was sentenced to three years . . ." (Brief of the Appellant at 17) There is no reference to this matter in Dora's motion for a new trial nor does Dora pinpoint in his brief where these facts can be found.

It is elementary that an appellate court " . . . will not go outside the record to find facts and will not consider a statement of facts attempted to be supplied by counsel in briefs." **Wortham v. State,** 219 So.2d 923, 926-27 (Miss. 1969).

**Point 4. Ineffective Assistance of Counsel.**

Dora argues that trial counsel was ineffective in the constitutional sense because he failed to request a lesser offense instruction on simple assault by physical menace. Even if the evidence was sufficient to support such a theory, there was no prejudice to Dora who received a lesser included offense instruction defining strong-arm robbery and was convicted of the lesser included offense. This state of affairs is to trial counsel's credit who cannot be condemned in the constitutional sense for not requesting yet a second lesser included offense instruction.

Dora has failed on direct appeal to make out a claim *prima facie* of ineffective assistance of trial counsel. The record fails to affirmatively reflect ineffectiveness of constitutional dimensions.

Appellee believes the present record is factually adequate for a determination by the appellate court that Dora was not denied the effective assistance of trial counsel for the reason he now claims. It appears to us that Dora's allegation of ineffectiveness is based upon facts fully apparent from the record and no further fact-finding is required.

Any omission by counsel was not of sufficient gravity to render counsel's performance ineffective in the constitutional sense. Counsel's decision, if any, to eschew requesting a simple

assault instruction was reasonable trial strategy especially where, as here, the defense presented was a general denial, i.e., Winters acted alone, but, if not, Dora's claim that he could be found guilty of no crime greater than strong-arm robbery as opposed to armed robbery.

We acknowledge it is unusual for a reviewing court to consider a claim of ineffective assistance of trial counsel when the claim is made on direct appeal. "This Court will rule on the merits on the rare occasions where (1) the record affirmatively shows ineffectiveness of constitutional dimensions, or (2) the parties stipulate that the record is adequate to allow the appellate court to make the finding without consideration of the findings of fact of the trial judge." **Drummond v. State,** No. 2008-KP-00313-COA decided October 27, 2009, (¶ 15) slip opinion at 8 [Not Yet Reported].

In this posture, a reviewing court can decline to rule on the merits of Dora's ineffective assistance of counsel claim without prejudice to Dora to raise the issue *de novo* in a motion for post-conviction relief. *See* **McLaurin v. State,** No. 2008-KA-00814-COA decided November 17, 2009 (¶¶ 14-17) slip opinion at 5-6 [Not Yet Reported]; **Drummond v. State,** *supra*, No. 2008-KP-00313-COA decided October 27, 2009, (¶¶14 and 15) slip opinion at 7-8 [Not Yet Reported]; **Wynn v. State,** 964 So.2d 1196 (Ct.App.Miss. September 4, 2007); **Jones v. State,** 961 So.2d 730 (Ct.App.Miss. February 20, 2007).

**Point 5. Cumulative Error.**

There being no error in any individual part, there can be no error to the whole. **Genry v. State,** 735 So.2d 186, 201 (Miss. 1999).

## ARGUMENT

### POINTS 1 AND 2.

**ANY RATIONAL TRIER OF FACT COULD HAVE FOUND BEYOND A REASONABLE DOUBT THAT DORA POSSESSED A FELONIOUS INTENT TO STEAL AND WAS GUILTY OF STRONG-ARM ROBBERY.**

**DORA HAS FAILED TO DEMONSTRATE THE TRIAL JUDGE ABUSED HIS BROAD JUDICIAL DISCRETION IN OVERRULING DORA'S MOTION FOR A NEW TRIAL GROUNDED, IN PART, ON A CLAIM THE JURY VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.**

**NO UNCONSCIONABLE INJUSTICE EXISTS HERE.**

Dora, in a nutshell, contends there was insufficient evidence from which a reasonable, fair-minded juror could find, either directly or by reasonable inference, that Dora entered into an agreement with Winters to rob Black or that Dora intended to rob Katina Black or that a robbery even took place.

He also opines for the same reason he is entitled to a second trial because his first trial resulted in an unconscionable injustice.

We disagree.

In the first place, Dora was not charged with conspiring with Winters to rob Katina Black. Accordingly, the State was not required to prove he entered into an agreement with Winters in order to convict him of robbing the store. All it had to prove was that Dora, acting alone or in concert with another, willfully and feloniously took money from the person of Katina Black against her will by putting her in fear of some immediate injury to her person.

The top ten incriminating facts include the following: **(1)** Dora's "casing" of the premises several days prior to the robbery (R. 104); **(2)** Dora's initial rendevous with Winters in Starkville and

the discussion that took place at Dora's home (R. 182); **(3)** Dora's travel to Brooksville in tandem with Winters (R. 183-84); **(4)** Dora's removal of the license tag from Winters's car and stashing it inside Winter's automobile (R. 184); **(5)** Dora's activation of his brake lights which alerted Winters that Katina Black had emerged from the store with the money bag (R. 181, 184-85); **(6)** Dora's actual presence at the scene of the crime and his observation of the robbery from a distance while seated inside his black automobile (R. 184-85, 273-74); **(7)** Dora's attempt to block Deputy McCrary from following the get-a-way vehicle which had no license tag (R. 137-39); **(8)** Dora's deceptive 911 call to Phyllis Hudson (R. 151-52; **(9)** Dora's mis-information to Phyllis Hudson (R. 151) and to law enforcement concerning the direction of travel of the robber's vehicle (R. 151, 162-64, 173, 223, 227, 247) and mis-information as to why **he** was present in Brooksville (R. 264), and finally **(10)** the subsequent sharing of the loot taken from Katina Black. (R. 189-91)

**Sufficiency of the Evidence.**

"In reviewing the sufficiency of the evidence, as opposed to its weight, " . . . all evidence supporting the guilty verdict is accepted as true, and the State must be given the benefit of all reasonable inferences that can be reasonably drawn from the evidence." **Jiles v. State,** 962 So.2d 604, 605 (Ct.App.Miss. 2006).

"[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." **Bush v. State,** 895 So.2d 836, 843 (¶16) (Miss. 2005), quoting from **Jackson v. Virginia,** 443 U.S. 307, 315, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

"Should the facts and inferences considered in a challenge to the sufficiency of the evidence 'point in favor of the defendant on any element of the offense with sufficient force that reasonable

men could not have found beyond a reasonable doubt that the defendant was guilty,' the proper remedy is for the appellate court to reverse and render." **Bush v. State,** *supra*, 895 So.2d at 843 citing, *inter alia*, **Edwards v. State,** 469 So.2d 68, 70 (Miss. 1985).

The indictment alleged Dora willfully and feloniously either took or attempted to take, steal, and carry away from the person or presence of Katina Black the personal property of Tem's Food Market, to wit: money.

Clearly the evidence in this case demonstrates an intent to steal. **Shanklin v. State,** 290 So.2d 625, 627 (Miss. 1974); **Newburn v. State,** 205 So.2d 260, 265 (Miss. 1967).

Dora, if only an observer at the scene, was at least an aider and abettor, if not a direct perpetrator. Dora aided, assisted, and encouraged Winters by activating his brake lights for Winters when Katina Black left the store. (R. 181-82) Dora aided and assisted in Winters's get-a-way by impeding the progress of Deputy McCrary who was attempting to follow the robber.

One who aids, abets, and assists others in the commission of a crime is equally guilty with the principal offender. **Anderson v. State**, 397 So.2d 81 (Miss. 1981); **Bullock v. State**, 391 So.2d 601 (Miss. 1980), cert. denied 101 S.Ct. 3068, 452 U.S. 931, 69 L.Ed.2d 432 (1981).

By virtue of the well settled principles of aiding and abetting, Dora is liable for the robbery in its entirety. An "aider and abettor" is any person who is present at the commission of a criminal offense and aids, counsels, or encourages another in the commission of that offense. He is equally guilty with the principal offender. **Sayles v. State**, 552 So.2d 1383, 1389 (Miss. 1989), citing **Bullock v. State**, 391 So.2d 601 (Miss. 1980).

It is elementary that where, as here, two or more persons act in concert to accomplish the common purpose, the act of one is the act of all. **Noble v. State**, 221 Miss. 339 , 72 So.2d 687

(1954). *Cf.* **Swinford v. State**, 653 So.2d 912 (Miss. 1995)[aiding and abetting murder]; **Gowdy v. State**, 592 So.2d 29 (Miss. 1991)[aiding and abetting the sale of cocaine]; **Anderson v. State**, 397 So.2d 81 (Miss. 1981)[aiding and abetting robbery]; **Bass v. State**, 231 So.2d 495 (Miss. 1970)[ aiding and abetting burglary].

The jury was properly instructed on the principles of aiding and abetting. *See* jury instructions S-3 and S-7. (C.P. at 37-38, respectively)

Needless to say, the jury, as was its prerogative, resolved this issue in favor of the State.

Where, as here, the issue presented is the denial of a directed verdict, peremptory instruction, or JNOV, evidence favorable to the State must be accepted as true, and any evidence favorable to the defendant must be disregarded. **Anderson v. State,** 904 So.2d 973 (Miss. 2004), reh denied; **Lynch v. State,** 877 So.2d 1254 (Miss. 2004), reh denied, cert denied 125 S.Ct. 1299, 543 U.S. 1155, 161 L.Ed.2d 122 (2004); **Hubbard v. State,** 819 So.2d 1192 (Miss. 2001), reh denied; **Yates v. State,** 685 So.2d 715, 718 (Miss. 1996).

By denying Dora's motion for a directed verdict (R. 258-59), his request for peremptory instruction (C.P. at 44), and Dora's motion for judgment notwithstanding the verdict (C.P. at 64-65, 75), Judge Kitchens correctly held the question of Dora's intent was a jury issue. Indeed, Judge Kitchens described the state of the evidence as presenting "a classic jury issue case." (R. 258, 307, 369)

Dora cites to the right cases but, in our opinion, reaches the wrong conclusion.

It is elementary that all proof need not be direct. Rather, a juror may draw any reasonable inferences from all the evidence in the case. **Campbell v. State,** 278 So.2d 420 (Miss. 1973); **McLelland v. State,** 204 So.2d 158 (Miss. 1967). Stated somewhat differently, the jury, as fact

finder, is entitled to consider not only facts testified to by witnesses but may also consider all inferences that may be reasonably and logically deduced from the facts in evidence. **Pryor v. State,** 349 So.2d 1063 (Miss. 1977).

In **Newburn v. State**, 205 So.2d 260, 265 (Miss. 1967), this Court stated:

> "Intent is a state of mind existing at the time a person commits an offense. If intent required definite and substantive proof, it would be almost impossible to convict, absent facts disclosing a culmination of the intent. The mind of an alleged offender, however, may be read from his acts, conduct, and inferences fairly deducible from all the circumstances."

In **Shanklin v. State**, 290 So.2d 625, 627 (Miss. 1974), this Court further opined:

> Intent to do an act or commit a crime is also a question of fact to be gleaned by the jury from the facts shown in each case. The intent to commit a crime or to do an act by a free agent can be determined only by the act itself, surrounding circumstances, and expressions made by the actor with reference to his intent. [citations omitted]

*See also* **Chambliss v. State,** 919 So.2d 30, 35 (Miss. 2005) citing **Shanklin v. State,** *supra;* **Knox v. State,** 805 So.2d 527 (Miss. 2002) [Intent to do an act or commit a crime is a question of fact to be gleaned by the jury from the facts shown in each case.]

Here Dora's intent could be read from his acts, conduct, and inferences fairly deducible from the surrounding circumstances. Testimony from Winters describing post-robbery events is quoted as follows:

> Q. [BY PROSECUTOR HAYES-ELLIS:] [W]hen you left the grocery store, did you travel south toward Macon?
>
> A. No, I didn't travel south toward Macon. I took a left toward Crawford.
>
> Q. Okay. How did you know to stop at the store and meet back up with Mr. Dora.

A. Because he left me a note where to go. I knew we was going to meet up right there.

Q. Okay. And when you - - when the two of you met at the store, what happened at that point?

A. He got in my car, and he gave me a portion of the money. He took the bag, and it was also - - I saw some checks in the bag.

He took the bag and the checks, and gave me a portion of the money.

Q. Okay.

A. And actually put my tag back on my car.

Q. Okay. And approximately how much money did he give you?

A. Approximately $1,000. (R. 190-91)

If this is not sufficient evidence of an intent to steal, we don't know what is.

Dora, of course, denied it all, creating a classic conflict in the testimony. (R. 272-74, 276, 280-81) Dora implicated Winters to the exclusion of himself, and Winters implicated Dora. It was as Judge Kitchens described, *viz.*, a classic jury issue. *See* jury instructions number S-5, S-4, and S-3 which instructed the jury in plain and ordinary English on the lesser included offense of strong-arm robbery and the concept of aiding and abetting. (C.P. at 34, 36, 37, respectively)

A jury determines the weight and credibility of a witness's testimony. **Nelson v. State,** 10 So.3d 898 (Miss. 2009), reh denied. Any conflicts created by the evidence are for the jury to resolve. **Brazzle v. State,** 13 So.3d 810 (Miss. 2009).

Judge Waller's opinion in **Bush v. State,** *supra*, 895 So.2d 836, 843 (¶¶16,17) (Miss. 2005), makes it perfectly clear that in resolving sufficiency of the evidence issues the evidence must be viewed and considered in the light most favorable to the State's theory of the case. We quote:

In *Carr v. State,* 208 So.2d 886, 889 (Miss. 1968), we stated that in considering whether the evidence is sufficient to sustain a conviction in the face of a motion for directed verdict or for judgment notwithstanding the verdict, the critical inquiry is whether the evidence shows "beyond a reasonable doubt that accused committed the act charged, and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction." **However, this inquiry does not require a court to**

> **'Ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.' Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.**

*Jackson v. Virginia,* 443 U.S. 307, 315, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (citations omitted) (emphasis in original.) Should the facts and inferences considered in a challenge to the sufficiency of the evidence "point in favor of the defendant on any element of the offense with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty," the proper remedy is for the appellate court to reverse and render. *Edwards v. State,* 469 So.2d 68, 70 (Miss. 1985) (citing *May v. State,* 460 So.2d 778, 781 (Miss. 1984)); *see also Dycus v. State,* 875 So.2d 140, 164 (Miss. 2004). However, if a review of the evidence reveals that it is of such quality and weight that, "having in mind the beyond a reasonable doubt burden of proof standard, reasonable fairminded men in the exercise of impartial judgment might reach different conclusions on every element of the offense," the evidence will be deemed to have been sufficient. *Edwards,* 469 So.2d at 70; *see also Gibby v. State,* 744 So.2d 244, 245 (Miss. 1999).

* * * * * *

In light of these facts, we find that any rational juror could have found beyond a reasonable doubt that all of the elements had been met by the State in proving capital murder with the underlying felony being armed robbery. This issue is without merit. **Bush v. State,** 895 at 843-44 (¶¶16, 17) [emphasis in bold print ours].

The **Bush** case is particularly notable for re-articulating the standards of review for both the

sufficiency of the evidence and the weight of the evidence. In note 3 of the **Bush** opinion, the Court pointed out that the tests articulated in **Bush** differ " . . . from the tests articulated in some of our previous opinions." **Bush v. State,** 895 So.2d at 844, note 3.

The Court in **Bush** observed that in **Turner v. State,** 726 So.2d 117, 125 (Miss. 1998), it had stated an incorrect standard of review for weight of the evidence complaints.

The test for legal sufficiency, on the other hand, was correctly stated in **Turner,** 726 So.2d at 124-25 as follows:

> Turner's contention is that the State failed to prove beyond a reasonable doubt that he was the driver of the pick-up when the accident occurred. The standard of review for Turner's legal sufficiency argument, wherein he argues the trial court erred in denying his motions for directed verdict and his motion for j.n.o.v., is:
>
> > Where a defendant has requested a peremptory instruction in a criminal case or after conviction moved for a judgment of acquittal notwithstanding the verdict, the trial judge must consider all of the evidence - not just the evidence which supports the State's case . . . . The evidence which supports the case of the State must be taken as true . . . The State must be given the benefit of all favorable inferences that may reasonabl[y] be drawn from the evidence . . . If the facts and inferences so considered point in favor of the defendant with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty, granting the peremptory instruction or judgment n.o.v. is required. On the other hand, if there is substantial evidence opposed to the request or motion - that is, evidence of such quality and weight that, having in mind the beyond a reasonable doubt burden of proof standard, reasonable fair minded men in the exercise of impartial judgment might reach different conclusions the request or motion should be denied.
>
> *Weeks v. State,* 493 So.2d 1280, 1282 (Miss. 1986)(citing *Gavin v. State,* 473 So.2d 952, 956 (Miss. 1985)) * * * * * *

A finding the evidence is insufficient results in a discharge of the defendant. **May v. State,** 460 So.2d 778, 781 (Miss. 1984).

Can it be said in the case *sub judice* that no rational juror could have found beyond a reasonable doubt that all of the elements of strong-arm robbery with an intent to steal had been met by the State?

Absolutely not.

To the contrary, based largely upon the testimony of Katina Black and Byron Winters, " . . . any rational juror could have found beyond a reasonable doubt that all of the elements had been met by the State in proving [the crime charged.]" **Bush v. State,** 895 So.2d at 844.

Throw in the deceptive 911 call testified about by Phyllis Hudson and police chief Tina Williams, and the question is not even close.

Dora claims the State failed to present any evidence that Dora entered into an agreement with Winters to rob Katina Black. True enough, there was no direct evidence of an agreement to actually rob the store. Although unnecessary for conviction, such was supplied by reasonable inference flowing from all of the evidence.

The problem with Dora's unique spin on the testimony is that when considering the sufficiency of the evidence on motion for judgment notwithstanding the verdict, evidence favorable to the State must be accepted as true and any evidence favorable to the defendant suggesting a lack of intent, must be disregarded. This includes Dora's explanation that the reason for his deceit and deception during the 911 call was to keep his wife in the dark about his whereabouts and possible relationship with another woman. (R. 275-77)

In judging the legal sufficiency, as opposed to the weight, of the evidence on a motion for a directed verdict or request for peremptory instruction or motion for judgment notwithstanding the

verdict, the trial judge is required to accept as true all of the evidence that is favorable to the State, including all reasonable inferences that may be drawn therefrom, and to *disregard* evidence favorable to the defendant. **Anderson v. State,** 904 So.2d 973 (Miss. 2004), reh denied; **Lynch v. State,** 877 So.2d 1254 (Miss. 2004), reh denied, cert denied 125 S.Ct. 1299, 543 U.S. 1155, 161 L.Ed.2d 122 (2004); **Hubbard v. State,** 819 So.2d 1192 (Miss. 2001), reh denied; **Yates v. State,** 685 So.2d 715, 718 (Miss. 1996); **Ellis v. State,** 667 So.2d 599, 612 (Miss. 1995); **Clemons v. State,** 460 So.2d 835 (Miss. 1984); **Forbes v. State,** 437 So.2d 59 (Miss. 1983); **Bullock v. State,** 391 So.2d 601 (Miss. 1980). *See also* **Jones v. State,** 904 So.2d 149, 153-54 (Miss. 2005) ["The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."]

Counsel's spin on the crime, *viz.*, no robbery ever took place, is an exaggeration - a hyperbole, if you please - of the strongest kind. She looks at the testimony in a light most favorable to Dora.

**Weight of the Evidence.**

Dora also claims the verdict of the jury was against the overwhelming weight of the evidence and he is entitled to a new trial because to allow the verdict to stand " . . . would be to sanction an unconscionable injustice." (Brief of the Appellant at 16)

This argument implicates the denial of Dora's motion for a new trial. "A greater quantum of evidence favoring the State is necessary for the State to withstand a motion for a new trial, as distinguished from a motion for j.n.o.v." **May v. State,** 460 So.2d 778, 781 (Miss. 1984).

This Court reviews the trial court's denial of a post-trial motion, e.g., a motion for a new trial,

under the abuse of discretion standard. **Flowers v. State**, 601 So.2d 828, 833 (Miss. 1992); **Robinson v. State**, 566 So.2d 1240, 1242 (Miss. 1990). No abuse of judicial discretion has been demonstrated here because the testimony of the witnesses for the State, including Byron Winters, weighs heavily in support of the verdict. Put another way, the testimony and evidence, in toto, does not preponderate in favor of Dora.

The rules of law applicable here are found in **Gary v. State,** 11 So.3d 769, 773 (¶¶ 16, 17) (Ct.App.Miss. 2009), as follows:

> "When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, we will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." *Bush [v. State],* 895 So.2d at 844 (¶18) citing *Herring v. State,* 691 So.2d 948, 957 (Miss. 1997)). On a motion for new trial, the circuit court sits as a thirteenth juror and only in exceptional cases in which the evidence preponderates heavily against the verdict will a new trial be granted. *Id.* (Citing *Amiker v. Drugs For Less, Inc.*, 796 So.2d 942, 947 (¶18) (Miss. 2000)) Our review requires that we weigh the evidence in the light most favorable to the verdict. *Id.*
>
> Looking at the evidence as a limited "thirteenth juror" in this case and viewing the evidence in the light most favorable to the verdict, we cannot say that the guilty verdict would sanction an unconscionable injustice. We find that the evidence does not preponderate heavily against the verdict, and the trial court did not abuse its discretion in denying Gary's motion for a new trial. This issue is without merit." (¶¶ 16, 17, slip opinion at 7-8)

According to Dora, there was insufficient proof of an intent on his part to permanently deprive Katina Black of the money bag. Also according to Dora, the evidence arguably demonstrated that Dora, acting in concert with Winters, only intended to commit an assault but failed to establish beyond a reasonable doubt that Dora intended to permanently deprive Katina Black of her money bag. In this posture, argues Dora, " . . . allow[ing] [this verdict] to stand would be to sanction an unconscionable injustice." (Brief of the Appellant at 16)

We think not.

Although Dora claims no robbery actually took place (Brief of the Appellant at 3), the evidence does not preponderate in favor of Dora's position. And while he might claim he was guilty of no crime greater than simple assault by physical menace, the State's theory of either armed robbery or strong-arm robbery is lopsidedly in favor of the State. **Bush v. State,** 895 So.2d 836, 844-45 (¶¶18-19) (Miss. 2005). Accordingly, the trial judge did not abuse his judicial discretion in denying Dora's motion for a new trial. (C.P. at 75)

Winters, to be sure, was at least an accomplice, if not a direct perpetrator. With respect to accomplice testimony, the true rule is found in **Johns v. State**, 592 So.2d 86, 88 (Miss. 1991), where we find the following:

> This Court has long held that the testimony of an accomplice must be viewed with "great caution and suspicion. Where it is uncorroborated, it must also be *reasonable, not improbable, self-contradictory or substantially impeached.*" [citations omitted] If the uncorroborated accomplice testimony does not suffer from these infirmities, such testimony may be found to adequately support a conviction. [citations omitted and emphasis ours]

*See also* **Jones v. State,** 740 So.2d 904 (Miss. 1999), reh denied; **Strahan v. State,** 729 So.2d 800 (Miss. 1998), reh denied; **Finley v. State**, 725 So.2d 226 (Miss. 1998); **Holly v. State**, 671 So.2d 32 (Miss. 1996); **James v. State,** 756 So.2d 850 (Ct.App.Miss. 2000).

Dora, we note, received the benefit of S-6, a cautionary instruction in this case. (R. 310-11; C.P. at 40)

"In this state, the uncorroborated testimony of an accomplice may be sufficient to convict even when the charge is capital murder and the sentence imposed is death." **Gandy v. State**, 438 So.2d 279, 285 (Miss. 1983), citing **Oates v. State**, 421 So.2d 1025 (Miss. 1982).

But Winters's testimony was not uncorroborated, thus foregoing any necessity that his testimony also be reasonable, not improbable, self-contradictory or substantially impeached. *See* **Hendrix v. State,** *supra*, 957 So.2d 1023 (Ct.App.Miss. 2007).

Corroboration was provided by the testimony of Katina Black, Chief Williams, and even Dora himself.

It is well settled "... that even slight corroboration will be sufficient to uphold a conviction." **Feranda v. State,** 267 So.2d 305 (Miss. 1972). *See also* **Young v. State,** 425 So.2d 1022, 1024 (Miss. 1983) ["Only slight corroboration of an accomplice's testimony is required to sustain a conviction."]

If the testimony of Winters is accepted as true, it is clear that Dora not only participated in the robbery, he was the instigator and chief architect - a principal, if you please.

"The jury is the **sole judge** of the weight and credibility of the evidence." **Byrd v. State,** 522 So.2d 756, 760 (Miss. 1988). This includes accomplice testimony. It's verdict will not be disturbed on appeal unless the failure to do so would sanction an "unconscionable injustice." **Groseclose v. State,** 440 So.2d 297, 300 (Miss. 1983).

The word "unconscionable" points to something that is monstrously harsh and shocking to the conscience. The verdict returned in the case at bar does not exist in this posture. It is neither harsh nor shocking, and affirmation of Dora's conviction(s) and sentence is the order of the day.

In ruling on the defendant's motion for a new trial, the trial judge - and this Court on appeal as well - must look at the evidence in the light most favorable to the State's theory of the case, i.e., "in the light most favorable to the verdict." **Herring v. State,** 691 So.2d 948, 957 (Miss. 1997), citing **Mitchell v. State,** 572 So.2d 865, 867 (Miss. 1990).

In **Bush v. State,** *supra*, 895 So.2d 836, 844 (¶18) (2005), the Supreme Court penned the following language also articulating the true rule:

> When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, we will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. *Herring v. State,* 691 so.2d 948, 957 (Miss. 1997). We have stated that on a motion for new trial,
>
> > The court sits as a thirteenth juror. The motion, however, is addressed to the discretion of the court, which should be exercised with caution, and the power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict.
>
> *Amiker v. Drugs for Less, Inc,* 796 So.2d 942, 947 (Miss. 2000)/2 However, the evidence should be weighed in the light most favorable to the verdict. *Herring*, 691 So.2d at 957. A reversal on the grounds that the verdict was against the overwhelming weight of the evidence, "unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict." *McQueen v. State*, 423 So.2d 800, 803 (Miss. 1982). Rather, as the "thirteenth juror" the court simply disagrees with the jury's resolution of the conflicting testimony. *Id.* This difference of opinion does not signify acquittal any more than a disagreement among the jurors themselves. *Id.* Instead, the proper remedy is to grant a new trial./3
>
> Sitting as a limited "thirteenth juror" in this case, we cannot view the evidence in the light most favorable to the verdict and say that an unconscionable injustice resulted from this jury's rendering of a guilty verdict. * * * " [text of notes 2 and 3 omitted]

*See also* **Chambliss v. State,** *supra,* 919 So.2d 30, 33-34 (¶10) (Miss. 2005), quoting *Bush*, 895 So.2d at 844 (¶18).

In short, the jury's verdict was not against the overwhelming weight of the credible evidence which does not preponderate in favor of Dora's claim that no robbery actually took place.

In **Maiben v. State**, 405 So.2d 87, 88 (Miss. 1981), this Court announced that

> . . . . . we will not set aside a guilty verdict, absent other error, **unless it is clearly a result of prejudice, bias or fraud, or is manifestly against the weight of credible evidence.** [emphasis supplied]

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

The case at bar certainly does not exist in this posture. This is not a case where the evidence preponderates heavily against the verdict or where allowing the verdict to stand would sanction or amount to an unconscionable injustice.

## POINT 3.

## NOTHING IN THIS RECORD SUGGESTS THE JURY WAS MISLED WHEN BYRON WINTERS DENIED HE WOULD BE REWARDED FOR HIS TESTIMONY.

Dora, citing **Bruce v. State**, 746 So.2d 901, 909-10 (¶39) (Ct.App.Miss. 1998), suggests the prosecutor withheld critical information by failing to inform the jury of " . . . the State's intentions to give leniency to Winters in exchange for damaging testimony against Dora." (Brief of the Appellant at 16)

This claim is devoid of merit because we cannot find within the four corners of the record any support for Dora's position that "[o]ne day after Dora was sentenced, Winters entered a guilty plea and was sentenced to three years in the custody of the MDOC." (Brief of the Appellant at 17) Dora's motion for a new trial, filed and adjudicated on September 19th three (3) days post-verdict (C.P. at 53) and two (2) days post-sentencing (C.P. at 358-63), makes no mention of the ultimate disposition of the charges against Winters. (C.P. at 64-66) Rather, Dora's allegations of a "deal" or leniency appear to be bare boned and conclusory allegations of fact. This Court cannot consider such facts here. **Genry v. State,** 735 So.2d 186, 200 (Miss. 1999) ["This Court 'cannot decide an issue based on assertions in the briefs alone; rather, issues must be proven by the record.' "]; **Wortham v. State,** 219 So.2d 923, 926-27 (Miss. 1969) ["We will not go outside the record to find facts and will not consider a statement of facts attempted to be supplied by counsel in briefs." *See also* **Schuck v. State,** 865 So.2d 1111 (Miss. 2003) [Consideration of matters on appeal is limited strictly to matters contained in the trial record.]

The record falls short of demonstrating any sort of deal was in place at the time Winters testified at Dora's trial.

Winters's possible bias and interest in this cause was fully covered during defense counsel's cross-examination of Winters, and the point was also hammered home by counsel during closing argument. (R. 332-33)

This is not a case, ala **Hill v. State**, 512 So.2d 883, 884-85 (Miss. 1987), cited and relied upon by Dora, where defense counsel was denied the opportunity to inquire or prevented from inquiring "... into possible promises of leniency by the state and the disposition of criminal charges pending against the state's witnesses." Such, we acknowledge, "are proper areas for interrogation."

In the case at bar, Dora's lawyer, without one whit of interference, freely, fully, and fairly inquired into the matter of a possible deal and possible promises of leniency by the State.

During cross-examination of Winters by defense counsel, the following colloquy took place:

> Q. Okay. And I believe you're under indictment for armed robbery - -
>
> A. (Witness nods head affirmatively).
>
> Q. - - for being involved in this crime, right?
>
> A. Right.
>
> Q. And I believe you have an attorney representing you, right?
>
> A. Yes, sir.
>
> Q. You understand today you're a witness for the prosecution, testifying against Mr. Dora, right?
>
> A. Right.
>
> Q. Are you of the opinion that you expect to get some favorable treatment from - - in your case - -
>
> A. No.
>
> Q. - - concerning your case on - - with your voluntary testimony today?
>
> A. No.
>
> Q. Have they promised you anything?
>
> A. No.
>
> Q. You don't expect to get any favorable treatment?
>
> A. No, sir.
>
> Q. You haven't talked to your lawyer about that before you took the stand today.

A. No, sir.

Q. Then it's your testimony here that you don't expect to get anything out of your testimony?

A. No, sir.

Q. All right. Well, then why are you testifying?

A. Why am I - - because it's a wrong action. I did wrong, and I think you should admit to wrongs.

Q. Okay.

A. We were wrong, we were wrong. If you did wrong, you did wrong. (R. 198-99)

* * * * * *

Q. Mr. Winters, would it be a fair statement that you're up here today to help yourself? You're not up here to help Mr. Dora today, are you?

A. I'm up here today to help law enforcement. (R. 213)

During closing argument defense counsel argued

" . . . that Mr. Byron Winters is looking after himself, and nobody else. He wants the best he can get in a deal, that that's the reason he was testifying for the State of Mississippi. He was a witness for the State.

* * * * * *

So what does Mr. Winters do when he gets back over here in the jail, and still in jail and can't make bond? What does he do? I got to help myself. I'm just - - he - - he turned on me and gave some information on me. I'm going to fix him. I'll fix him. I'll just implicate him in the crime, so I can get me a deal. And when he did that, they went and picked the man up and charged him with armed robbery.

I submit to you ladies and gentlemen, the testimony of Mr. Winters and the statement of Mr. Winters that was given to the law enforcement authorities is the sole reason why that man was charged. That's the only reason. (R. 339)

The record does not support the idea that Winters was promised any sentencing leniency via a so-called "deal" in exchange for his testimony against Dora. Nevertheless, the jury was well aware that Winters had been charged with the same offense and had been incarcerated for a year. (R. 199) In assessing Winters's credibility, the jury was not precluded from taking into consideration Winters's reason and motivation for testifying in this cause and any interest he may have had in its outcome.

Dora received jury instruction S-6, a strongly worded cautionary charge advising the jury the testimony of an accomplice was to be weighed with "great care and caution." (C.P. at 40) Thus, the jury was well aware of Winter's interest in this cause and may have given it a great deal of consideration in assessing Winters's credibility. For the above reasons, Dora's complaint is unpersuasive.

**POINT 4.**

**THE DEFENDANT HAS FAILED ON DIRECT APPEAL TO MAKE OUT A CLAIM *PRIMA FACIE* OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL. THE RECORD FAILS TO AFFIRMATIVELY REFLECT INEFFECTIVENESS OF CONSTITUTIONAL DIMENSIONS.**

Appellate counsel, perhaps with the refractive aid of hindsight and back-focal lenses, assails the effectiveness of trial counsel, Mr. James E. Brown, Jr. Apparently, the only deficiency in his performance was his failure to seek a jury instruction on simple assault which, according to Dora, is a lesser included offense of robbery. This alleged lapse of trial counsel, a "sin" of omission as opposed to commission, is insufficient to reflect representation lacking in constitutional sufficiency.

Although the record, in our opinion, is factually adequate for a determination by a reviewing court that trial counsel was not ineffective for the reason Dora now claims, we defer to the cases which have declined to address the issue without prejudice to the appellant's right to raise it *de novo*

in a post-conviction environment.

The ground rules for resolving this complaint were first set forth in **Read v. State,** 430 So.2d 832, 841 (MIss. 1983), where this Court stated:

> (1) **Any defendant convicted of a crime may raise the issue of ineffective assistance of counsel on direct appeal, even though the matter has not first been presented to the trial court. The Court should review the entire record on appeal.** If, for example, from a review of the record, as in *Brooks v. State*, 209 MIss. 150, 46 So.2d 94 (1950) or *Stewart v. State*, 229 So.2d 53 (MIss. 1969), this Court can say that the defendant has been denied the effective assistance of counsel, the court should also adjudge and reverse and remand for a new trial. *See also, State v. Douglas*, 97 Idaho 878, 555 P.2d 1145, 1148 (1976).
>
> (2) Assuming that the Court is unable to conclude from the record on appeal that defendant's trial counsel was constitutionally ineffective, the Court should then proceed to decide the other issues in the case. Should the case be reversed on other grounds, the ineffectiveness issue, of course, would become moot. **On the other hand, if the Court should otherwise affirm, it should do so without prejudice to the defendant's right to raise the ineffective assistance of counsel issue via appropriate post-conviction proceedings.** If the Court otherwise affirms, **it may nevertheless reach the merits of the ineffectiveness issue where (a) as in paragraph (1) above, the record affirmatively shows ineffectiveness of constitutional dimensions,** or (b) the parties stipulate that the record is adequate and the court determines that findings of fact by a trial judge able to consider the demeanor of witnesses, etc. are not needed.
>
> (3) If, after affirmance as in paragraph (2) above, the defendant wishes to do so, he may then file an appropriate post-conviction proceeding raising the ineffective assistance of counsel issue. *See Berry v. State*, 345 So.2d 613 (MIss. 1977); *Callahan v. State, supra.* Assuming that his application states a claim, *prima facie*, he will then be entitled to an evidentiary hearing on the merits of that issue in the Circuit Court of the county wherein he was originally convicted./5 Once the issue has been formally adjudicated by the Circuit Court, of course, the defendant will have the right to appeal to this Court as in other cases. [emphasis supplied; text of note 5 omitted]

The language found in the recent cases of **McLaurin v. State,** *supra,* No. 2008-KA-00814-COA decided November 17, 2009, (¶¶ 14-17) slip opinion at 5-6 [Not Yet Reported] and **Drummond v. State,** *supra,* No. 2008-KP-00313-COA decided October 27, 2009, (¶¶14 and 15) slip opinion at 7-8 [Not Yet Reported], control the posture of Dora's complaint:

> Drummond contends that defense counsel's failure to object when the State was attempting to elicit hearsay testimony from the victim amounted to ineffective assistance of counsel. Drummond also argues that defense counsel was ineffective because counsel never attempted to impeach Moffett with his prior testimony. This Court does not generally consider an ineffective-assistance-of-counsel claim on direct appeal.
>
> The Mississippi Supreme Court has stated that:
>
> > It is unusual for this [c]ourt to consider a claim of ineffective assistance of counsel when the claim is made on direct appeal. This is because we are limited to the trial court record in our review of the claim[,] and there is usually insufficient evidence within the record to evaluate the claim. The Mississippi Supreme Court has stated that, where the record cannot support an ineffective assistance of counsel claim on direct appeal, the appropriate conclusion is to deny relief, preserving the defendant's right to argue the same issue through a petition for post-conviction relief. This Court will rule on the merits on the rare occasions where (1) the record affirmatively shows ineffectiveness of constitutional dimensions, or (2) the parties stipulate that the record is adequate to allow the appellate court to make the finding without consideration of the findings of fact of the trial judge."
>
> *Wilcher v. State,* 863 So.2d 776, 825 (¶171) (Miss. 2003) (internal citations and quotations omitted). The record does not affirmatively indicate Drummond suffered denial of effective assistance of counsel of constitutional dimensions, and the parties have not stipulated that the record was adequate to allow the appellate court to make a finding without considering the finding of facts by the trial judge. Thus, we decline to address this issue without prejudice to Drummond's right to seek post-conviction relief, if he so chooses.

**Drummond v. State,** *supra*, No. 2008-KP-00313-COA decided October 27, 2009, (¶ 15) slip opinion at 8 [Not Yet Reported].

In the **McLaurin** case this court stated the following:

> McLaurin raises twenty-three allegations of ineffective assistance of counsel. Without exhaustively listing each of McLaurin's assertions, we summarize his allegations using his own words: "defense counsel did little to avail himself of the evidence in the custody of the State, . . . much less conduct an independent investigation."
>
> Mississippi Rule of Appellate Procedure 22(b) states:
>
> > Issues which may be raised in post-conviction proceedings may also be raised on direct appeal if such issues are based on facts fully apparent from the record. Where the appellant is represented by counsel who did not represent the appellant at trial, the failure to raise such issues on direct appeal shall constitute a waiver barring consideration of the issues in post-conviction proceedings.
>
> "Where the record is insufficient to support a claim of ineffective assistance, 'the appropriate conclusion is to deny relief, preserving the defendant's right to argue the same issue through a petition for post-conviction relief.' " *Wynn v. State,* 964 So.2d 1196, 1200 (¶9) (Miss.Ct.App.2007) (citing *Aguilar v. State,* 847 So.2d 871, 878 (¶17) (Miss.Ct.App. 2002)).
>
> Several of McLaurin's allegations are based upon facts that are not fully apparent from the record: defense counsel failed to file a direct appeal or a motion for post-conviction relief after accepting a retainer and asserting the defense he was going to file the appeals; defense counsel did not review an incriminating photograph of McLaurin used at trial and did not file a motion to exclude the photograph; defense counsel failed to sufficiently investigate potential witnesses and relevant medical records; and defense counsel did not submit any jury instructions. The record contains no medical records, nor does it contain any statements by potential witnesses. Thus, we cannot address these issues on direct appeal. Because we cannot address several of McLaurin's ineffective assistance of counsel allegations on direct appeal, we find that McLaurin's ineffective assistance claim would be more appropriately brought in a petition for

> post-conviction relief, if he chooses to do so. Accordingly, we deny relief on this issue without prejudice."

**McLaurin v. State,** *supra*, No. 2008-KA-00814-COA decided November 17, 2009 (¶¶ 14-17) slip opinion at 5-6 [Not Yet Reported].

Because (1) the record fails to show ineffectiveness of constitutional dimensions and (2) both parties have not stipulated the record is adequate to allow the appellate court to make the necessary findings of fact, this Court need not rule on the merits of Dora's individual ineffective assistance of counsel claim. **Wynn v. State,** *supra,* 964 So.2d 1196 (Ct.App.Miss. September 4, 2007); **Jones v. State,** *supra,* 961 So.2d 730 (Ct.App.Miss. February 20, 2007).

At best, any scrutiny of trial counsel's omission must await a new horizon in a post-conviction environment where, assuming a hearing is required, trial counsel will have an opportunity to explain the reasons for his actions and/or inactions. It is a rare case indeed where an appellate court will find constitutional ineffectiveness in trial counsel without granting to counsel a meaningful opportunity to be heard.

Our position, in a nutshell, is that Dora has failed to demonstrate on direct appeal that any aspect of his lawyer's performance was deficient and that the deficient performance, if any, prejudiced the defense. Started differently, the record fails to affirmatively reflect ineffectiveness of constitutional dimensions.

## POINT 5.

## THERE BEING NO ERROR IN ANY INDIVIDUAL PART, THERE CAN BE NO ERROR TO THE WHOLE.

Our response to Dora's "cumulative error" argument is found in **Genry v. State**, *supra*, 735 So.2d 186, 201 (Miss. 1999), where we find the following language:

> This court may reverse a conviction and sentence based upon

> cumulative effect of errors that independently would not require reversal. **Jenkins v. State**, 607 So.2d 1171, 1183-84 (Miss. 1992); **Hansen v. State**, 592 So.2d 114, 153 (Miss. 1991). However, where "there was no reversible error in any part, so there is no reversible error to the whole." **McFee v. State**, 511 So.2d 130, 136 (Miss. 1987).

*See also* **Wheeler v. State,** 826 So.2d 731, 741 (¶ 39) (Miss. 2002) [Each alleged error discussed individually and no cumulative error found]; **McLaurin v. State,** *supra*, No. 2008-KA-00814-COA (¶35, slip opinion at12) decided November 17, 2009 [Not Yet Reported], citing **Bright v. State,** 894 So.2d 590, 596 (¶31) (Miss.Ct.App. 2004) (quoting **Coleman v. State,** 697 So.2d 777, 787 (Miss. 1997) ["Since McLaurin has failed to show any individual errors, we find no cumulative error that would necessitate reversal of his conviction."]

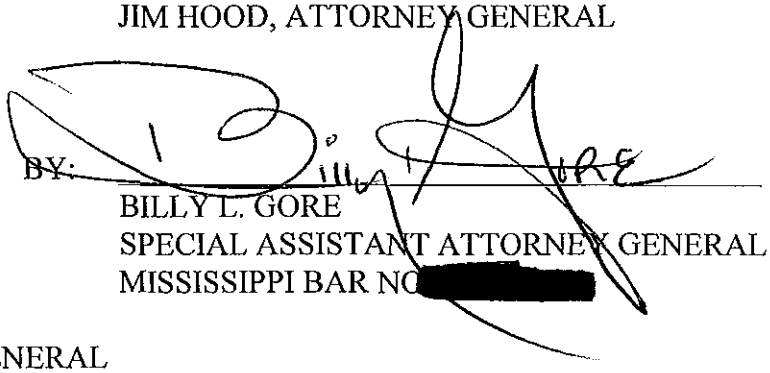
Contrary to Dora's suggestion otherwise, this is not a proper case for application of the doctrine of either "cumulative" error or "plain" error. It was true in the **Genry** and **McLaurin** decisions, and it is equally true here, that since the appellant failed " . . . to assert any assignments of error containing actual error on the part of the trial judge in this case, this Court finds that this case should not [be] reverse[d] based upon cumulative error." 735 So.2d at 201.

## CONCLUSION

Appellee respectfully submits that no reversible error took place during the trial of this cause. Accordingly the judgments of conviction of recidivism and strong-arm robbery, together with the fifteen (15) year mandatory sentence imposed in this cause, should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL



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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 date mailed, postage prepaid, a true and correct copy of the above **BRIEF FOR THE APPELLEE** to the following:

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Circuit Judge, District 16
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Columbus, MS 39703

**HONORABLE F0RREST ALLGOOD**
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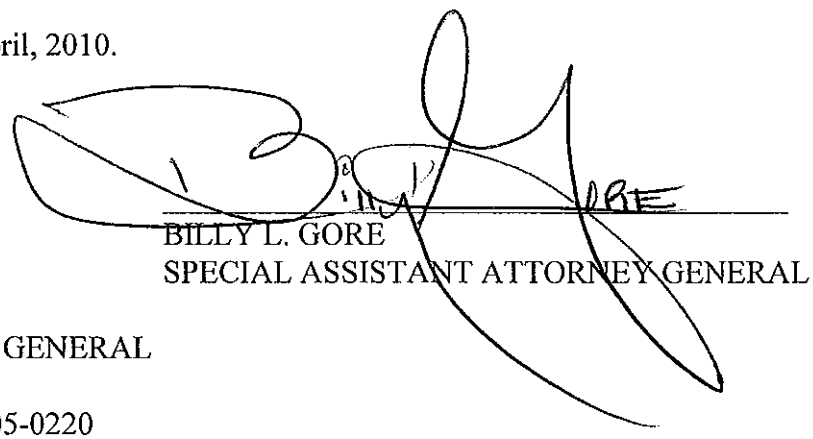
This the 16th day of April, 2010.



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