

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

FREDERICK DENELL GRIM

APPELLANT

VS.

NO. 2008-KA-1920

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

**BY: LAURA H. TEDDER
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	iv
STATEMENT OF THE ISSUES	1
SUMMARY OF THE ARGUMENT	1
ARGUMENT	3
I. The habitual portion of the indictment correctly sets out the convictions and sufficient proof of said convictions was offered at trial.	3
II. Grim received constitutionally effective assistance at trial and cannot meet the two prong test set out in <i>Strickland</i>	6
III. The evidence at trial was sufficient to support the conviction of Frederick Grim for sale of cocaine.	9
IV. The jury's verdict was supported by the overwhelming weight of the evidence and the trial judge correctly denied Grim's Motion for JNOV or in the alternative for a New Trial.	11
V. The indictment is constitutionally sound and the Grim was sufficiently notified of the charges against him to present a defense.	14
VI. Grim's conviction is not reversible under the cumulative error doctrine.	15
CONCLUSION	16
CERTIFICATE OF SERVICE	17

TABLE OF AUTHORITIES

FEDERAL CASES

Jackson v. Virginia, 443 U.S. 307, 315, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)	10
United States v. Varkonyi, 645 F.2d 453, 456 (5th Cir. 1981)	9, 1

STATE CASES

Bogan v. State, 754 So.2d 1289, 1294 (Miss.Ct.App. 2000)	1, 3
Brown v. State, 995 So.2d 698	8
Bush v. State, 895 So.2d 836, 843 (Miss.2005)	9, 11
Cole v. State, 666 So.2d 767, 777 (Miss.1995)	7
Dycus v. State, 875 So.2d 140, 164 (Miss.2004)	10
Edwards v. State, 469 So.2d 68, 70 (Miss.1985)	10
Fuqua v. State, 938 So.2d 277, 281 (Miss. Ct. App. 2006)	9, 15
Gibby v. State, 744 So.2d 244, 245 (Miss.1999)	10
Gibson v. State, 731 So.2d 1087, 1098 (Miss.1998)	3, 15
Handley v. State, 574 So.2d 671, 683 (Miss.1990)	7
Harris v. State, 970 So.2d 151, 157 (Miss.2007)	2, 3, 15
Leatherwood v. State, 473 So.2d 964, 969 (Miss.1985)	7
Lester v. State, 692 So.2d 755, 772 (Miss.1997)	1, 3
Lewis v. State, 897 So.2d 994, 996 (Miss. Ct. App.2004)	8, 14
Madere v. State, 794 So.2d 200, 212 (Miss. 2001)	8, 14
Mangum v. State, 762 So.2d 337, 342 (Miss.2000)	11
McQuarter v. State, 574 So.2d 685, 687 (Miss.1990)	7
Mitchell v. State, 915 So.2d 1 (Miss.Ct.App. 2005)	2, 14
Moss v. State, 977 So.2d 1201, 1215 (Miss.Ct.App.2007)	11
Nicholson on Behalf of Gollott v. State, 672 So.2d 744, 751 (Miss.1996)	7
Oates v. State, 421 So.2d 1025, 1030 (Miss.1982)	1, 3
Perkins v. State, 863 So.2d 47 (Miss.2003)	1, 3
Steen v. State, 873 So.2d 155, 161 (Miss. Ct. App.2004)	8, 14
Wilcher v. State, 863 So.2d 776, 825 (Miss.2003)	6
Williams v. State, 445 So.2d 798, 804 (Miss.1984)	8, 14

STATE STATUTES

Mississippi Code Annotated Section 41-29-147 (Rev.2005)	8
Mississippi Code Annotated Section 99-19-81	8
Mississippi Code Annotated Section 99-19-83	1, 3, 4, 6, 7

STATEMENT OF THE ISSUES

- I. The habitual portion of the indictment correctly sets out the convictions and proof of said convictions was offered at trial.
- II. Grim received constitutionally effective assistance at trial and cannot meet the two prong test set out in Strickland.
- III. The evidence at trial was sufficient to support the conviction of Frederick Grim for sale of cocaine.
- IV. The jury's verdict was supported by the overwhelming weight of the evidence and the trial judge correctly denied Grim's Motion for JNOV or in the alternative for a New Trial.
- V. The indictment is constitutionally sound and the Grim was sufficiently notified of the charges against him to present a defense.
- VI. Grim's conviction is not reversible under the cumulative error doctrine.

SUMMARY OF THE ARGUMENT

On appeal, Grim argues that the indictment did not set out the crimes used to prosecute him as an habitual offender pursuant to Mississippi Code Annotated § 99-19-83 with the specificity required by Mississippi Rule of Circuit and County Practice 11.03. However, Grim did not object on this ground at trial. Mississippi appellate courts have long held that an objection must be made with specificity in order to preserve it for appeal. Oates v. State, 421 So.2d 1025, 1030 (Miss.1982). An appellate may not make an objection at trial and then argue new grounds for the objection on appeal. Lester v. State, 692 So.2d 755, 772 (Miss.1997). This proposition was not properly preserved at trial and is therefore procedurally barred. Perkins v. State, 863 So.2d 47 (Miss.2003) Further, a trial court will not be held in error on a matter that was never presented for its consideration. Bogan v. State, 754 So.2d 1289, 1294 (Miss.Ct.App. 2000). Even if this matter were not procedurally barred, it is still without merit. The habitual

portion of the indictment correctly sets out the convictions and proof of said convictions was offered at trial. All the convictions upon which Grim's habitual status is based are listed, along with the date of sentencing, and incorporated in the indictment. (C.P. 7-10)

Grim received constitutionally effective assistance at trial and cannot meet the two prong test set out in Strickland. Grim's defense counsel's failure to object to the indictment's recitation of both habitual statutes did not constitute ineffective assistance of counsel. Further, Grim has failed to demonstrate the likelihood of a different outcome had counsel performed in a different manner. As a result, his argument on this issue is without merit.

The evidence at trial was sufficient to support the conviction of Frederick Grim for sale of cocaine and the verdict was supported by the overwhelming weight of the evidence. Four law enforcement officers as well as the confidential informant testified as to the events of that day. They searched Reed and his vehicle immediately prior to and immediately after the sale. A videotape of the sale was made and showed the exchange between Reed and Grim.

Grim argues that the indictment was defective because he was charged under both of the habitual offender statutes. The record reflects that Grim failed to bring the matter to the attention of the trial judge. As a result of Grim's failure to raise an objection to the indictment at trial, this issue is procedurally barred. Mitchell v. State, 915 So.2d 1 (Miss.Ct.App. 2005).

Grim argues that the cumulative effect of the errors in his trial warrants reversal. Under the cumulative-error doctrine, "individual errors, which are not reversible in themselves, may combine with other errors to make up reversible error, where the cumulative effect of all errors deprives the defendant of a fundamentally fair trial." Harris v. State, 970 So.2d 151, 157 (Miss.2007) (quoting Ross v. State, 954 So.2d 968, 1018 (Miss.2007)). However, where there is

no reversible error in any part, there can be no reversible error to the whole that warrants reversal. *Id.* (citing Gibson v. State, 731 So.2d 1087, 1098 (Miss.1998)).

ARGUMENT

I. The habitual portion of the indictment correctly sets out the convictions and sufficient proof of said convictions was offered at trial.

On appeal, Grim argues that the indictment did not set out the crimes used to prosecute him as an habitual offender pursuant to Mississippi Code Annotated § 99-19-83 with the specificity required by Mississippi Rule of Circuit and County Practice 11.03. However, Grim did not object on this ground at trial. Mississippi appellate courts have long held that an objection must be made with specificity in order to preserve it for appeal. Oates v. State, 421 So.2d 1025, 1030 (Miss.1982). An appellate may not make an objection at trial and then argue new grounds for the objection on appeal. Lester v. State, 692 So.2d 755, 772 (Miss.1997). This proposition was not properly preserved at trial and is therefore procedurally barred. Perkins v. State, 863 So.2d 47 (Miss.2003) Further, a trial court will not be held in error on a matter that was never presented for its consideration. Bogan v. State, 754 So.2d 1289, 1294 (Miss.Ct.App.2000).

Further, without conceding the procedural bar, the State asserts that the substance of this assignment of error is without merit. The indictment includes an attachment which sets out each of the five convictions which were used to charge Grim as an habitual offender. For each of the four convictions, the date of conviction is set out in the attachment, which is made a part of the indictment. (C.P. 8-10)

The convictions enumerated in the indictment as the basis for indictment pursuant to

Mississippi Code Annotated § 99-19-83 are as follows:

- 1) Conviction for Possession of Cocaine entered March 27, 1997 in the Circuit Court of Tunica County with a sentence of 3 years;
- 2) Conviction for Aggravated Assault entered March 6, 1998 in the Circuit Court of Tunica County with a sentence of 7 years;
- 3) Conviction for Possession of a Firearm by a Felon entered March 6, 1998 in the Circuit Court of Tunica County with a sentence of 7 years;
- 4) Conviction for Grand Larceny entered October 5, 2005 in the Circuit Court of Desoto County with a sentence of 2 years; and,
- 5) Conviction for Possession of Cocaine entered March 27, 1997 in the Circuit Court of Tunica County with a sentence of 3 years.

Certified records from the Mississippi Department of Corrections, entered into evidence as State's Exhibits 5 and 6 show the following:

The Tunica County Grand Jury's Indictment of Grimm for Aggravated Assault and Possession of a Firearm by a Felon contained in the State's Exhibit 6, further establishes the date of Grimm's prior conviction for Possession of a Controlled Substance as March 27, 1997.

The Sentencing Judgments and the Notice of Criminal Disposition in Cause Number 3449 in the Tunica County Circuit Court clearly establishes the date of sentencing for Grimm's convictions for Aggravated Assault and Possession of a Firearm by a Convicted Felon. Grimm received a sentence of 2 years for each conviction, with the two sentences to run concurrently, and with the sentences to run consecutively with any sentence previously imposed. Grimm was further sentenced to 5 years of post-release supervision upon release from the terms of

incarceration.

The Order of Revocation of Probation in Cause Number 3253 in the Tunica County Circuit Court states that “Frederick Grimm . . . was on the 27th day of March, 1997, convicted of the offense of Possession of Controlled Substance.” The Order of Revocation further references the Judgment of the Court dated March 27, 1997. The date of Grimm’s conviction for the offense of Possession of a Cocaine was clearly stated in the indictment and in the State’s Exhibits as March 27, 1997.

Gloria Gibbs, the Records Supervisor for the Mississippi Department of Corrections testified that Grimm had been convicted of four felonies in the State of Mississippi. (Tr. 195) She testified that the first offense was possession of a controlled substance and that Grimm was sentenced to one year in the custody of the Mississippi Department of Corrections. (Tr. 195) Grimm served his sentence starting July 13, 1997 through July 13, 1998. (Tr. 195, 200) She testified that on March 6, 1998, Grimm was sentenced for aggravated assault and possession of a firearm by a convicted felon. Further, Ms. Gibbs testified that Grimm was sentence to two years for each of those convictions, with the two sentences to run concurrently. (Tr. 196) Ms. Gibbs testified that Grimm served the time for possession of a controlled substance, he then served one year and 13 days for the charge of aggravated assault and one year and 13 days for the charge of possession of a firearm by a convicted felon, concurrently. (Tr. 197) Grimm was released on November 3, 1999. (Tr. 203)

The date of sentencing is sufficient to satisfy the requirement of Rule 11.3 of the Uniform Rules of Circuit and County Court Practice, since a judgment is not final in a criminal conviction until the date of sentencing, which is, in effect, the date of final judgment, and the date from

which an appeal can be properly taken. This Court stated that a conviction was not a final judgement until the defendant is properly sentenced. Lang v. State, 238 Miss. at 680, 119 So.2d 608.

The evidence at trial clearly established that Grim was convicted of three different felonies, possession of cocaine, aggravated assault, and possession of a firearm by a convicted felon. The record further shows that Grim served at least one year for each of these crimes. State's Exhibits 5 and 6, along with the testimony of Gloria Gibbs, establish the dates of the convictions and the length of the sentences. The pages of the indictment listing the convictions supporting the conviction pursuant to Mississippi Code Annotated § 99-19-83 set out the dates of the convictions pursuant Uniform Circuit and County Court Practice Rule 11.03 and said convictions are consistent with those offered in the proof at sentencing. Further, since aggravated assault is a violent crime, Grim was properly sentenced pursuant to Mississippi Code Annotated § 99-19-83 (1972, as amended) which provides for a sentence of life imprisonment for persons who have two previous felony convictions for which their served separate terms of one year or more and at least one of which is a violent crime.

II. Grim received constitutionally effective assistance at trial and cannot meet the two prong test set out in *Strickland*.

Grim asserts that he received ineffective assistance of counsel at trial. It is unusual for Mississippi appellate courts to consider a claim of ineffective assistance of counsel when the claim is made on direct appeal, due to the limitations of the trial court record in the review of the claim, there is usually insufficient evidence within the record to evaluate the claim. Wilcher v. State, 863 So.2d 776, 825 (Miss.2003) (internal citations and quotations omitted). A review of

the record reveals that Grim has failed to establish both elements of the *Strickland* test. Even if trial counsel's performance could be considered deficient in failing to do those things alleged by Grim, he has yet to prove the requisite showing of prejudice to support an ineffective assistance of counsel claim. The law is clear that “[a]ssertions of error without prejudice do not trigger reversal.” *Nicholson on Behalf of Gollott v. State*, 672 So.2d 744, 751 (Miss.1996) (citing *Hatcher v. Fleeman*, 617 So.2d 634, 639 (Miss.1993)).

Mississippi “recognizes a strong but rebuttable presumption that counsel's conduct falls within a broad range of reasonable professional assistance.” *McQuarter v. State*, 574 So.2d 685, 687 (Miss.1990) (citing *Gilliard v. State*, 462 So.2d 710, 714 (Miss.1985)). To overcome this presumption, the defendant “must show that there is a ‘reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.’ ” *Handley v. State*, 574 So.2d 671, 683 (Miss.1990) (quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052). In addition to the presumption that counsel's conduct is reasonably professional, there is a presumption that counsel's decisions are strategic in nature. *Leatherwood v. State*, 473 So.2d 964, 969 (Miss.1985) (citing *Murray v. Maggio*, 736 F.2d 279, 282 (5th Cir.1984)). In sum, “counsel's choice of whether or not to file certain motions, call witnesses, ask certain questions, or make certain objections falls within the ambit of trial strategy.” *Cole v. State*, 666 So.2d 767, 777 (Miss.1995) (citing *Murray*, 736 F.2d at 279).

Grim argues that his trial counsel should have objected to the sentencing portion of the trial, since the trial judge pronounced the sentence of life in prison pursuant to Mississippi Code Annotated § 99-19-83 (1972, as amended). Mississippi trial judges have for many years been accustomed to conducting non-jury sentencing hearings under Mississippi Code Annotated

Sections 99-19-81 and 99-19-83 (Rev.2007) (habitual-offender statutes), and Mississippi Code Annotated Section 41-29-147 (Rev.2005) (second and subsequent drug-offender statute), and the majority correctly notes that prior convictions are excepted from *Apprendi* insofar as requiring jury determination of fact issues for enhancement of punishment. *Brown v. State*, 995 So.2d 698 (Miss. 2008).

Grim asserts that his counsel should have objected where the indictment did not set out the dates of sentencing. However, the indictment clearly has, attached and incorporated therein, two pages which detail Grim's prior felony convictions, including the date of final conviction, the sentence. (C.P. 9, 10)

The issue of whether an indictment is so flawed as to warrant reversal is a question of law and allows this Court a broad standard of review. *Steen v. State*, 873 So.2d 155, 161 (Miss. Ct. App.2004). The primary purpose of an indictment is to notify a defendant of the charges against him so as to allow him to prepare an adequate defense. See *Lewis v. State*, 897 So.2d 994, 996 (Miss. Ct. App.2004). All that is required is that the indictment provide "a concise and clear statement of the elements of the crimes charged." *Williams v. State*, 445 So.2d 798, 804 (Miss.1984). The question is not whether the indictment could have been framed in a more satisfactory manner, but whether "the language used in the indictment is sufficiently specific to give notice of the act made unlawful, and exclusive enough to prevent its application to other acts." *Madere v. State*, 794 So.2d 200, 212 (Miss. 2001). The indictment's recitation of both the habitual statutes along with the listing of Grim's prior convictions, in detail, was sufficient to give notice of the unlawful acts to allow him to present a defense. This language is also exclusive enough to prevent the Appellant from believing he was charged for a different act.

"The validity of an indictment is governed by practical, not technical considerations." United States v. Varkonyi, 645 F.2d 453, 456 (5th Cir. 1981). Thus, the standard is met.

Moreover, as recently noted by the Court of Appeals, "[t]he ultimate test, when considering the validity of an indictment on appeal, is whether the [Appellant] was prejudiced in the preparation of his defense." Lyles v. State, 12 So.3d 532, 539 (Miss. Ct. App. 2009) (quoting Fuqua v. State, 938 So.2d 277, 281 (Miss. Ct. App. 2006)) (emphasis added). The Appellant did not assert and the record did not illustrate in any way that he was prejudiced in preparation of his defense. As such, it is clear that the indictment is sufficient. The defense counsel's failure to object to the indictment's recitation of both habitual statutes did not constitute ineffective assistance of counsel. Further, Grim has failed to demonstrate the likelihood of a different outcome had counsel performed in a different manner. As a result, his argument on this issue is without merit.

III. The evidence at trial was sufficient to support the conviction of Frederick Grim for sale of cocaine.

The standard of review for challenging the legal sufficiency of evidence in a criminal trial is well settled. In Bush v. State, 895 So.2d 836, 843 (Miss.2005), the Mississippi Supreme Court stated:

[I]n 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 [the] 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 [jurors] 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 fair-minded [jurors] 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).

There is sufficient evidence to sustain Grim's conviction for sale of cocaine. Officers Hawkins testified that he and other officers searched Grim's person and vehicle before the buy occurred. (Tr. 60) He also testified that they were able to listen to the conversation between Reed, the confidential informant, and Grim. They observed Reed arrive at Grim's residence and saw Grim approach Reed's vehicle. Reed and Grim went inside the house. The officers were able to hear Reed say “Fred” a couple of times. They were also able to hear over the transmitter Reed say the would “double up” which referred to receiving more product that could be broken down and sold. (Tr. 63) The officers saw Reed leaving the residence and called him. During that phone call he told the officers he was leaving Grim's house and he agreed to meet them at a post-buy location. (Tr. 65) They followed Reed to the post-buy location. Reed recounted the events of the transaction and gave the drugs to Officer Hawkins. (Tr. 65) Hawkins testified that he secured the crack cocaine. He also secured the video. (Tr. 65) Reed was searched again after the buy and no controlled substances were found. The officers took Reed's statement, viewed

the videotape and then released him. (Tr. 66) The drugs were confirmed by the crime lab to be crack cocaine.

It is within the province of the jury to accept parts of the testimony of any witness, and the jury may give consideration to all inferences flowing from the testimony.” Mangum v. State, 762 So.2d 337, 342 (Miss.2000) (citing Grooms v. State, 357 So.2d 292 (Miss.1978)). The jurors heard from both sides of this case and returned a guilty verdict based on the testimonies they accepted as true. After viewing the evidence in the light most favorable to the prosecution, we find that a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Accordingly, this issue is without merit.

IV. The jury’s verdict was supported by the overwhelming weight of the evidence and the trial judge correctly denied Grim’s Motion for JNOV or in the alternative for a New Trial.

“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 836, 844 (Miss.2005). “The jury sits as the fact-finder and determines the credibility of the witnesses and gives value to the weight of the evidence against the accused.” Moss v. State, 977 So.2d 1201, 1215 (Miss.Ct.App.2007).

The overwhelming weight of the evidence clearly supports the conviction. Officer Hawkins testified that he and other officers searched Grim's person and vehicle before the buy occurred. (Tr. 60) He also testified that they were able to listen to the conversation between Reed, the confidential informant, and Grim. They observed Reed arrive at Grim’s residence and

saw Grim approach Reed's vehicle. Reed and Grim went inside the house. The officers were able to hear Reed say "Fred" a couple of times. They were also able to hear over the transmitter Reed say the would "double up" which referred to receiving more product that could be broken down and sold. (Tr. 63) The officers saw Reed leaving the residence and called him. During that phone call he told the officers he was leaving Grim's house and he agreed to meet them at a post-buy location. (Tr. 65) They followed Reed to the post-buy location. Reed recounted the events of the transaction and gave the drugs to Officer Hawkins. (Tr. 65) Hawkins testified that he secured the crack cocaine. He also secured the video. (Tr. 65) Reed was searched again after the buy and no controlled substances were found. The officers took Reed's statement, viewed the videotape and then released him. (Tr. 66) The drugs were confirmed by the crime lab to be crack cocaine.

Further, Reed testified that he was acting as a confidential informant in order to work off a charge of sale of marijuana. (Tr. 86) He testified that prior to making the buy, he and his vehicle were searched. He testified that he was given \$200.00 cash to make the buy. He drove to Fredrick Grim's house and Grim allowed him to come into the house to use the restroom. Grim sold him crack cocaine and gave him a plastic bag as well. (Tr. 91) Reed then went to the post buy site where he and his vehicle were again searched by the officers. Reed testified as to the events in the video that showed him receiving 20 rocks of crack cocaine from Frederick Grim. (Tr. 111) Reed testified that he put the rocks into the plastic bag. When he got into the car, he tied the bag with a string and then went to the post-buy location and gave the bag to Officer Hawkins. (Tr. 111)

Agent Terry Spillers testified that he is a Major with the Mississippi Bureau of Narcots

and that Luis Hawkins is one of the officers he supervises. He testified that he was working with Luis on February 15, 2007. He testified that he searched Reed's car for contraband at the pre-buy location. He did not find any contraband. He rode with Agent Hawkins, Investigator Milburn and Agent Chris Smith to the site of the buy. After Reed informed them the purchase was made, they met at the post-buy location. Spillers again searched Reed's vehicle to see if there were any controlled substances, weapons or money and did not find any. (Tr. 142)

Agent Christopher Smith testified that he works for the Tunica Police Department and was assisting Mississippi Bureau of Narcotics on the day of the buy. He testified that he searched Reed's person prior to departing the pre-buy meeting and did not find any contraband. (Tr. 145)

Investigator Cedrick Milburn testified that he is employed with the Tunica County Sheriff's Department and was on that day assisting the Mississippi Bureau of Narcotics. He participated in the surveillance and that he searched Reed after the transaction. (Tr. 149)

The testimony of all four of the officers as well as the confidential informant establishes that Grim sold Reed 20 rocks of cocaine for \$200.00. The evidence further included a video that showed the transaction. Testimony from a Mississippi Crime Lab employee established that the substance was crack cocaine. The verdict is clearly supported by the overwhelming weight of the evidence and the trial court correctly denied Grim's Motion for JNOV or in the alternative for a New Trial. This issue is without merit and the jury's verdict and the rulings of the trial court should be affirmed.

V. The indictment is constitutionally sound and the Grim was sufficiently notified of the charges against him to present a defense.

Grim argues that the indictment was defective because he was charged under both of the habitual offender statutes. The record reflects that Grim failed to bring the matter to the attention of the trial judge. As a result of Grim's failure to raise an objection to the indictment at trial, this issue is procedurally barred. Mitchell v. State, 915 So.2d 1 (Miss.Ct.App. 2005).

Should the court determine to address this issue on the merits despite the procedural bar, the state asserts that the indictment is sound. The issue of whether an indictment is so flawed as to warrant reversal is a question of law and allows this Court a broad standard of review. Steen v. State, 873 So.2d 155, 161 (Miss. Ct. App.2004). The primary purpose of an indictment is to notify a defendant of the charges against him so as to allow him to prepare an adequate defense. See Lewis v. State, 897 So.2d 994, 996 (Miss. Ct. App.2004). All that is required is that the indictment provide "a concise and clear statement of the elements of the crimes charged." Williams v. State, 445 So.2d 798, 804 (Miss.1984). The question is not whether the indictment could have been framed in a more satisfactory manner, but whether "the language used in the indictment is sufficiently specific to give notice of the act made unlawful, and exclusive enough to prevent its application to other acts." Madere v. State, 794 So.2d 200, 212 (Miss. 2001). The indictment's recitation of both the habitual statutes along with the listing of Grim's prior convictions, in detail, was sufficient to give notice of the unlawful acts to allow him to present a defense. This language is also exclusive enough to prevent the Appellant from believing he was charged for a different act. "The validity of an indictment is governed by practical, not technical considerations." United States v. Varkonyi, 645 F.2d 453, 456 (5th Cir. 1981). Thus, the standard is met.

Moreover, as recently noted by the Court of Appeals, "[t]he ultimate test, when

considering the validity of an indictment on appeal, is whether the [Appellant] was prejudiced in the preparation of his defense." *Lyles v. State*, 12 So.3d 532, 539 (Miss. Ct. App. 2009) (quoting *Fuqua v. State*, 938 So.2d 277, 281 (Miss. Ct. App. 2006)) (emphasis added). The Appellant did not assert and the record did not illustrate in any way that he was prejudiced in preparation of his defense. As such, it is clear that the indictment is sufficient. This issue is without merit and the conviction should be affirmed.

VI. Grim's conviction is not reversible under the cumulative error doctrine.

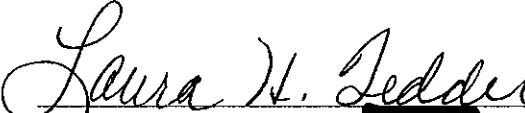

Grim argues that the cumulative effect of the errors in his trial warrants reversal. Under the cumulative-error doctrine, "individual errors, which are not reversible in themselves, may combine with other errors to make up reversible error, where the cumulative effect of all errors deprives the defendant of a fundamentally fair trial." *Harris v. State*, 970 So.2d 151, 157 (Miss.2007) (quoting *Ross v. State*, 954 So.2d 968, 1018 (Miss.2007)). However, where there is no reversible error in any part, there can be no reversible error to the whole that warrants reversal. *Id.* (citing *Gibson v. State*, 731 So.2d 1087, 1098 (Miss.1998)). This issue is without merit.

CONCLUSION

The assignments of error raised by the Appellant are without merit and the jury's verdict and the rulings of the trial court should be affirmed.

Respectfully submitted,

**JIM HOOD, ATTORNEY GENERAL
STATE OF MISSISSIPPI**

By: 
Laura H. Tedder, MSB # 
Special Assistant Attorney General

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

CERTIFICATE OF SERVICE

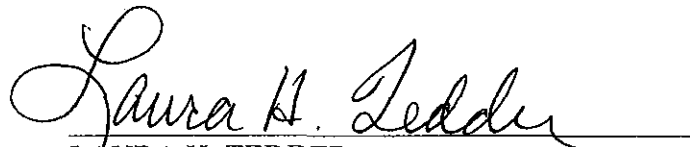
I, Laura H. Tedder, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Albert B. Smith, III
Circuit Court Judge
P. O. Drawer 478
Cleveland, MS 38732

Honorable Laurence Y. Mellen
District Attorney
P. O. Box 2514
Tunica, MS 38676

Frederick Denell Grim, #T1076
Mississippi State Penitentiary
Unit 29-J
Parchman, MS 38738

This the 9th day of November, 2009.



LAURA H. TEDDER
SPECIAL ASSISTANT ATTORNEY GENERAL

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