IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CLAYTON TRAMMELL — APPELLANT

VS. — NO. 2009-KP-0196-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF ISSUES

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STATEMENT OF FACTS

On April 24, 2007, twenty-seven-year-old Clayton Trammell enlisted two sixteen-year-old boys to help him rob the Pigley Wiggley in Vicksburg. T. 203, 225-226. Trammell had been "scoping Piggly Wiggly out" and knew that the store did not have security cameras. T. 225. To create a diversion, Trammell directed one of the juveniles, Arthur Andrews, to call 911 and report a shooting in another part of town. T. 237. Trammell and Andrews then entered the store and Trammell handed Piggly Wigly employee Angela Hamilton a note which read, "Put all the money in the bag now. I have a gun. I will use it. Don't make a sound." T. 174, 228. Hamilton complied. Although she never saw a gun, Hamilton testified that she believed Trammell had one due to the note and the fact that he kept his right hand inside his pocket. T. 174, 177.

Three days after the robbery, Hamilton identified Trammell in a photo lineup. T. 185. She also testified at trial that during the robbery she recognized Trammell as a regular from the store. T. 181. Trammell's accomplices also gave statements to police implicating Trammell in the armed robbery. T. 191, 203. Trammell was indicted for armed robbery and two counts of directing a child to commit a felony. C.P. 5. The trial court granted a motion for directed verdict on the two counts of directing a child to commit a felony. T. 244. Trammell was found guilty of armed robbery and sentenced to serve thirty years in the custody of the Mississippi Department of Corrections.

SUMMARY OF ARGUMENT

The trial court properly denied Trammell's motion to suppress the gun found in his house during the execution of a lawful search warrant. Although the gun was not specifically listed in the search warrant as an item to be seized, Officer Brown was lawfully in a position to view the gun and reasonably believed that its incriminating character was apparent. Officer Brown was acting on information that Trammell committed an armed robbery in which he threatened the victim that he

had a gun. As such, the gun was lawfully seized under the plain view doctrine.

The State proved each element of armed robbery beyond a reasonable doubt. The victim's testimony alone would have supported the jury's verdict. Her testimony was corroborated by the testimony of one of Trammell's accomplices in the armed robbery. Additionally, the State presented other evidence from which reasonable inferences may be drawn to establish Trammell's guilt. Also, the verdict is not against the weight of the evidence. To the contrary, the evidence presented overwhelmingly establishes Trammell's guilt.

Trammell claims that the trial court erred in refusing various jury instructions. None of the instructions in question embody Trammell's theory of the case. Further, the refused instructions were all properly denied as cumulative or without foundation in the evidence.

Trammell failed to pursue his motion for a psychiatric evaluation to a hearing or order. As such, the issue of his competency to stand trial is procedurally barred. Additionally, there is absolutely no indication in the record that Trammell was unable to assist in his defense.

The record is insufficient to determine Trammell's clam of ineffective assistance of counsel on direct appeal. The proper avenue for Trammell's claim is in a motion for post-conviction relief where Trammell will have the benefit of affidavits to support his claims.

Trammell is not entitled to relief based on cumulative error where he has failed to show even a single error was committed by the trial court.

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED TRAMMELL'S MOTION TO SUPPRESS.

After Trammell's accomplices gave statements implicating him in the armed robbery, a search warrant was issued for Trammell's home. T. 138. The search warrant listed the following

items to be seized: "money, checks, money order receipts, clothing worn during the robbery of the Piggly Wiggly Store to include gray hooded sweatshirt, dark denim pants, long sleeve black shirt." Exhibit 2. During a search of Trammell's home, Officer Billy Brown found and seized a gun hidden underneath clothes in a hall closet. T. 139. Defense counsel moved to suppress the gun. The trial court denied the motion, finding that the gun was admissible under the plain view doctrine. T. 157. Trammell argues on appeal that the gun should have been suppressed because it was not specifically listed in the search warrant and was not in plain view.

A trial court's denial of a motion to suppress will not be overturned where the trial court's findings are supported by substantial credible evidence. *Johnson v. State*, 999 So. 2d 360, 363 (¶ 13) (Miss. 2008). Under the plain view doctrine, a police officer may make a warrantless seizure when the officer is lawfully in a position to view an object, the object's incriminating character is immediately apparent, and the officer has a lawful right of access to the object. *Walker v. State*, 881 So.2d 820, 827 (¶16) (Miss. 2004). Our reviewing courts have applied the plain view doctrine in numerous cases in which policed seized evidence of a crime that was not specifically listed in the search warrant. In *Lockett v. State*, police seized credit cards hidden behind a wall plaque after finding the guns in Lockett's home, which were the only items listed in the search warrant. 517 So.2d 1317, 1325 (Miss. 1987). The *Lockett* court held that under the plain view doctrine, when an officer is executing a valid search warrant and comes across "other incriminating articles" not specified in the warrant, those items may be seized. *Id.*

In *Street v. State*, officers executed a search warrant, which listed only a 9 mm gun to be seized, on the defendant's home. 754 So.2d 497, 501 (¶13) (Miss. Ct. App. 1999). During the search, officers seized documentation related to Street's gang affiliation. *Id.* Street argued on appeal that because "unspecified material may only be seized if it (a) is, itself, contraband, or (b) readily

appears to constitute evidence of criminal activity," and because gang affiliation in and of itself is not illegal, nor did the documents have evidentiary value to the murder for which he was being investigated, the officers were not authorized to seize the documents under the plain view doctrine. *Id* at 501-502. This honorable Court found that because it was possible that the victim's murder may have been gang related, the officers could have reasonably believed that the seized documents did have some evidentiary value. *Id.* at 502 (¶14). Therefore, because the documents were found in plain view during the execution of search warrant and "could reasonably be construed as having some evidentiary value," they were properly seized under the plain view doctrine. *Id.* at (¶ 15).

In the present case, because Officer Brown was executing a valid search warrant in Trammell's home, the first and third requirements for the plain view exception, that the officer was in a lawful position to view the gun and the officer had a lawful right of access to the gun, were clearly met. Officer Brown knew that the perpetrator threatened the victim that he had a gun and would use it. Trammell's mother, who was present during the search, denied ownership of the gun. T. 151. Considering the totality of the circumstances, it was certainly reasonable for Officer Brown to believe that the gun had evidentiary value. Accordingly, the trial court's denial of Trammell's motion to suppress must be affirmed because it is supported by substantial credible evidence in the record.

Trammell also argues for the first time on appeal that the closet in which the gun was found was an area of the house outside his dominion and control. Because this argument was never presented to the trial court, Trammell is procedurally barred from raising such a claim for the first time on appeal. *Anderson v. State*, 904 So.2d 973, 977 (¶5) (Miss. 2004).

II. TRAMMELL IS NOT ENTITLED TO A NEW TRIAL, AS THE VERDICT IS NOT AGAINST THE WEIGHT OF THE EVIDENCE.

An appellant is entitled to a new trial on a weight of the evidence claim only when the verdict is so contrary to the weight of the evidence that allowing the verdict to stand would "sanction an unconscionable injustice." *Bush v. State*, 895 So.2d 836, 844 (¶18) (Miss. 2005). The power to resolve conflicts in the evidence and to assess witness credibility lies within the sole province of the jury. *Moore v. State*, 969 So.2d 153, 156 (¶11) (Miss. Ct. App. 2007).

Trammell claims that the verdict is against the weight of the evidence because the victim did not see Trammell brandish a gun during the armed robbery, did not testify that she was in fear for her life, and did not testify that the Trammell threatened her during the armed robbery.[1] As to Trammell's first contention, it is not necessary to display a deadly weapon in order to be convicted of armed robbery. The Mississippi Supreme Court has held, "[W]hen a defendant makes an overt act and a reasonable person would believe that a deadly weapon is present, there is no requirement that a victim must actually see the deadly weapon in order to convict pursuant to Miss. Code Ann. § 97-3-79." *Dambrell v. State*, 903 So. 2d 681, 683 (¶ 6) (Miss. 2005) (overruling *Gibby v. State*, 744 So.2d 244 (Miss. 1999)). Relying on *Dambrell*, this honorable Court has found that the exhibition of a note stating that the defendant has a gun is an overt act which would reasonably lead a victim to believe that a deadly weapon is present for purposes of our armed robbery statute. *Lyons v. State*, 942 So. 2d 247, 250-51 (¶¶ 13-16) (Miss. Ct. App. 2006).

Trammell's claim that the victim never testified she was placed in fear of immediate injury during the robbery is contrary to the record. The victim specifically testified that during the robbery, "I was scared for my life." T. 177. Regarding Trammell's claim that he never threatened her during

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[1]Most of the claims Trammell raises under his weight of the evidence claim actually challenge the sufficiency rather than the weight of the evidence. However, the Appellee will address the issues in the order raised by the Appellant for the reader's convenience.

the robbery, he presented the victim with a note which stated, "Put all the money in the bag now. I have a gun. I will use it. Don't make a sound." Again, in accordance with *Dambrell* and *Lyons*, Trammell's presentation of a note in which he threatened the victim that he had a gun and would use it if she did not comply with his demands was a sufficient overt act which reasonably placed the victim in fear that Trammell in fact possessed a gun.

Trammell also questions the victim's identification of Trammell as the person who committed the armed robbery. He argues that the victim testified that she recognized Trammell as a regular customer, but that the police learned his identity from Andrews. This is merely a jury argument. The State is required to proved the identity of the defendant as the person who committed the crime charged in every case. *Evans v. State*, 382 So.2d 1084, 1085 (Miss. 1980). Hamilton positively identified Trammell at trial as the perpetrator. T. 175. Additionally, the State proved that she did in fact make a positive pre-trial identification of Trammell by picking him out of a photo line-up three days after the armed robbery. T. 185. Additionally, one of Trammell's accomplices in the armed robbery positively identified Trammell at trial. T. 226.

Trammell has failed to show that the verdict is against the weight of the evidence. Accordingly, Trammell's contentions are without merit.

III. THE STATE PROVED ALL OF THE ELEMENTS OF ARMED ROBBERY BEYOND A REASONABLE DOUBT.

In determining whether the State presented legally sufficient evidence to support the jury's verdict, the reviewing court must determine whether, when viewing the evidence in the light most favorable to the State, any rational juror could have found that the State proved each element of the crime charged beyond a reasonable doubt. *Bush v. State*, 895 So.2d 836, 843 (¶16) (Miss. 2005). Additionally, under this inquiry, "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." *Wash v. State*, 931 So.2d 672, 673 (¶5) (Miss. Ct. App. 2006).

As previously established, the victim's testimony alone established all of the elements or armed robbery. The State was required to prove and did prove that (1) Trammell took or attempted to take (2) from the person or from their presence the personal property of another (3) against the victim's will (4) by violence or by putting the victim in fear of immediate injury to her person by the exhibition of a deadly weapon. Miss. Code Ann. § 97-3-79. Hamilton testified that when Trammell presented her with the demand note, she complied by giving him "the whole bag of money" belonging to the Piggly Wiggly store, and that she was in fear of her life during the armed robbery. T. 173, 177. This testimony established all of the necessary elements. However, the State presented further proof of the armed robbery.

Both of Trammell's accomplices gave statements to police implicating Trammell in the armed robbery. T. 191, 203. Andrews testified in detail regarding his participation in the robbery which Trammell planned and lead. Additionally, although the State is not required to present a motive, such evidence was presented in the present case. Robert Stauts, owner of S&S Automotive and Transmission, testified that Trammell brought his vehicle in for repair on February 15, 2007. T. 207. After the repair was completed, Trammell made no payment nor did he contact the shop. As a result, Stauts began charging storage fees for the abandoned vehicle and sent Trammell a letter indicating such. T. 208. Trammell then made one $300 payment on the balance on April 8, 2007. T. 208. Andrews testified that when Trammell recruited him for the armed robbery, Trammell indicated that he needed money to get his car out of the shop. T. 225-226. The day after the robbery, Trammell paid Stauts $1676.96 in cash to get his car out of the shop. T. 210.

Even the uncorroborated testimony of a single witness is sufficient to support a jury's verdict.

Collins v. State, 817 So.2d 644, 658 (¶46) (Miss. Ct. App. 2002) (citing *Sturdivant v. State*, 745 So.2d 240, 248 (Miss. 1999)). In the present case, the victim's testimony alone would have been legally sufficient to support the jury's verdict. The victim's testimony was corroborated by Trammell's accomplice. The eyewitness testimony along with other inferences drawn from the evidence shows that the State proved all of the elements of the crime charged beyond a reasonable doubt.

IV. NO ERROR WAS COMMITTED IN THE DENIAL OF VARIOUS JURY INSTRUCTIONS.

Trammell claims that he was denied the right to present his theory of the case by the trial court's denial of instructions D-1, D-4, D-6, and D-8. Trammell fails to cite even a single case which shows that the instructions were denied in error. The failure to cite authority to support an assignment of error is a procedural bar on appeal. *Young v. State*, 919 So.2d 1047, 1049 (¶ 5) (Miss. Ct. App. 2005). However, recognizing that Trammell has chosen to proceed in this appeal *pro se*, the State would also show that his claims regarding the denial of these instructions are without merit.

Jury instructions are to be read as a whole. *McKlemurry v. State*, 947 So.2d 987, 990 (¶3) (Miss. Ct. App. 2006). "No reversible error will be found to exist if, when read together, the instructions correctly state the law and effectuate no injustice." *Id.* Although a criminal defendant is entitled to present jury instructions which support his theory of the case, that entitlement is limited in that the trial court may properly refuse instructions which are cumulative, incorrectly state the law, or are fairly covered by other instructions. *Livingston v. State*, 943 So.2d 66, 71 (¶14) (Miss. Ct. App. 2006).

Instruction D-1, an elements instruction, was denied as cumulative. T. 252. The trial court had already granted instruction S-1A, an elements instruction which properly stated the law. T. 250,

C.P. 51. Defense counsel's objection to the granting of S-1A was that it stated as an element, "by the exhibition of a deadly weapon through the use of a written note stating that Clayton Trammell was armed with a gun," whereas the statute references only the display of a deadly weapon. T. 250, 252. However, as discussed under issue 2, under the authority of *Dambrell* and *Lyons*, the perpetrator need not show the deadly weapon to the victim, and the use of a note indicating that the defendant has a weapon suffices. Accordingly, instruction S-1A properly stated the law, and instruction D-1 was properly denied as cumulative.

Instruction D-4 was denied as cumulative. T. 252-253. Instruction C-1 had already been granted, and instruction D-4 mirrors C-1 nearly verbatim. C.P. 27-29, 45-47 Accordingly, it was properly denied.

Instruction D-6 was a circumstantial evidence instruction which was denied due to the fact that the State presented eyewitness testimony. T. 253. Clearly, a circumstantial evidence instruction is not warranted where the State presents direct evidence. *Ross v. State*, 954 So.2d 968, 1009 (¶100) (Miss. 2007). Eyewitness testimony is direct evidence. *Jones v. State*, 920 So.2d 465, 477-78 (¶38) (Miss. 2006). The State presented two eyewitness to the armed robbery, Hamilton and Andrews. Accordingly, a circumstantial evidence instruction was inappropriate in this case.

Finally, instruction D-8 was a form of the verdict instruction. C.P. 33. The instruction included directions for the form of the verdict on the two counts for which the trial court had already granted directed verdicts. Additionally, a proper form of the verdict instruction had already been accepted. C.P. 52.

None of the denied instructions upon which Trammell assigns error encompassed his theory of the case. Additionally, the instructions were all properly denied as either cumulative or without foundation in the evidence. Trammell's fourth assignment of error necessarily fails.

V. TRAMMEL WAS NOT ENTITLED TO A COMPETENCY HEARING.

Trammell claims that the trial court committed reversible error in failing to conduct a hearing to determine whether he was competent to stand trial. The record shows that defense counsel filed a motion for appointment of a psychiatrist to conduct a psychiatric evaluation. C.P. 8. However, the motion was not pursued to a decision. A movant is charged with the duty of pursuing his motion through to hearing and decision. *Roy v. State*, 878 So. 2d 84, 89 (¶23) (Miss. Ct. App. 2003) (citing URCCCP 2.04). "Pre-trial motions not ruled upon by the time of trial are deemed abandoned." *Id.* Because Trammell failed to pursue the motion in question, it was abandoned.

Further, a psychiatric evaluation is required only if the trial court has reasonable ground to believe that the defendant is incompetent to stand trial. URCCCP 9.06. There is simply no evidence in the record which shows that the trial court had reasonable ground to believe that Trammell was not competent to stand trial. "The defendant bears the burden of 'persuad[ing] the trial judge that there is sufficient evidence to warrant a mental examination.'" *Epps v. State*, 984 So.2d 1042, 1045 (¶9) (Miss. Ct. App. 2008) (quoting *Wilson v. State*, 755 So.2d 2, 4(¶7) (Miss. Ct. App.1999)). Further it should be noted that nowhere in the appellant's brief does Trammell allege that he was not competent to stand trial. Instead, he claims only that the trial court erred in failing to conduct a hearing on the matter. A competency hearing is not required unless the trial court has already ordered a psychiatric evaluation under URCCCP 9.06. *Sanders v. State*, 9 So.3d 1132, 1136 (¶16) (Miss. 2009). It seems evident from the fact that Trammell has undertaken sole responsibility for his appeal and written a fairly comprehensible appellate brief that it is doubtful that there is any evidence which could have been presented to show that Trammell was unable to assist in his defense. In any event, there is simply nothing in the record to establish that the trial court had reasonable grounds to question Trammell's competence to stand trial.

Trammell's fifth assignment of error is barred for failure to pursue the motion to a ruling. Additionally, the record does not support Trammell's claim that he was incompetent to assist in his defense.

VI. THE TRIAL COURT PROPERLY DENIED TRAMMELL'S MOTION TO SUPPRESS.

Trammell argues under this assignment of error that his motion to suppress should have been granted because the search warrant affidavit did not list a gun to be seized. The State has already shown under the appellant's first assignment of error that the motion to suppress was properly denied under the plain view doctrine.

VII. THE RECORD ON APPEAL IS NOT SUFFICIENT TO DETERMINE TRAMMELL'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

Ineffective assistance of counsel claims can only be decided on direct appeal if "the record affirmatively shows ineffectiveness of constitutional dimensions, or ... 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." *Ramsey v. State*, 959 So.2d 15, 25 (¶30) (Miss. Ct. App. 2006). None of these requirements are met in the instant case. Because the bulk of Trammell's allegations of ineffective assistance involve alleged inaction by defense counsel, Trammell's claim should be presented in a motion for post-conviction relief where he will have the benefit of affidavits to attempt to support his claim. *Robinson v. State*, 25 So.3d 1084, 1086 (¶12) (Miss. Ct. App. 2010).

VIII. TRAMMELL'S SENTENCE IS REASONABLY LESS THAN A LIFE SENTENCE.

Trammell claims that his thirty year sentence is effectively a life sentence which requires reversal because the jury did not recommend a life sentence. Because Trammell failed to object at the sentencing hearing, he is procedurally barred from arguing for the first time on appeal that he

received an excessive sentence. *Cox v. State*, 793 So. 2d 591, 599 (¶33) (Miss. 2001). Additionally, Trammell's claim is without merit. After a conviction for armed robbery in which the jury does not recommend a life sentence, the trial court's imposition of a sentence is proper where the trial court takes into consideration the defendant's life expectancy and "all relevant facts necessary to fix a sentence for a definite term of years reasonably expected to be less than life." *Lindsay v. State*, 720 So.2d 182, 185 (Miss. 1998) (quoting *Stewart v. State*, 372 So.2d 257, 259 (Miss. 1979)). The trial court consulted two different actuarial tables of life expectancy before imposing Trammell's thirty year sentence. T. 287. Both tables showed the life expectancy for a twenty-nine-year-old black male to be thirty-nine years. T. 287. Additionally, the trial court made a record of other relevant factors considered in imposing Trammell's sentence. T. 284-287. Accordingly, Trammell's thirty year sentence is reasonably less than a life sentence and must be upheld.

IX. RELIEF BASED ON CUMULATIVE ERROR IS NOT WARRANTED, AS NO INDIVIDUAL ERROR HAS BEEN PROVEN BY THE APPELLANT.

"Where there is no error in any one of the alleged assignment of errors, there can be no error cumulatively." *Hughes v. State*, 892 So.2d 203, 213 (¶29) (Miss. 2004). Because Trammell failed to show error in any of his individual assignments of error, his final claim necessarily fails.

CONCLUSION

For the foregoing reasons, the State asks this honorable Court to affirm Trammell's conviction and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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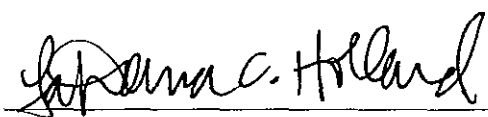
This the 5th day of May, 2010.



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