IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JAMES VARDAMAN — APPELLANT

VS. — NO. 2006-KA-0734-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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PROCEDURAL HISTORY:

On November 1 and 2, 2005, James Vardaman, "Vardaman" was tried for possession of pseudoephedrine, a precursor chemical for manufacture of methamphetamine, more than 250 dosage units, and conspiracy to manufacture methamphetamine before a Rankin County Circuit Court jury, the Honorable Samac S. Richardson presiding. R. 1. Vardaman was found guilty of both counts as an habitual offender and given life sentences in the custody of the MDOC. C.P. 119-120. From these convictions and sentences he appealed to this Court. C.P. 131.

ISSUES ON APPEAL

I.

WAS THERE CREDIBLE, SUBSTANTIAL EVIDENCE IN SUPPORT OF THE CONVICTIONS?

II.

WAS THE JURY PROPERLY INSTRUCTED?

III.

WAS VARDAMAN CORRECTLY SENTENCED?

IV.

WAS VARDAMAN EFFECTIVELY REPRESENTED?

STATEMENT OF THE FACTS

On September 22, 2004, Vardaman, Jerry Mullins and Julie Mason were indicted by a Rankin County Grand jury for possession of more than 250 units of pseudoephedrine, a precursor chemical for manufacture of methamphetamine, and conspiracy to manufacture methamphetamine on or about July 6, 2004. C.P. 7-8. Mr. Mullins and Ms. Mason pled guilty prior to trial and were serving their sentences. R. 163; 193

On November 1 and 2 , 2005, Vardaman, was tried for possession of more than 250 dosage units of pseudoephedrine, a precursor chemical for manufacture of methamphetamine and conspiracy to manufacture methamphetamine before a Rankin County Circuit Court jury, the Honorable Samac S. Richardson presiding. R. 1. Vardaman was represented by Mr. J. Patrick Frascogna. R. 1.

Ms. Kathy Davis, manager of General Dollar store in Brandon, Mississippi, testified that Vardaman came into her store. She identified him in the court room. R. 141. This was on July 6, 2004. R. 141. He tried to buy more than two packs of cold tablets containing pseudoephedrine. Davis called 911 to report the infraction. Since she was suspicious of his intentions, she also watched when he went across the street to the Family Dollar Store. R. 144.

Sergeant Martin Mann with the Brandon Police Department testified to pursuing a gold Nissan. This was after a 911 call about excessive purchases of pseudoephedrine. Mann observed Vardaman exit the car at a BP station at Cross Gates Boulevard on highway 80. . R. 60. Mann identified Vardaman in the court room .R. 61-62. Mann observed Vardaman hastily throw something in the trash can. After the car was stopped, the trash can was searched. Empty boxes and emptied blister packs of cold pills were found. They were on top of the other contents of the trash can.

Inside the car, near Vardaman was a yellow Dollar General plastic bag. It was found "tucked under the dash" containing numerous pseudoephedrine pills. R. 60;62. This was where Vardaman was seen leaning over doing something inside the car. Ms. Julie Mason the driver of the car initially denied knowing anything about the cold pill purchases. R. 61. Man identified exhibit S-A as being the yellow plastic bag containing the pills. R. 63. The cold pills had been "popped out" of the blister pack in which they were packaged for retail sale.

Mann testified that when the pills inside the bag were counted there were 288 pills. R. 67. He had "no doubt" that there were 288 pills in the bag. R. 104. Mann believed from examining them that they were all "pseudoephedrine pills." R. 68. Mann testified that the empty boxes found where Vardaman left them listed the active ingredient as "pseudoephedrine," a precursor chemical. R. 68. Exhibit S-B was a box of 24 cold medicine tablets from Family Dollar store found with the other evidence in the trash can. The ingredient label indicated "pseudoephedrine 60 milligrams." R. 68. Exhibit 4 shows another box from Dollar General showing "pseudoephedrine" as the active ingredient in the cold tablets. Exhibit 11 was the "blister packs" of cold pills, listing the active ingredient as "pseudoephedrine." R. 76. Exhibit S-2 was the last remaining pseudoephedrine pill found on the floor when officers subdued Vardaman. Officer Thornton corroborated Mann as to the quantity of pills being over 250 dosage units. R. 135.

Officer Mann testified that Vardaman managed to smuggle the yellow bag with pills into the bathroom. He did this while officers were distracted dealing with two co-defendants and a baby. Vardaman was observed throwing the pills into the toilet. Officer prevented him from flushing the commode. However, once the pills were in the water they dissolved into "a massive powder."R. 79. Only one cold pill could be located on the floor. R. 79; and see S-2, the pseudoephedrine pill found with Vardaman in the bathroom.

Mann testified that Vardaman wrote out a statement in which he admitted that he, Mullins and Mason left Crystal Springs to buy Sudafed. They purchased some pseudoephedrine in Terry, and four boxes were purchased at Dollar General, and four more boxes at the Family Dollar store. They "busted the pills out of the packs" while driving on highway 80. R. 82, 106. At he BP station on highway 80 Vardaman threw empty boxes and packs into the garbage. R. 82. They were stopped there by police. In addition to the written statement, Mann testified that Vardaman told him the purpose of the pill purchases was "to make a cook either that night or the next day." R. 83.

Mann explained the pseudoephedrine pills were needed since they contained a key ingredient needed for manufacture, which was ephedrine. R. 83. "The Cook" was slang for manufacture of methamphetamine by various techniques, including heating under one method. This enabled the ephedrine to be extracted from the pseudoephedrine after cooking and filtration. The residue left after the processing was crystal methamphetamine, a powerful stimulant also called crystal meth. R. 83.

On cross examination, Mann testified that Vardaman's **Miranda** rights were read to him prior to his statement. Vardaman indicated that he understood his rights, and spoke to Mann. R. 100.

Officer Thornton testified that he observed Vardaman struggling with an officer. This was while he was in the bathroom. Thornton saw a large amount of cold pills dissolving in the commode at that time. R. 116. Thornton testified that Vardaman admitted to him that he was involved with Mullins and Mason in procuring pseudoephedrine cold pills in order to cook or manufacture crystal methamphetamine. R. 117. Officer Thornton's police report also stated that Vardaman admitted that they came to Brandon to purchase pseudoephedrine with intent to manufacture. See State's Exhibit 2. in manila envelop marked Exhibits.

Officer Mark Miller testified that he allowed Vardaman to go the bath room. R. 153. He had

aggressively tried to be taken there several times. However, when Vardaman went into the bathroom, Miller saw a yellow bag come out from his crotch area, and pills inside being poured into the toilet. Miller grabbed Vardaman and took him down to the ground. R. 153. Vardaman kept trying to flush the toilet. He was prevented from doing so only by the application of force by officers nearby. R. 154.

Officer Carter testified to helping subdue Vardaman. Vardaman kept trying to flush the commode. He was prevented from doing so only by application of force to his arms and person. Carter saw white pills going from Vardaman's crotch area into the toilet. He also saw the bottom of the toilet filled with the dissolving pills. R. 161.

Co-defendant Jerry Mullins testified that he taught Vardaman how to manufacture methamphetamine. R.165-166. On July 6, 2004, Vardaman came to his house and wanted to go to Brandon. He wanted to get an automobile license but also wanted pills for manufacture. Mullins testified that he knew "before" getting out of the car in Brandon "what" he was going to obtain and "why" he was doing it. R. 172. When Vardaman told him he saw some Police Officers in Brandon, Mullins told the driver, Julie, to pull over so they could "get rid of the pills." R. 173.

At the conclusion of the state's case, the trial court overruled a motion for a directed verdict. R. 130; 206-207.

Vardaman chose not to testify in his own behalf. R. 203.

At a sentencing hearing, the trial court heard testimony from Ms. Taylor from the MDOC. She was a custodian of the prison's records division. R. 249. After hearing testimony from Ms Taylor with cross examination,, the trial court found that Vardaman qualified for enhanced sentencing as an habitual offender. This included reviewing prison records on Vardaman's previous convictions and computer generated data on the time Vardaman had served on each

separate sentence. This was under M. C. A. § 99-19-83. Vardaman was therefore sentenced as "an habitual offender" and given life sentences in the custody of the MDOC. C.P. 119-120. The trial court overruled Vardaman's counsel's motion for a new trial. C.P. 130. From these convictions and denial of relief he appealed to this Court. C.P. 131.

SUMMARY OF THE ARGUMENT

1. The record reflects credible, partially corroborated substantial evidence in support of the denial of peremptory instructions and the jury's verdicts. This included eye witness testimony of possession of more than 250 dosage units, plus admissions against interest of intending to use cold pills for "a cook" R. 83. This is slang for manufacture of crystal meth..

Mr. Vardaman was found in possession of a yellow bag full of pseudoephedrine pills. R. 62-64. The boxes of cold pills from which the pills were extracted were recovered. R. 69. Kathy Davis, the manager of the Dollar General store, from which some of the cold pills had been purchased identified boxes of cold pills recovered from Vardaman as having been purchased from her store. R. 143.

Officer Man testified he had "no doubt" that there were 288 dosage units of pseudoephedrine in the tied bag found near Vardaman. R. 67; 104. Mann testified the active ingredient listed on the cold pill boxes was "pseudoephedrine". R. 68. Vardaman admitted to Mann that the pills in the Dollar General yellow bag had been "popped out of the blister packs" purchased there. R.106, and S-2 to S-11 for copies of boxes and blister packs found in a garbage can at a BP service station in Brandon.

Officers testified that they saw Vardaman trying to flush the pseudoephedrine pills down the toilet. R. 79;140. Officer Mann identified exhibit S-2 as being a pseudoephedrine tablet which was "the exact same as the rest of the pills that were in the bag" he discovered with Vardaman. R. 65.

Vardaman admitted to Officers that the cold pills were purchased for "a cook" which was slang for manufacture of methamphetamine. R. 83-84; 117.

2. This issue was waived for failure to raise it with the trial court. R. 56-66; C.P. 113-116. It is also lacking in merit. The trial court instructed the jury on the use of notes during the testimony of

Officer Mann, the prosecution's first witness. R. 66. This was prior to testimony about either the quantity of pills found with Vardaman or about his admissions against interest. The record reflects the trial court instructed the jury prior to their deliberations about the personal and non-shareable nature of any notes taken by any individual juror. C.P. 77.

3. This issue was also waived for failure to raise it with the trial court. The issue raised with the trial court was the accuracy of the one year time served component, and not whether the sentences were for separate offenses separately brought. R. 264; C.P. 113-116.

The trial court found after a post-conviction hearing that Vardaman qualified for enhanced punishment under M C A §99-19-83. There was testimony from the custodian of the prison records division about computer generated records derived from the prison's generated data processing center. R. 249. She testified with prison records, and time served computer records. Ms. Taylor testified about Vardaman's prior convictions and sentences, his serving of more than a year on two, one of which was a crime of violence. Copies of his prior convictions and sentences in the MDOC were admitted into evidence. Contrary, to Vardaman's complaint, the court found that there was evidence that he served a year or more for offenses separately brought, "different crimes arising out of different circumstances." R. 265.

4. The record reflects Vardaman's trial counsel represented him effectively before a Rankin County jury. His counsel can not be faulted for Vardaman's convictions given the overwhelming weight of the evidence against him. This included testimony of his possessing more than 250 cold pills, containing precursor chemicals, as well as his admissions of intending to use the precursors for a "cook." R. 67; 84-85. Cooking was slang for the process for transforming the pseudoephedrine into crystal methamphetamine for consumption as a strong stimulant.

There was a lack of evidence that his counsel did anything that prejudiced Mr. Brown's

defense. There was no indication of any actions that undermined confidence in the fairness of the proceedings against Mr. Vardaman. **Ferguson v. State**, 507 So. 2d 94, 97 (Miss. 1987)

ARGUMENT

PROPOSITION I

THERE WAS CREDIBLE, SUBSTANTIAL EVIDENCE IN SUPPORT OF VARDAMAN'S CONVICTIONS.

Vardaman's appeal counsel believes there was insufficient evidence in support of his convictions, particularly for conspiracy to manufacture. She believes that there was no evidence before the jury of any conspiracy to manufacture. She thinks there was no evidence of any common scheme or plan to manufacture, based upon the testimony of Vardaman, Mullins and Mason, his co-defendants. While the co-defendants made various admissions about the purchasing of precursors , there was insufficient evidence of "any agreement" with Vardaman to manufacture. She also thinks there was insufficient evidence for establishing the quantity of pills possessed by the appellant. Appellant's brief page 6-12.

To the contrary, the record contains not only credible, substantial evidence in support of Vardaman's conviction for possession but also sufficient evidence from which it was reasonable to infer that he was also guilty of conspiracy to manufacture methamphetamine. This includes eye witness testimony of possession of over 250 dosage units as well as "admissions against interest" of intending to use the pills for a cook, or to manufacture. M. R E. 801(d)(2). R. 67;83. There was also testimony from co-defendant Mullins that Vardaman admitted to him there were more pills in the car hidden in the dashboard that the police had not yet found. R. 175.

Sergeant Martin Mann with the Brandon Police Department testified that he detained Vardaman and his two co-defendants. This was July 6, 2004 in Brandon, Mississippi. After receiving information about Vardaman's attempts at purchasing excessive amounts of cold pills, Officer Man pursued the car in which he was seen.

While the car in which Vardaman was driving was being pursued, Mann observed Vardaman hastily throw something in a trash can. After the car was stopped, a tied yellow Dollar General plastic bag was found "tucked under the dash" containing numerous pseudoephedrine pills. R. 60;62. This was near Vardaman who was seen bent over actively doing something on the floor board of the car

Mann testified that when the pills inside the bag were counted there were 288 pills. R. 67. He had "no doubt" that there were 288 pills in the bag. R. 104. Based upon his examination of the pills, Mann believed they were all pseudoephedrine pills. R. 68. Mann also testified that the labels visible on the cold pill boxes captured clearly listed "the active ingredient as pseudoephedrine 60 milligrams." R. 68. See S-3 through S-9 in exhibits volume for xerox copies of cold pill boxes listing pseudoephedrine as the active ingredient.

Q. **And what was the total number of pills in the bag that you counted?**

A. **I opened the bag, placed the contents on a table, and counted two hundred and eighty eight tablets.** (Emphasis by Appellee). R. 67.

Sergeant Mann also testified that Vardaman admitted having come to Brandon to purchase boxes of Sudafed, i.e. cold pills. He also admitted to taking the pills out of their aluminum packages, and throwing away the boxes and emptied packages at a BP service station near where he was detained. Mann also testified that Vardaman admitted that "they had planned a cook that night or the next day." R. 82-83.

Q. Could you please read to the jury the contents of that statement, please?

A. The following statement was made by James Vardaman on July 12, 2004, while located at the Rankin County jail: **I, James Vardaman, Jerry Mullins and Julie Mason left Crystal Springs to buy Sudafed. We bought some in Terry; came to Brandon, where I went to the Dollar General and bought two boxes and Jerry bought two boxes, also , then, went to the Family Dollar and got four boxes, got to the car and busted the pills out of the packs while we were driving to the BP,**

where at the BP, I got out and threw away the empty packs into the garbage, and pulled out onto the street, and got pulled over by the Brandon police. That's (indicating) where he initialed the remaining area and signed it that date, 10:30 in the morning.

Q. Now, in addition to what he wrote there, did he tell you anything additional that's not included on that statement?

A. We begin the interview with, basically, what was the purpose in this visit and the incident, Can you shed any light on what happened and what was going on? **He got into that a little bit and indicated that he and the other two defendants had left Crystal Springs to purchase pseudoephedrine. They had planned to make a cook either that night or the next day.** R. 82-83. (Emphasis by Appellee).

Detective Matt Thornton with the Brandon Police Department testified that he spoke with Vardaman about his involvement with the others in his vehicle. Vardaman admitted that they were purchasing precursors in order to manufacture methamphetamine.

Q. **Did the defendant indicate to you in his statement that he was actively involved with the other two parties that were in the vehicle in procuring this pseudoephedrine for the purpose of cooking crystal methamphetamine?**

A. **Yes.** R. 117. (Emphasis by Appellee).

Ms. Kathy Davis, manager of General Dollar store in Brandon, Mississippi testified that she remembered Vardaman. She remembered him because he tried to purchase more than the legal limit for cold pills. She called 911. This alerted Sergeant Mann, whose office was nearby, to place Vardaman under surveillance.

Q. Okay. How much was he buying?

A. Well, it was more –it was three or more boxes, because we don't–it wouldn't–it wouldn't catch me off guard unless it was more. R. 142.

Q. All right. Push them out. Pop them out with your thumb or something. And why is it that you called the police, Kathy?

A. Well, I've been in the business quite a while, been in management for a while, and I knew that it was–I didn't recognize this person from the area, number one; and, number two, anybody that comes in and makes a purchase like that usually has

something else in mind to do with it. It's not that they're buying it for a cold. R. 143-144.

Mr. Jerry Mullins testified that he had recently showed Vardaman how to manufacture methamphetamine. He agreed to go with Vardaman to Brandon to purchase cold pills, containing pseudoephedrine. Mullins knew that the intent of their various purchases was to manufacture or create more methamphetamine for their use.

Q. Why did you know what he wanted? How did you know what he wanted?

A. Because of the prior–prior thing, me teaching him how to cook.

Q. **So before you ever got out of the car to go inside the Dollar General Store, you knew what you were going to get and why you were going to get it.**

A. **Right.** R. 172. (Emphasis by Appellee).

...

Q. What did he say?

A. He said that his wife had gotten the car out and there was more pills in the dashboard.

Q. He said there were pills that the police hadn't found?

A. Right. R. 175.

There was corroborated eye witness testimony that Vardaman tried to destroy the evidence found in the Dollar General bag. R. 79;116; 153. He did so by smuggling the evidence bag of cold pills into the bathroom. He did this after worrying officers about his need to go to the bath room. He was observed pulling out the yellow bag and pouring the pills into the commode. He had to be taken down to the floor and restrained. This prevented him from flushing them down the toilet. However, there was corroborated eye witness testimony as to both what Vardaman did as well as seeing what was observed of the mass of dissolving cold pills in the commode.

Q. Was it clear then, to you, based on the defendant's behavior there in that

bathroom that it was his clear intent to flush that evidence down the toilet?

A. Absolutely. R. 80.

In **Burchfield v. State** 892 So.2d 191, *199 (Miss. 2004), the Court found that identification of pseudoephedrine on "the labels" of cold medication, such as Sudafed, fell within the exception to hearsay under M. R. E. 803(17), "market reports, commercial publications."

In that case Christopher Burchfield was found with unopened boxes of Walgreen cold tablets containing pseudoephedrine. Burchfield had some 864 dosage units. They were still contained in the "blister packs" inside the Walgreen's cold pill boxes.

> ¶32. We find the Iowa Supreme Court's "market list" analysis persuasive. Virtually everyone in society, from time to time, will select a box of pills from the shelf at a drug store based solely on the trustworthiness of the printed box. We trust that a box which says "Sudafed," is truly "Sudafed"-not "Benadryl." And we place the pills in our bodies, trusting that they contain the ingredients the labels claim. Therefore, this Court finds that these labels are relied upon by the public and falls within the "market list" hearsay exception.
>
> ¶ 33. Thus, we find the disclosure of ingredients on the labels of pre-packaged, unopened, over-the-counter medications may be admissible hearsay under M.R.E. 803(17), provided the trial court determines (as he did in this case) that the circumstances warrant admission. That is not to say that every label is admissible. The trial court will still evaluate the circumstances and, where reasonable suspicions are raised, such labels may be properly excluded. These matters are properly within the sound discretion of our learned trial judges.

In the instant cause, the record reflects that the cold pill boxes and blister packs of cold pills were opened by Vardaman prior to his apprehension. R. 67-68;82. The record also reflects, nevertheless, that the labels on the boxes and aluminum packs of pills admitted into evidence were clearly visible. They stated, as shown in the exhibits volume, that the cool pills packaged therein contained "pseudoephedrine." Pseudoephedrine is one of the precursor chemicals for manufacturing methamphetamine.

Likewise, Sergeant Mann's testified that he counted up to "288 pills" in the Dollar General

bag prior to Vardaman's destruction of this evidence. Mann also testified that the 287 pills that dissolved in water were exactly like the one cold pill containing pseudoephedrine found in the record. R. 65.

In **McClain v. State**, 625 So. 2d 774, 778 (Miss. 1993), the Court stated that when the sufficiency of the evidence is challenged, the prosecution was entitled to have the evidence in support of its case taken as true together with all reasonable inferences. Any issue related to credibility or the weight of the evidence was for the jury to decide, not this court.

> The three challenges by McClain (motion for directed verdict, request for peremptory instruction, and motion for JNOV) challenge the legal sufficiency of the evidence. Since each requires consideration of the evidence before the court when made, this Court properly reviews the ruling on the last occasion the challenge was made in the trial court. This occurred when the Circuit Court overruled McClain's motion for JNOV. **Wetz v. State**, 503 So. 2d 803, 807-08 (Miss. 1987). In appeals from an overruled motion for JNOV, the sufficiency of the evidence as a matter of law is viewed and tested in a light most favorable to the State. **Esparaza v. State**, 595 So. 2d 418, 426 (Miss. 1992); **Wetz** at 808; **Harveston v. State**, 493 So. 2d 365, 370 (Miss. 1986);...The credible evidence consistent with McClain's guilt must be accepted as true. **Spikes v. State**, 302 So. 2d 250, 251 (Miss. 1974). The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. *Wetz*, at 808 , **Hammond v. State**, 465 So. 2d 1031, 1035 (Miss. 1985); *May* at 781. Matters regarding the weight and credibility of the evidence are to be resolved by the jury. **Neal v. State**, 451 So. 2d 743, 758 (Miss. 1984);..We are authorized to reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty. *Wetz* at 808; **Harveston** at 370; **Fisher v. State**, 481 So. 2d 203, 212 (Miss. 1985).

. When the evidence presented by the prosecution, and summarized above, was taken as true with reasonable inferences, there was more than sufficient, credible eye witness testimony and evidence in support of the trial court's denial of all peremptory instructions. Sergeant Mann testified that Vardaman had over 250 dosage units; he was sure of his count. R.67; 104. Officer Thornton corroborated Man as to the quantity being over 250 dosage units. R. 135. Mann testified that the boxes recovered from Vardaman listed the active ingredient in the cold pills as being

"pseudoephedrine." R. 68 . Mann testified that the 288 pills in the bag looked alike and had come from the empty blister pack containers inside the various cold pill boxes. R. 67-68.

Vardaman admitted in his statement that he removed the cold pills from their boxes and blister packs and threw the empty boxes and packs into a garbage can at the BP gas station. R. 82. Vardaman also admitted to investigators that he intended to use the cold pills they were collecting to manufacture methamphetamine. R. 83;117. Co-defendant Mullins corroborated him in testifying that he knew why they were buying cold pills. i.e. to manufacture methamphetamine. R. 172. He also testified that Vardaman had admitted to having other pills the police did not find in the car. R. 175.

On a motion for a directed verdict, Vardaman was not entitled to give himself the benefit of any conflicts or gaps in the evidence that would be favorable to his innocence. In **Noe v. State**, 616 So. 2d 298, 302 (Miss. 1993), the Supreme Court stated that when the sufficiency of the evidence is challenged, the evidence favorable to the State must be accepted as true with all reasonable inferences. Evidence favorable to the defense must be disregarded.

Consequently, Vardaman's arguments about arithmetic and no evidence of a formal agreement to manufacture are wide of the mark.

In **Harris v. State**, 731 So. 2d 1125, *1132 (Miss.1999), the Supreme Court found that a conspiracy could be inferred from circumstances involved in a case. The conspiracy can be "inferred from the actions and conduct of the alleged conspirators," based upon evidence presented in the case to the jury. Evidence of the conspiracy can be "proved entirely by circumstantial evidence." Therefore, there is no burden on the prosecution to prove any formal agreement to a common plan to manufacture.

In **Doby v. State**, 532 So. 2d 584, 591 (Miss. 1988), the Court stated a conviction can be

supported by the uncorroborated testimony of a single witness :

> With this reasoning in mind, the Court holds that the testimony of Conner was legally sufficient to support Doby's conviction for the sale of cocaine. This Court recognizes the rule that persons may be found guilty on the uncorroborated testimony of a single witness. See **Ragland v. State**, 403 So. 2d 146 (Miss. 1981);..

The Appellee would submit that the jury resolved conflicts or gaps in the evidence along with issues of credibility when it found Vardaman guilty of possession as well as possession with intent. There was credible, partially corroborated evidence, as summarized above, in support of denying all peremptory instructions.

The Appellee would submit that this issue is lacking in merit.

PROPOSITION II

THIS ISSUE WAS WAIVED AND THE JURY WAS PROPERLY INSTRUCTED.

Vardaman believes that the trial court erred in not instructing the jury properly on the use of any notes taken by jurors during the trial. Since there was a delay between the beginning of the trial and the instruction provided, he believes this could have resulted in misuse of notes to his own detriment. Appellant's brief page 12-13.

The record reflects that this issue was not raised by Vardaman with the trial court. R. 56-66; C.P. 113-116.

In **Haddox v. State**, 636 So. 2d 1229, 1240 (Miss. 1994), the Court stated:

> Because these arguments are not preserved for appeal, this Court cannot reverse based upon them. The assertion on appeal of grounds for an objection which was not the assertion at trial is not an issue properly preserved on appeal. **Baine v. State**, 606 So. 2d 1076 (Miss. 1992); **Willie v. State**, 585 So. 2d 660, 671 (Miss. 1991); **Crawford v. State**, 515 So. 2d 936,938(Miss. 1987);...

In addition, the record reflects that the trial court instructed the jury on note taking during the testimony of Officer Mann. R. 67. Mann was the prosecution's first witness and the transcript contains some nine pages of testimony prior to the instructions on note taking. This was prior to any testimony about either the number of pills found or admissions by Vardaman about his intent to manufacture with the assistance of Mullins. R. 58-67. The jury was also given written jury instruction C-5 on note taking prior to the beginning of their deliberations. C.P. 77.

Trial court:

> Whether you take notes or not, each of you must form and express your own opinion as to the facts of this case. The individual juror's notes may be used by that juror only and may not be shown to or shared with other jurors. R. 67

In **Bell v. State**, 631 So. 2d 817, 820 (Miss. 1994), this Court stated that there is a

presumption that jurors follow the trial court's admonition.

> This Court has held that it must be presumed that the jurors followed the court's admonition to disregard the unanticipated, unprovoked incident and decide the case solely upon the evidence presented; to presume otherwise would be to render the jury system inoperable. See **Wright v. State**, 540 So. 2d 1, 4 (Miss. 1982); **Hunt v. State**, 538 So. 2d 422, 426 (Miss. 1989).
>
> The Appellee would submit that this issue is also lacking in merit.

PROPOSITION III

THIS ISSUE WAS WAIVED. IT IS ALSO LACKING IN MERIT. THE RECORD REFLECTS THAT VARDAMAN WAS PROPERLY DETERMINED TO BE AN HABITUAL OFFENDER.

Vardaman believes that the prosecution failed to prove that he was convicted of two felonies for crimes separately brought and arising out of separate incidents at different times. Appellant's brief page 14-16.

To the contrary, this issue was waived for failure to raise it with the trial court. The objection raised with the trial court was that the prison record's were not clear as the amount of time Vardaman served for his various felony convictions. He also raised the constitutionality of allowing an "assault of a police officer" to be used for enhancement purposes. R. 264. In his Motion for a JNOV, Vardaman raised the alleged error in allowing the indictment to be amended, and the alleged unconstitutionality of allowing enhancement under the facts of this case. C.P. 113-116.

The issue of showing the convictions were for charges separately brought and arising out of separate incidents was therefore waived for failure to raise them with the trial court. **Haddox v. State**, 636 So. 2d 1229, 1240 (Miss. 1994)

In addition, the record reflects that this issue is lacking in merit. Mr. Ray for the prosecution pointed out for the record that Ms Taylor was the custodian of prison records. R. 249. In addition to her other documents, including courts sentencing orders, Ms Taylor had computer generated compilations of the time Vardaman served in penal instructions under the control of the MDOC. Therefore, the testimony of Ms. Taylor from MDOC was sufficient for showing that Vardaman served a year or more for his Lincoln County convictions, in addition to his Copiah County convictions which were also for over a year.

The Lincoln County charge was for "uttering forgery" in cause number 11-5-378 for which Vardaman served some fourteen months. The Copiah County charges were for assault of a police officer and possession of methamphetamine in cause number 2000–0082CR. Vardaman served over a year for both of these convictions. Assault of a police officer was a crime of violence.

Ms. Taylor testified that Vardaman serve a year or more in jail for Lincoln County forgery convictions and the Copiah County convictions for possession of meth and assault of a police officer. R. 255-256.

Mr. Ray for the prosecution pointed out for the record this fact:

> She (Ms. Michele Taylor with the MDOC) is able to definitely tell you though, that the man served 2/13/98, 5/29 of '98 and from 10/10 of '98 to 8/20 of '99. But it really doesn't matter because he served–he was convicted there and he clearly served more than a year under the Copiah County conviction.

Based upon the testimony of Ms. Taylor, as summarized above by the prosecution, the trial court found that under M. R. E. §99-19-83, there was evidence for establishing that Vardaman was an habitual offender.

> ...**But I count the Lincoln County sentence--it looks to me like it's about fourteen months is what was served, at a minimum. But regardless of that, Copiah County had a two count indictment. Different crimes arising out of different circumstances. Different sentences-one being a jury trial, one being a guilty plea–for a total of five years sentence.**
>
> That being the case, then you turn to look and make a determination as to whether or not those is a crime of violence. It being a simple assault on a law enforcement officer, it has to be a violent crime. Therefore, this court is of the opinion that the state has met its burden to prove that this defendant is a violent, habitual offender under the requirements of 99-19-83. They met all the requirements as to the one year or more than one year period of incarceration. R. 265-266.

In **Barnette v. State** 478 So.2d 800, *802 (Miss.1985), the court found that acts committed close in time to one another can constitute separate criminal charges.

> We have repeatedly recognized that separate acts, though committed close in point of time to one another, may constitute separate criminal offenses. **Lee v. State**, 469 So.2d 1225, 1228-29 (Miss.1985); **Dixon v. State**, 465 So.2d 1092, 1096-97 (Miss.1985); **Maycock v. Reed**, 328 So.2d 349, 352 (Miss.1976). The separate convictions approved in those cases were far more closely related than in the case at bar.

In **Branch v. State** , 347 So. 2d 957, 958 (Miss. 1977), this Court state that '[t]here is a presumption that the judgment of the trial court is correct." The burden is on the Appellant to demonstrate some reversible error to this court.'

> There is a presumption that the judgment of the trial court is correct, and the burden is on the appellant to demonstrate some reversible error to this Court. It is the appellant's duty to see that all matters necessary to his appeal, such as exhibits, witnesses testimony and so forth, are included in the record, and he may not complain of his own failure in that regard. The Court may only act on the record presented to it. **Shelton v. Kindred**, 279 So. 2d 642, 644 (Miss. 1972)

The Appellee would submit that this issue was waived; it is also lacking in merit.

PROPOSITION IV

VARDAMAN RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

For Vardaman to be successful in his ineffective assistance claim, he must satisfy the two-pronged test set forth in **Strickland v. Washington**, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064-65, 80 L. Ed. 2d 674, 693-95 (1984) and adopted by this Court in **Stringer v. State**, 454 So. 2d 468, 476-477 (Miss. 1984). Vardaman must prove: (1) that his counsel's performance was "deficient," and (2) that this supposed deficient performance "prejudiced" his defense. The burden of proving both prongs rests with Vardaman. **McQuarter v. State**, 574 So. 2d 685, 687 (Miss. 1990). Finally, Vardaman must show that there is a reasonable probability that but for the errors of his counsel, the sentence of the trial court would have been different. **Nicolau v. State**, 612 So. 2d 1080, 1086 (Miss. 1992), **Ahmad v. State**, 603 So. 2d 843, 848 (Miss. 1992).

The second prong of the **Strickland v. Washington**, 466 U.S. 668, 685, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) is to determine whether there is "a reasonable probability" that but for the alleged errors of his counsel, Mr. Frascogna, the result of Vardaman's guilty plea would have been different. This is to be determined from "the totality of the circumstances" involved in his case.

Appellee would submit that based upon the record we have cited, there is a lack of evidence for holding that there is a reasonable probability that Frascogna erred in his representation of Mr. Vardaman. The record reflects that trial counsel filled numerous pre-trial motions, made objections during the trial, and vigorously argued on behalf of Brown in closing argument. Trial counsel's objection to testimony about "done time together" with Vardaman was sustained and the jury told to ignore it. R. 164-165.

As to the alleged lack of proper certification of Vardaman's extensive prison records, the

record reflects that Ms Taylor was "the custodian of those records." R. 249. She testified under oath with the records kept under her supervision and control. These records were extensive including sentencing orders, probation orders, pre-sentencing reports, fingerprints, as well as sentence computation of time served records. Taylor was cross examined about any ambiguities or confusion in the records. R. 259-265. The computer generated records of the MDOC were admissible under M. R. E. 803(8), "Public Records and Reports."

In **Ficklin v. State** 758 So.2d 457, *462 (Miss. App. 2000), the Court found data generated from computer storage of public documents admissible.

> We find that a reasonable definition of the term in Rule 803(8) of "data compilation" includes computer generated data or computer print-outs. The Mississippi Rules of Evidence are modeled on the Federal Rules. The federal Advisory Committee's Note to a different rule, which is the one that first used the term "data compilation," provided as follows:
>
> The expression "data compilation" is used as broadly descriptive of any means of storing information other than the conventional words and figures in written or documentary form. It includes, but is no means limited to, electronic computer storage.
>
> Fed.R.Evid. 803(6) (Advisory Committee's Note). This same premise was incorporated into the comment to Rule 803(6) of the Mississippi Rules, which states that "the phrase 'data compilation' includes, but is not limited to, electronic information storage systems." M.R.E. 803(6) cmt. We hold that the computer generated records of Ficklin's prior incarceration fall within the public records exception to the hearsay rule, and are admissible as data compilations under Rule 803(8).

Trial counsel, Mr. Frascogna, can not be faulted for the overwhelming evidence against Vardaman, which included his own voluntary statements to investigators, his admission against interest about his intent to manufacture with the precursors he and his friends had purchased..

As stated in **Strickland**, and quoted in Mohr v. State , 584 So. 2d 426, 430 (Miss. 1991):

> Under the first prong, the movant 'must show that the counsel's performance was deficient and that the deficient performance prejudiced the defense. Here there is a

> strong presumption of competence. Under the second prong, the movant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' The defendant must prove both prongs of the test. Id. 698.

Vardaman bears the burden of proving that both parts of the tests have been met. **Leatherwood v. State**, 473 So. 2d 964, 968 (Miss. 1985).

> The burden of proving ineffective assistance of counsel is on the defendant to show that the counsel's performance was deficient and that the deficient performance prejudiced the defense.

When an appeal involves post conviction relief, the Mississippi Supreme Court has held, "that where a party offers only his affidavit, then his ineffective assistance of counsel claim is without merit." **Lindsay v. State**, 720 So. 2d 182, 184 (6 (Miss. 1998); **Smith v. State**, 490 So. 2d 860 (Miss. 1986).

In **Ferguson v. State**, 507 So. 2d 94, 97 (Miss. 1987), quoting **Strickland**, 466 U S at 687, 104 S. Ct. 2052.

> Although it need not be outcome determinative in the strict sense, it [deficient assistance of counsel] must be grave enough to 'undermine confidence' in the reliability of the whole proceeding.

The Appellee would submit that there has been no showing of either deficient performance or of prejudice sufficient to undermine confidence in the fairness of the proceeding against Mr. Vardaman. This issue is also lacking in merit.

CONCLUSION

Vardaman's convictions and life sentences should be affirmed for the reasons cited in this brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, W. Glenn Watts, 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 21st day of March, 2007.

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