IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

STELLA SPANN — APPELLANT

VS. — NO. 2006-KA-1117

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: STEPHANIE B. WOOD
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

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STELLA SPANN **APPELLANT**

VS. **NO. 2006-KA-1117**

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STATEMENT OF THE ISSUES

I. THE TRIAL COURT DID NOT ERR IN ALLOWING THE STATE TO AMEND THE INDICTMENT.

II. THERE WAS SUFFICIENT EVIDENCE TO SUSTAIN THE DEFENDANT'S CONVICTION.

III. THE TRIAL COURT'S REFUSAL TO ALLOW MARY REED TO TESTIFY WAS NOT REVERSIBLE ERROR.

IV. THE TRIAL COURT PROPERLY REFUSED THE LESSER-INCLUDED JURY INSTRUCTION OF POSSESSION OF COCAINE.

STATEMENT OF THE CASE

Mike Jernigan, a confidential informant, met with Brandon Police on May 7, 2004 at the Rankin County Livestock Pavilion. (Transcript p. 41). The officers searched Mr. Jernigan and his vehicle to confirm that he did not have alcohol or drugs on him or in his car and wired his vehicle for audio and video. (Transcript p. 41). They gave him $40 in cash and instructed him to "go to Cherry Hill and purchase crack cocaine." (Transcript p. 42).

While in the Cherry Hill neighborhood, Mr. Jernigan was approached by Willie Holmes AKA Bo. (Transcript p. 43). Mr. Jernigan asked Bo "if he knew where anything was at."

(Transcript p. 43). Bo told Mr. Jernigan that they were "going to have to go see Stella." (Transcript p. 43 and 80). Bo got in the vehicle with Mr. Jernigan and they drove to the Defendant, Stella Spann's house. (Transcript p. 44 and 81). When they arrived at Spann's house, Mr. Jernigan gave Bo the $40 given to him by Brandon Police. (Transcript p. 45).

Bo went inside Spann's house and both he and Spann came outside. (Transcript p. 44). Bo told Mr. Jernigan to follow them and then got in Spann's car, a 1992 red Grand Am. (Transcript p. 44-45 and 82). Mr. Jernigan followed the Grand Am down College Street just past Brandon High School where Spann's car ran out of gas. (Transcript p. 46 and 83). Bo then got in the car with Mr. Jernigan and they drove to the Red Apple Chevron at the corner of College Street and Highway 80 to get gas for Spann's car. (Transcript p. 46 and 83). They then drove back to where Spann's car was stranded. (Transcript p. 46).

Bo told Mr. Jernigan to drive back to the Red Apple and wait for them. (Transcript p. 47). Mr. Jernigan then drove back to the Red Apple and pulled in beside the car wash. (Transcript p. 83). Spann and Bo drove north on College Street and crossed the intersection of Highway 80. (Transcript p. 47 and 84). They then turned left on Timberlane Street and stopped. (Transcript p. 58-59). Spann got out of the car and walked down the street. (Transcript p. 58 - 59). She later returned to the car and drove back to the Red Apple where she pulled up beside Mr. Jernigan. (Transcript p. 47, 58-59 and 84). Spann handed the crack to Bo and asked Mr. Jernigan, "are you going to give me a drop or anything for going through all this trouble to get this?" (Transcript p. 48 - 49 and 90). Mr. Jernigan told her that he could not because it did not belong to him. (Transcript p. 49). Bo got out of Spann's car, walked around to Mr. Jernigan's car, and handed him the crack. (Transcript p. 48-49). Mr. Jernigan then left the Red Apple and drove back to the Rankin County Livestock Pavillion where he met with the police officers and turned over the crack. (Transcript p. 51 and 86).

Spann was later arrested and indicted. On February 22, 2006, the State filed a Motion to Amend Indictment to Charge Defendant as an Habitual Offender. (Record p. 26). The Motion was granted by an Order filed on February 23, 2006. (Record p. 71). Spann was tried and convicted of "Sale of Cocaine, a Schedule II Controlled Substance." (Record p. 101). She was not sentenced as a habitual offender, but instead was sentenced: " to serve a term of 30 years in the custody of Mississippi Department of Corrections. . . . After serving a term of 15 years, the Defendant shall be released on SUPERVISED POST-RELIEF SUPERVISION for a term of 5 years. . . ." (Record p. 103).

SUMMARY OF THE ARGUMENT

The trial court did not err in allowing the State to amend the indictment. Further, the issue is moot in that Spann was not sentenced as a habitual offender. Also, there was sufficient evidence to sustain Spann's conviction.

The trial court did not err in refusing to allow Mary Reed to testify. Further, even if the court had erred in refusing Ms. Reed's testimony, the error was harmless in that the exclusion of the testimony did not substantially affect the outcome of the trial. The trial court properly refused the lesser-included jury instruction of possession of cocaine.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN ALLOWING THE STATE TO AMEND THE INDICTMENT.

Spann claims that it was reversible error for the trial court to allow the State "to amend the indictment on the morning of trial . . . to habitual offender status." (Appellant's Brief p. 1). Uniform Circuit and County Court Rule 7.09 specifically states that an indictment may be amended to charge the defendant as a habitual offender. Further, "[i]t is well settled ... that a change in the indictment

is permissible if it does not materially alter facts which are the essence of the offense on the face of the indictment as it originally stood or materially alter a defense to the indictment as it originally stood so as to prejudice the defendant's case." *Wilson v. State*, 935 So.2d 945, 948 (Miss. 2006) (quoting *Miller v. State*, 740 So.2d 858, 862 (Miss.1999). The Mississippi Supreme Court held in *Swington v. State* that:

> [T]he test of whether an accused is prejudiced by the amendment of an indictment or information has been said to be whether or not a defense under the indictment or information as it originally stood would be equally available after the amendment is made and whether or not any evidence [the] accused might have would be equally applicable to the indictment or information in the one form as in the other; if the answer is in the affirmative, the amendment is one of form and not of substance.

742 So.2d 1106, 1118 (Miss.1999). The Court further held that "[t]he plain language of URCCC 7.09, concerning amendment of indictments, makes it readily apparent that prior offenses used to charge the defendant as an habitual offender are not substantive elements of the offense charged." *Id.* Thus, Spann was not prejudiced by the amendment.

Spann also claims that she was "unfairly surprised." (Appellant's Brief p. 4). She further contends that "had she been given proper notice of the State's intention to charge her as a habitual offender, she may have elected to plea rather than to risk going to trial." (Appellant's Brief p. 3-4). In *Madison v. State*, the indictment was amended the day before trial just as in Spann's case. 923 So.2d 252, 254 (Miss. Ct. App. 2006). The defendant in *Madison* made the exact same arguments as Spann and this Court held that:

> Madison was not unfairly surprised by the motion to amend the indictment to charge him as a habitual offender. "The test for whether an amendment to the indictment will prejudice the defense is whether the defense as it originally stood would be equally available after the amendment is made." *Eakes v. State*, 665 So.2d 852, 859-60 (Miss.1995). Since an amendment charging a defendant as a habitual offender does not affect the substance of the crime charged, but only the sentencing, Madison's defense to the armed robbery charge was unaffected by the amendment. *Adams v. State*, 772 So.2d 1010, 1020(¶ 50) (Miss.2000). This issue is without merit.

Id. Moreover, "Mississippi law allows an amendment of an indictment to charge a defendant as a habitual offender even after the jury has returned a guilty verdict." *Wilson*, 935 So.2d at 948 (citing *Torrey v. State*, 891 So.2d 188, 195 (Miss.2004)). Accordingly, it was not reversible error to allow the State to amend the indictment as Spann was not prejudiced or unfairly surprised.[1] Thus, Spann's first issue is without merit.

II. THERE WAS SUFFICIENT EVIDENCE TO SUSTAIN THE DEFENDANT'S CONVICTION.

Spann also argues that the trial court "committed reversible error when it refused to grant a directed verdict." (Appellant's Brief p. 4). A motion for directed verdict challenges the "legal sufficiency of the evidence." *Murrell v. State*, 955 So.2d 975, 978 (Miss. Ct. App. 2007). Evidence is sufficient to sustain a conviction where "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Cridiso v. State,* 956 So.2d 281, 290 (Miss. Ct. App. 2006) (quoting *Bush v. State*, 895 So.2d 836, 843 (Miss.2005)). "In reviewing such motions, the trial court considers all of the credible evidence consistent with the defendant's guilt, giving the prosecution the benefit of all favorable inferences that may be reasonable drawn from this evidence." *Smith v. State,* 839 So.2d 489, 495 (Miss.2003) (citing *McClain v. State*, 625 So.2d 774, 778 (Miss.1993)). Basically, "once the jury has returned a verdict of guilty in a criminal case, [the court is] not at liberty to direct that the defendant be discharged short of a conclusion on [its] part that the evidence, taken in the light most favorable to the verdict, no reasonable, hypothetical juror could find beyond a reasonable doubt that the defendant was guilty." *Phinisee v. State*, 864 So.2d 988, 992 (Miss. Ct. App. 2004) (citing *Fairchild v. State*, 459 So.2d 793, 798 (Miss.1984); *Pearson v. State,*

[1] Furthermore, the issue is moot in that Spann was not sentenced as a habitual offender as explained in the "Statement of the Case" section of this Brief.

428 So.2d 1361, 1364 (Miss.1983)). With this standard in mind, there is sufficient evidence in the case at hand to prove that Spann sold cocaine.

Miss. Code Ann. § 41-29-139 requires that the State prove only that Spann knowingly or intentionally transferred a controlled substance. *See Sullivan v. State,* 749 So.2d 983, 993-94 (Miss.1999). "The State is not required to prove that the seller of a controlled substance personally placed the substance in the hands of the buyer." *Id.* Further, the State is not required to prove that the seller received any benefit or profit for the controlled substance. *See Harrell v. State*, 755 So.2d 1, 1 (Miss. Ct. App. 1999) (holding that Mississippi law is clear that the "active participation in an illegal drug transaction is sufficient to support a conviction of sale of drugs without demonstrating that the participant received any benefit from the transaction"); *Boone v. State*, 291 So.2d 182 (Miss. 1974) (holding that the seller does not have to realize a profit to be guilty of the sale of a controlled substance); and *Ealy v. State*, 757 So.2d 1053, 1058 (Miss. 2000) (also holding that it was not necessary for the State to show that the defendant made a profit from the sale).

The evidence presented at trial illustrates that the State of Mississippi met its burden and provided sufficient evidence that Spann sold cocaine. For example,

a. Spann had possession of the crack cocaine. (Transcript p. 48 - 49, 90, and 109).
b. Spann handed the crack cocaine to Willie Holmes who handed the cocaine to the confidential informant. (Transcript p. 48-49).
c. Spann asked the confidential informant, "are you going to give me a drop or anything for going through all this trouble to get this?" (Transcript p. 49).

As such, there is sufficient evidence to sustain Spann's conviction. Thus, Spann's second issue is without merit.

III. THE TRIAL COURT DID NOT ERR IN REFUSING TO ALLOW MARY REED TO TESTIFY.

Spann also argues that the trial court "committed reversible error when it refused to allow the defense to call defense witness Mary Reed to impeach the credibility of the Confidential Informant Mike Jernigan." (Appellant's Brief p. 5). "The admissibility of evidence is within the discretion of the trial court, and absent abuse of that discretion, the trial court's decision on the admissibility of evidence will not be disturbed on appeal." *Porter v. State*, 869 So.2d 414, 417 (Miss. Ct. App. 2004) (citing *McCoy v. State*, 820 So.2d 25, 30 (Miss. Ct. App.2002)). Further, "the admission or exclusion of evidence must result in prejudice or harm, if a cause is to be reversed on that account." *Id.* Accordingly, regardless of whether the trial court erred in refusing to allow Mary Reed to testify, the refusal would have to result in prejudice or harm to be reversible.

Spann asserts that Ms. Reed was prepared to testify "that she was with Mike Jernigan when he was smoking crack with [Stella Spann]." (Appellant's Brief p. 6). Exclusion of this testimony did not substantially affected the outcome of the trial as it had no bearing whatsoever on whether Spann sold cocaine. As set forth in detail above, there was more than sufficient evidence to support the verdict regardless of whether Ms. Reed was allowed to testify. As such, regardless of whether the trial court allowed Ms. Reed's testimony, the jury would have still found Spann guilty of the sale of cocaine. "[A]n error is harmless only when it is apparent on the face of the record that a fair minded jury could have arrived at no verdict other than that of guilty." *Gray v. State,* 799 So.2d 53, 61 (Miss. 2001) (quoting *Forrest v. State*, 335 So.2d 900, 903 (Miss.1976)). Furthermore, the Mississippi Supreme Court held the following regarding "harmless error":

> To warrant reversal, two elements must be shown: error, and injury to the party appealing. Error is harmless when it is trivial, formal, or merely academic, and not prejudicial to the substantial rights of the party assigning it, and where it in no way affects the final outcome of the case; it is prejudicial, and ground for reversal, only

> when it affects the final result of the case and works adversely to a substantial right of the party assigning it. Obviously, in order for the rule of harmless error to be called into play in support of a judgment, the judgment must be otherwise supportable, and will be reversed when there is nothing in the pleadings or evidence to support it.

Id. (quoting *Catholic Diocese of Natchez-Jackson v. Jaquith*, 224 So.2d 216, 221 (Miss.1969)).

As there is more than adequate evidence in the record to support Spann's conviction, any error in refusing to allow Ms. Reed's testimony was harmless. Therefore, Spann's third issue is also without merit.

IV. THE TRIAL COURT PROPERLY REFUSED THE LESSER-INCLUDED JURY INSTRUCTION OF POSSESSION OF COCAINE.

Lastly, Spann argues that the trial court erred in refusing to grant "lesser-included offense instructions, which advised that if the State failed to prove one or more elements of sale of a controlled substance, the jury may find Stella Spann guilty of possession of cocaine." (Appellant's Brief p. 7). Jury instructions are within the sound discretion of the trial court. *Shumpert v. State,* 935 So.2d 962 (Miss. 2006) (citing *Goodin v. State,* 787 So.2d 639, 657 (Miss. 2001)). The appropriate standard for determining whether a lesser-included offense instruction is proper is as follows:

> a lesser included offense instruction should be granted unless the trial judge-and ultimately this (the Supreme) Court-can say, taking the evidence in the light most favorable to the accused and considering all reasonable favorable inferences which may be drawn in favor of the accused from the evidence, that no reasonable jury could find the defendant guilty of the lesser included offense (and conversely not guilty of at least one essential element of the principal charge).

Reynolds v. State, 658 So.2d 852, 855 -856 (Miss.1995) (quoting *Ormond v. State*, 599 So.2d 951 (Miss.1992)). The evidence, even taken in the light most favorable to Spann, does not establish that a reasonable jury could find Spann not guilty of the Sale of Cocaine. As set forth above, Spann knowingly transferred a controlled substance. Moreover, the *Reynolds* court held that "... the mere

fact that one must possess a controlled substance before they can sell it is not enough to require a lesser included offense instruction." 658 So.2d at 856.

Further, the court may refuse an instruction which incorrectly states the law, is fairly covered elsewhere in the instructions, or is without foundation in the evidence. *Smith v. State,* 839 So.2d 489, 498 (Miss. 2003) (citing *Ellis v. State*, 790 So.2d 813, 815 (Miss.2001)) (*emphasis added*). There is no foundation in the evidence to support a jury instruction for the lesser-included offense of possession.

Spann further indicates in her Brief that she was only "interested in getting what she called quote 'a crumb' for her personal use." (Appellant's Brief p. 8). At set forth in detail above, a seller of a controlled substance need not receive a profit or benefit from the sale to be found guilty of Sale of a Controlled Substance. Accordingly, Spann's final issue is without merit.

CONCLUSION

The State respectfully requests that this Honorable Court affirm the conviction and sentence of Stella Spann as there was sufficient evidence to support the conviction and as the trial court did not commit reversible error.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: Stephanie B. Wood

STEPHANIE B. WOOD
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

CERTIFICATE OF SERVICE

I, Stephanie B. Wood, 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 Samac S. Richardson
Circuit Court Judge
P. O. Box 1885
Brandon, MS 39043

Honorable David Clark
District Attorney
P. O. Box 68
Brandon, MS 39043

Wesley T. Evans, Esquire
Attorney At Law
Post Office Drawer 528
Canton, MS 39046

This the 13th day of July, 2007.

Stephanie B Wood

STEPHANIE B. WOOD
SPECIAL ASSISTANT ATTORNEY GENERAL

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