IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ALBERT J. KEA — APPELLANT

VS. — NO. 2006-KA-1383

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

STATE RULES

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ALBERT J. KEA **APPELLANT**

vs. **CAUSE No. 2006-KA-01383-COA**

THE STATE OF MISSISSIPPI **APPELLEE**

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against a judgment of the Circuit Court of Simpson County, Mississippi in which the Appellant was convicted and sentenced for his felony of **PERJURY**.

STATEMENT OF FACTS

The Appellant's house caught fire and burned down. Believing that the Entergy power company was at fault for his loss, he and his wife sued Entergy. In his complaint, he prayed for the sum of two million dollars in compensation for their loss. Prior to trial on this complaint, the Appellant's wife died.

Part of the loss alleged by the Appellant involved a number of personal items, which the Appellant claimed were in the house at the time of the fire and were destroyed by the fire. These included antiques, art items, collectibles, sets of Wedgewood porcelain, venetian glass, vases and platters.

One of the attorneys representing Entergy investigated the Appellant's claim with respect

to these items of personal property. She discovered that they had not been destroyed as claimed but were in the Appellant's son's house. The Appellant's son lived in Colorado. The attorney traveled to the son's home and personally saw each of the items the Appellant claimed had been destroyed in the fire.

When at long last the Appellant's suit against Entergy came on for trial, the Appellant was duly sworn to tell the truth, and he testified that the items on his lists had been destroyed in the fire. He also identified photographs of the personal property. The Appellant further testified that his wife and he owned the property described in the lists.

Unfortunately for the Appellant, his son was called to testify by Entergy's attorneys. The son testified that he and his wife owned the items described in the lists, and he further testified that the property had not been destroyed. The Appellant's son brought several of the items described in the lists to trial. With the admission of the son's testimony, the civil action came to an abrupt conclusion. The value of the items on the lists was said to be at about $160,000.00. (R. Vol. 2, pp. 11 - 36).

The Appellant has administered the oath of a witness prior to giving his testimony in the civil action against Entergy. A certified transcript of the record of that trial was entered into evidence. (R. Vol. 1, pp. 36 - 40).[1]

The Appellant's son, Robert John Kea, testified. He said that his wife and he had an interested in collecting antiques, figurines and paintings. It seems that the Appellant's son also had an interest in collecting criminal convictions, including car theft, resisting arrest, making false statements on a passport. He also appeared to have an interest in acquiring various names

[1] The fact that the Appellant was administered the oath and his subsequent sworn testimony will be found in the transcript of the civil action. It is exhibit S-6 here.

for himself.

The younger Kea was aware of the fire at his father's house, and he was also aware of the lawsuit his father and his wife filed against Entergy. Kea testified that, at the time of the fire, the items of property described by the Appellant in his lists were at his home. At that time, the younger Kea lived in Dallas; he made photographs of those items. The items did not belong to the Appellant or his wife. The items of property described by the Appellant were never in the Appellant's home and were not destroyed in the fire that destroyed the Appellant's home.

Mr. Kea further testified that he did not come to the Appellant's home to retrieve the property, the property never having been in the Appellant's home. Mr. Kea brought several of the items claimed to have been destroyed to trial. He identified them, described their provenance, and testified that they did not belong to the Appellant or his wife and had never been in the Appellant's house. There was one item that was given to the Appellant's wife after the fire, given to her while she was ill, but that item was in the place the Appellant was living at the time of the trial in the case at bar. Kea had also given the Appellant a pewter tankard after the fire.

Mr. Kea also brought documents to prove his ownership of certain items. He further testified that, while his name at birth was Robert John Kea, he was also known as Robert John Keys after 1990 until a few years before trial.

Kea testified that he learned from his sister that the Appellant had claimed the property on the lists as belong to him and his wife and that they had been destroyed in the fire. He said he learned this some two or three years prior to trial in the case at bar. He denied having told his father that he needed $50,000.00 in order to avoid having to go to jail.

Kea testified on cross - examination that he and his wife were in Turkey at the time his

father's house burned. They were there for approximately two to three weeks. He did not visit his father when his father was in hospital some days before the fire. Kea testified that he did not visit his father's home shortly before the fire.

Kea testified that he had given his stepmother photographs of the items on the list. His stepmother admired them and wanted photographs of them. The Appellant did not give his son money for the items on the lists. (R. Vol. 2, pp. 40 - 117).

Robert John Kea's wife testified. She stated that the items on the Appellant's lists were actually owned by her or by her husband and her. She further stated that the items were at her home when the Appellant's house burned. She and her husband were in Turkey when the Appellant's house burned. None of the items were ever in the Appellant's house, and none of them were destroyed in the fire.

She and her husband were not visiting in Magee at the time of the fire. The Appellant did once lend them the sum of $10,000.00, but this was not for the purpose of keeping the younger Kea out of jail. There was no other occasion in which the Appellant lent money to them. A set of photographs of the collectibles ended up in the Appellant's possession because the Appellant's wife requested a copy.

The defense presented a case - in - chief. One Larry Blair, an employee of a pest control company, testified that he had been in the Appellant's home on a number of occasions. He said that he had seen sone five items in the Appellant's home before it burned. However, he did not know if they were in the home at the time it burned. He last serviced the house about a week before the fire, but he could not recall if he had seen those items in the Appellant's house at that time. (R. Vol. 3, pp. 145 - 151).

A Mary Starling testified. She said she was a friend of the Appellant's wife. She

identified some fifty - five or fifty -six items that had been in the Appellant's house prior to the fire.

Starling said that the Appellant's wife was nice to the younger Kea; she also said that the Appellant and his wife often give him money. She never saw Robert John Kea argue.

About a week before the fire, Starling said that she saw Robert John Kea leaving the Appellant's house with a filled garbage bag. Robert John Kea put this bag in a van. She did not know what was in the bag. The Appellant was said to have been in the hospital at the time his son was seen leaving the house with this filled garbage bag. The Appellant's wife was said to have told the witness that some of the items on the list were missing from the house.

This witness also testified in the Appellant's suit against Entergy. She also leased a place to live from his wife. The Appellant also helped the witness' son out of a legal problem. (R. Vol. 3, pp. 151 - 176).

The defense then called Teresa Joy Tisdale. She stated that the Appellant and his wife are her husband's aunt and uncle. She stated that she saw Robert John Kea take items from the Appellant's house during Christmas, 1994. The saw a gun being taken from the house, and she heard the clinking of glass items as well. This witness identified several items as having been in the Appellant's house.

Then there was Lisa Terry Holloway. She identified a number of items as having been inside the Appellant's home prior to the fire. She further stated that the Appellant was in the hospital a week before the fire. The witness stated that she saw Robert John Kea at the Appellant's home, while the Appellant was in the hospital. Robert John Kea was taking items of property from the upstairs part of the house and putting it into his vehicle.

The witness said she assisted Robert John Kea in this. There were a number of boxes,

and it took perhaps twenty or thirty minutes to get the job done. The witness did not know what was in the boxes. Two other people helped Robert John Kea as well. The items that she identified as having been in the Appellant's home could have been taken away by Robert John Kea so far as she knew. (R. Vol. 3, pp. 176 - 193).

Carolyn McMillan testified that she helped the Robert John Kea bring down a few small boxes from the Appellant's home. She could not recall when that occurred. She also identified one or two items as having been in the Appellant's home. (R. Vol. 3, pp. 194 - 200).

Helen Williams then testified. She stated that her brother is the Appellant. She lived with him in the 1990's. She stated that a certain watch was in the house. She further stated that relations between the Appellant and Robert John Kea were changeable. She said, though, that her brother often gave money to his son. She recalled seeing some of the items in the house before it burned. After the fire, she gave Robert John Kea a stack of photographs of some or all of the items of property in order to make an inventory. (R. Vol. 3, pp. 200 - 210)

The Appellant testified. He said he often helped his son out financially. He said his wife had acquired collectibles. Robert John Kea would often purchase figurines for the Appellant's wife, traveling to Europe to do so. The Appellant gave him money to make these purchases, or else repaid him for them. The items on the lists were those purchased for the Appellant's wife and were in the house prior to the fire. He said he made the photographs of the collectibles.

In the early part of May, 1998, the Appellant was involved in a motor vehicle accident. In consequence of the accident, he was hospitalized for a week or so. The day after he was discharged from the hospital, his house burned down. The Appellant said that he was under the impression that all of the items on his list or lists had been destroyed in the fire and that he did not know otherwise until trial in the suit against Entergy.

Robert John Kea was said to have assisted his father in putting together an inventory of the personal property lost, or supposedly lost, in the fire. The photographs of the collectibles had the Appellant's handwriting on the back.

When the Appellant's wife died, Robert John Kea came to the funeral. He asked his father for the sum of $50,000.00; the Appellant refused. Some months later, Robert John Kea's wife visited the Appellant and told him that his son would go to jail if he would not lend his son the sum he had requested. She left in something of a huff. The Appellant said he had not had any further conversation with his son or his son's wife since that time.

The Appellant testified that he did testify under oath that the items of property he claimed were lost in the fire were destroyed in the fire in the civil suit. He said, though, that he thought that those items were in his house. He said he knew that his son had been to his house while he was hospitalized but that he did not know that his son had taken property from the house. He said that if he had known that his son was in possession of the property, he would not have testified that it had been destroyed in the fire.

The Appellant testified that his son came to see him twice several days before the fire. The Appellant said that he would think the district attorney was crazy if the district attorney told him that his son was in Turkey at the time the Appellant was in the hospital.

The Appellant testified that no one told him that collectibles were missing from his house while he was lying in the hospital. He said that he did not notice them missing when he returned to his home. In the four years after the fire, he said he did not know that his son had possession of the property. The Appellant's house had thirty - seven rooms.

Robert John Kea was recalled. He said that, in the years after the fire, the Appellant never asked for return of the collectibles. He further stated that he was not in Mendenhall the

week of the fire but was in Turkey. (R. Vol. 3, pp. 252 - 265).

Lisa Kea was recalled. She too testified that she and her husband were in Turkey at the time of the fire. Her passport was introduced into evidence as well. (R. Vol. 3, pp. 265 - 271).

The Appellant, in his "Statement of the Case," at pages 2 and 5 through 6, alleges facts not contained in the transcript of record of this case. Likewise, he has attempted to circumvent a fundamental rule of appellate practice concerning the allegation of facts unsupported by the record in an appendix to his brief. All of these allegations of fact, wherever alleged are to be ignored. *Mason v. State*, 440 So.2d 318 (Miss. 1983).

STATEMENT OF ISSUES

1. DID THE TRIAL COURT ERR IN ADMITTING ROBERT JOHN AND LISA KEA'S PASSPORTS, THEY HAVING BEEN ALLEGEDLY INSUFFICIENTLY AUTHENTICATED?

2. DID THE ADMISSION OF THE PASSPORTS ACT SO AS TO VIOLATE THE APPELLANT'S RIGHT TO CONFRONT WITNESSES AGAINST HIM?

3. DID THE TRIAL COURT ERR IN FAILING TO INSTRUCT THE JURY ON THE "TWO WITNESS RULE"?

4. WAS THE EVIDENCE INSUFFICIENT TO SUPPORT THE VERDICT; WAS THE VERDICT CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE?

5. WERE THERE CUMULATIVE ERRORS SUCH AS TO REQUIRE A NEW TRIAL?

SUMMARY OF THE ARGUMENT

1. THAT THE TRIAL COURT DID NOT ERR IN ADMITTING THE PASSPORTS; THAT THE CLAIM THAT THE ADMISSION OF THE PASSPORTS VIOLATED THE APPELLANT'S RIGHT TO CONFRONT WITNESSES AGAINST HIM IS NOT BEFORE THIS COURT

2. THAT THE FAILURE TO GIVE A "TWO WITNESS" INSTRUCTION WAS HARMLESS ERROR

3. THAT THE VERDICT WAS SUPPORTED BY THE EVIDENCE; THAT THE VERDICT WAS NOT CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE

4. THAT THERE IS NO CUMULATIVE ERROR IN THIS RECORD AMOUNTING TO CAUSE FOR A NEW TRIAL

ARGUMENT

1. THAT THE TRIAL COURT DID NOT ERR IN ADMITTING THE PASSPORTS; THAT THE CLAIM THAT THE ADMISSION OF THE PASSPORTS VIOLATED THE APPELLANT'S RIGHT TO CONFRONT WITNESSES AGAINST HIM IS NOT BEFORE THIS COURT[2]

In the course of the State's rebuttal case, the State sought to introduce passports belonging to Robert John Kea and Lisa Kea. Its purpose was to show that there were customs stamps in the passports from Turkey and Great Britain covering the time period that Robert John Kea was said to have been taking things from the Appellant's house.

The Appellant objected to admission of the passports, alleging that they or the stamps therein had not been properly authenticated. The trial court overruled the objection, holding that, while it did not accept the passports as being official documents of the government of the United States or of a foreign government, the notations in the passports were merely notations concerning arrivals and departures. It found the passports admissible for that reason. (R. Vol. 3, pp. 256 - 258; 269).

First of all, to the extent that the Appellant here asserts that his right to confront witnesses was violated by the admission of the passports, we note that there was no objection in the trial court on that ground. To the extent that the Appellant asserts here that the passports or stamps were hearsay, no hearsay objection was raised in the trial court. The hearsay claim is barred. *Bailey v. State*, 960 So.2d 583 (Miss. Ct. App. 2007).

The Appellant alleges that the stamps and seals of Turkish customs officials were not

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[2] In this response we will address the Appellant's First and Second Assignments of Error.

properly authenticated under M.R.E 902(3). He further asserts that a passport must be authenticated in order for it to be admitted to evidence, citing *Gullotta v. United States*, 113 F.2d 683 (8th Cir. 1940 and *United States v. Weiss*, 491 F.2d 460 (2nd Cir. 1974). However, again turning to the objection as made in the trial court, the Appellant did not object to the stamps of the Turkish officials. He objected to the introduction of the passports, though without citing any rule of evidence. Nonetheless, the trial court appears to have considered the stamps, and while its ruling is obscure, at least to us, it seems that it was of the view that the stamps were not acts of a foreign government.

Rule 902 provides that certain documents are self - authenticating and that extrinsic evidence of authenticity is not required as a condition precedent to admission. While it is true that under subsection (3) foreign documents require a final certification, we submit that stamps affixed to a passport are not foreign documents within the meaning and intention of that subsection. We submit that the testimony of the passport holders was sufficient to authenticate the fact of the stamps.

M.R.E. 902(3) speaks to ". . . documents purporting to be executed or attested in his official capacity. . . ." A stamp affixed to a passport, indicating entry into a country, is not a document executed or attested to. These stamps give no more information than the date and place of entry. Unlike foreign court decrees, deeds and other such documents, these stamps are not documents.

We submit that, as to stamps affixed to passports, it would be completely sufficient for the passport holder to testify that they were affixed in his presence. Under M.R.E. 901(a), (b)(1),(10), a witness with personal knowledge may testify to such.

It is true that in *Overseas Trust Bank LTD v. Poon*, 181 A.2d 762, 581 N.Y.S. 2d 92

(N.Y.A.D. 2 1992), the court there held that it was not error to refuse admission of a passport showing stamps from customs officials of another country where there was no attestation or testimonial authentication by officials of that other country, but that holding did not state that it would be error had the trial court done so. Nor did it specifically hold that only officials from another country could provide authentication. And, of course, the decision is no authority here. In *Gullotta v. United States*, 113 F.2d 683 (8th Cir. 1940), it was held that the admission of a passport by the King of Italy was error. However, it was error because there was no evidence at all to authenticate the document. It was for that reason that the passport in that case was incompetent evidence. Here, though, the passports were authenticated by the passport holder, and, of course, the passports themselves do not purport to be documents issued by a foreign government.

United States v. Weiss, 491 U.S. 460 (2nd Cir. 1974) involved an attempt by a defendant to introduce a passport to prove that he had not entered Thailand. In other words, the attempt was made to show, by the lack of customs officials' stamps, that the defendant was not in the country. The court held it would have been necessary to prove that the customs officials in Thailand would have invariably affixed such stamps to passports. Since this was not done, the trial court did not err in refusing admission of the passports. This is not the situation in the case at bar.

In any event, these federal cases are not authority in this Court. Since their factual settings are similar, they are not useful as persuasive authority.

As for the passports involved in the case at bar, we think the witnesses sufficiently authenticated them. The passports were sufficient to allow them entry into another country and re-entry into the United States. Whether they were really and truly passports issued by the government of the United States was not actually that important of a question. What was

important and relevant was, whether valid passports or not, they were used as such.

In the event that the Court should find that the admission of the passports and contents therein was error, we submit that it was harmless error. The witnesses testified as to their whereabouts at the time the Appellant was in the hospital and at the time of the fire; the passports were merely cumulative of that testimony. Where a fact has been proved by competent testimony, here the testimony of Robert John and Lisa Kea, the erroneous admission of other testimony or evidence as to the same fact is harmless error. *Chisolm v. State*, 856 So.2d 681 (Miss. Ct. App. 2003).

As for the alleged denial of the right of confrontation, the Appellant did in fact cross-examine the holders of the passports as to their presence in Turkey at the time of the fire and at the time the Appellant was in the hospital. This was sufficient. Even had the prosecution thought to have had the passports or the stamps therein certified, there would have been no live witness at trial to cross-examine concerning the certification. The admission of the passports did not violate the Appellant's right to confront witnesses against him. In any event, should the Court determine otherwise, any violation of this right, under the facts of this case, would be harmless as well, for the same reason stated above.

The First and Second Assignments of Error are without merit.

2. THAT THE FAILURE TO GIVE A "TWO WITNESS" INSTRUCTION WAS HARMLESS ERROR

In the Third Assignment of Error, the Appellant claims that the trial court erred in failing to give a "two witness" instruction. However, the Appellant also admits that he did not request one be given. He asserts that, notwithstanding his failure to request such an instruction, the trial court erred in failing to give one.

The "two witness" instruction rule has been a constant and vexing problem in perjury cases. Why it should be so is obscure to us. Perhaps it is because prosecutions for perjury are relatively rare and that because of that fact the trial courts and prosecutors are forgetful of the law concerning it.

The "two witness" rule is a rule from the common law. In perjury cases, the jury is to be instructed that " . . . the falsity of an allegedly perjured statement must be established by the testimony of at least two witnesses or by one witness and corroborating circumstances . . . ." *Hale v.* State, 648 So.2d 531 (Miss. 1994); *Nash v. State*, 44 Miss. 857, 147 So.2d 499 (1962). This seems to have been the rule in this State since 1879, at least. *Brown v. State*, 57 Miss. 424 (1879). *Nash* further holds that it is error to fail to give this instruction, even if it is not requested by the State or the defense, unless the accused's own testimony establishes the perjury, or unless the evidence established by the State so clearly demonstrates the accused's guilt that his conviction would have been inevitable. While we have attempted to persuade this Court to abandon this hoary rule, the Court has declined to do so. *Hall v. State*, 751 So.2d 1161 (Miss. Ct. App. 1999).

The facts of the case at bar demonstrate clearly that the possessions claimed by the Appellant were not in his house and were not destroyed by the fire. He admitted this. There is no question but that he stated under oath, in the civil action against Entergy, that the items were in the house and so destroyed. There were two witnesses who testified that the items the Appellant claimed were never in the Appellant's house. We submit that the verdict of guilty would have been inevitable; thus any error in failing to grant the instruction was harmless. *Gordon v. State*, 158 Miss. 185, 128 So. 769 (1930).

3. THAT THE VERDICT WAS SUPPORTED BY THE EVIDENCE; THAT THE VERDICT WAS NOT CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE

In considering the Appellant's claims that the verdict was not supported by the evidence or, alternatively, that it was opposed to the great weight of the evidence, we bear in mind the respective standards of review applicable to them. *May v. State*, 460 So.2d 778 (Miss. 1984).[3]

Summarized, the facts of this case in support of the verdict, taken as true and together with all reasonable inferences therefrom were these. The Appellant's house caught fire and burned down, the fire destroying much, if not all, that was in it. The Appellant was of the view that Entergy was at fault for the fire, so he sued the company. A part of his claim for damages involved a list of collectible items, which he maintained belonged to him or his wife and which had been destroyed in the fire. He testified under oath to that effect at the trial on his lawsuit against Entergy. A transcript of that testimony was put into evidence in the trial of the case at bar.

However, the Appellant's son and daughter-in-law testified that none of the items were in the Appellant's home at the time of fire. Indeed, none had been destroyed. They were in the Appellant's son's home in Colorado at the time of the fire. The son denied having taken the items from the home while the Appellant lay in the hospital. The son and his wife were in Turkey at that time.

It is true enough that there was evidence opposed to the State's evidence, but, when considering whether the evidence was sufficient to permit a jury to pass on the question of the

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[3] At pages 20 - 21 of the brief for the Appellant, the Appellant cites federal cases for what he considers to be the federal standard of review by which sufficiency of the evidence claims are analyzed. Those cases have no relevance here. The federal standard of review is entirely irrelevant as well.

Appellant's guilt or innocence, the evidence opposed to the verdict is to be ignored.

The State was required to prove that the Appellant wilfully and corruptly swore, testified or affirmed to a material matter under oath in a court of law. Miss. Code Ann. Section 97-9-59 (Rev. 2006). The State, with two witnesses and the civil trial transcript, proved this.

There is no question but that the Appellant testified under oath in the civil trial. Likewise, there is no issue as to whether the items that the Appellant testified had been destroyed were, in fact, not destroyed. The contested issued in the case was whether the Appellant wilfully and corruptly and falsely swore as to the existence of the items and their destruction in the fire.

Given the testimony of the State's witnesses to the effect that the items were at no time in the Appellant's house, if believed by the jury, the Appellant's testimony at the trial of the Entergy suit could only have been wilful and corrupt, and false. A reasonable jury could easily have concluded this. The Appellant's testimony at the civil trial was certain and unambiguous concerning the presence of the items at his house. The trouble with his testimony was that it was simply untrue.

The Appellant points to certain credibility issues involving Robert John Kea. Indeed, this person did have such issues. However, in assessing whether the evidence was sufficient to allow a jury to pass on guilt or innocence, this Court is not to make credibility determinations. This Court is to take the testimony and evidence in support of the verdict as true, it being the jury's task to make credibility choices. Beyond that, this Kea's wife testified to the same facts. There is nothing suspect about her testimony.

As for the denial of the motion for a new trial, we find nothing unconscionable about the verdict. It is quite true that the Appellant's defense was mistake – that he was unaware that his son had removed the items from his home while he lay in the hospital. This, though, was an

issue for the jury to determine. It may be that there was some testimony to the effect that the Appellant's son was seen at his father's house, taking packages away, but there was no testimony as to what might have been in those packages. Beyond this, there was testimony that the son and his wife were out of the country when the son was supposed to have been in the Appellant's house. This testimony was supported by the stamps in the passports.

In addition, there was testimony that, after the conclusion of the suit against Entergy, when the Appellant supposedly learned that the items he supposedly thought had been destroyed were not, he did not at any time request return or them, or go to Colorado to retrieve them. (R. Vol. 3, pp. 252 - 253). This was certainly a peculiar thing for man to do, if in fact the property was ever his to begin with and rightfully in his possession.

The testimony concerning the Appellant's guilt cannot be reasonably thought to be unreasonable or highly improbable. The trial court did not err in denying the Appellant motions for a directed verdict and did not err in denying relief on the Appellant's motion for a new trial.

The Fourth Assignment of Error is without merit.

4. THAT THERE IS NO CUMULATIVE ERROR IN THIS RECORD AMOUNTING TO CAUSE FOR A NEW TRIAL

In his final Assignment of Error, the Appellant alleges that the trial court committed several evidentiary errors that, cumulatively, effectively deprived him of a fair trial. The Appellant, however, has not troubled himself to tell this Court what those several errors might have been – whether they are the supposed errors alleged in his foregoing assignments of error, or whether he has some other ideas of error. This being so, we have nothing to respond to.

It is the State's position that the trial court committed no reversible errors in the course of this trial. Consequently, there can be no cumulative reversible error.

CONCLUSION

The Appellant's conviction should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John R. Henry, 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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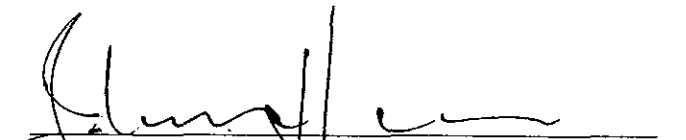
This the 4th day of October, 2007.



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