IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ELNORSH DUCKWORTH — APPELLANT

VS. — NO. 2006-KA-1996-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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PROCEDURAL HISTORY:

On September 13-14, 2006, Elnorsh Duckworth, "Duckworth" was tried for sale of cocaine before a Harrison County Circuit Court jury, the Honorable Roger T. Clark presiding. R.1. Duckworth was found guilty and given a twenty five sentence in the custody of the MDOC. C.P.54-55. From the conviction, Duckworth appealed to this Court. C.P. 61-62.

ISSUES ON APPEAL

I.
SHOULD OFFICER BROOKS HAVE BEEN STRICKEN FOR CAUSE?

II.
WAS OFFICER JOHNSON AND OFFICER MCILHENNY'S TESTIMONY PROPERLY RECEIVED?

III.

WAS THE JURY PROPERLY INSTRUCTED?

STATEMENT OF THE FACTS

In March, 2005, Duckworth was indicted for sale of cocaine as an habitual offender along with Ms. Gail Cawthon by a Harrison County Grand Jury. This sale allegedly occurred on November 11, 2004 in Gulfport, Mississippi. C.P. 11-12.

On September 13-14, 2006, Duckworth was tried for sale of cocaine before a Harrison County Circuit Court jury, the Honorable Roger T. Clark presiding. R.1. Duckworth was represented by Mr. Charles Stewart. R. 1.

During voir dire, Mr. Raymond Brooks informed the Court that although he was a Gulfport police officer, he believed that he could be fair and impartial. R.11. The trial court did not remove him for cause. This was based upon his statements that he could be impartial. R. 34-35. Brooks was peremptorily struck by counsel for Duckworth and did not serve on the jury. R. 38.

Mr. Jay Green testified that he was working with Gulfport police. This was on November 11, 2004 around 8:45 P.M. He was working as "an undercover agent" for a drug task force. R. 54-55. While on Polk Street, he encountered a black male and female. R. 55. Green was in an unmarked car. He was wired for sound. He pulled up to the suspects. He said, "do you know where I can get up on something." R. 55. The female asked, "what are you looking for?" R. 55. Green said, "a twenty." The black male standing within arm's length of the female said, "how much again?" Green repeated "twenty."R. 55.

The female turned to the male. Green testified to seeing Duckworth take "an off white rocky substance" out of his pocket. He handed it to the female. She turned and handed it to Green. Green gave her the twenty dollar bill, which had been xeroxed. This occurred at the corner of Polk Street and Texas Avenue in Harrison County. R. 57. Green identified Duckworth as the person from whom he had seen the alleged cocaine come. R. 57.

When the transfer was competed, Green rolled up his car window. He described the two suspects over a microphone. R. 60-61. Green testified that he had listened to the audio tape. It was an "accurate representation of the events as you (he) participated and observed them that day." R. 59. The audio cassette was played for the jury. R. 62.

After notifying the surveillance agents, Green saw them arrive in their concealed car. The female ran. She was chased, tackled and detained. The male was also detained. R. 62. The audio recording of the alleged drug transaction was admitted into evidence as exhibit 1. R. 59. A photocopy of the crime lab submission of 7.3 grams of an "off white rock like substance" for testing for "controlled substance" was admitted as exhibit 2. The package containing the remnants of cocaine after testing was admitted into evidence, exhibit 3. R. 127-128.

Officer Windell Johnson with the Gulfport Police Department testified that he had "sixteen years" experience in law enforcement. R. 78. He and Officer McElhenny were monitoring an alleged drug sale. They were listening over a transmitter in a concealed car. When sale was completed, the car was quickly moved forward. The officers saw the two suspects. "A female that was dressed in a blue coat and blue jeans," and "a male that was dressed in a white t shirt and blue jeans." This corresponded to the description of the suspects provided by Green. R. 79.

Officers Johnson and McElhenny testified that the transaction occurred near the intersection of Polk Street and Texas Avenue. They had their headlights on for illumination. R. 95; 103. There was also a street light in that location. R. 88.

The car's head lights were focused on two suspects in the intersection. The male suspect moved away but was apprehended. The female ran. She was captured after pursuit by Officer McElhenny. R. 81. Johnson saw the male "drop the buy money." The twenty dollar bill was then retrieved. R. 95.

The trial court sustained an objection to Officer Johnson testimony. This was to a question about whether the male suspect "handed the cocaine to the female." R. 83. This was based upon Johnson's admission to "not seeing" the transaction. He testified to merely "hearing" the three voices of the participants to the alleged sale.

Officer Johnson was questioned about whether it would be "typical" for two individuals to be involved in an alleged drug transaction. The trial court overruled an objection "to typical." R. 83-84. Johnson testified that "in his experience" drug dealers will use addicts as front men. They use them for the hand to hand exchanges of drugs they have in their possession. The addict delivers the money back to the dealer after the exchange. The addict will sometimes be paid by receiving a piece of the crack. R. 84.

Mr. Scott McElhenny testified that he was a detective with the Gulfport Police Department. R. 96. He was in an unmarked car doing surveillance. They were responding to complaints about prostitution and drug dealing in the Polk Street neighborhood. He was driving the car. Officer Johnson was listening to the conversation. This was the voices involved in the alleged cocaine transaction. They were heard over a microphone concealed on the undercover agent. R. 99.

McElhenny chased the female suspect. He had to tackle her to detain her. R. 108. McElhenny realized she was providing a false name. He recognized her from previous contact in the neighborhood. R. 109-110.

McElhenny testified to hearing the voices being recorded and transmitted to the surveillance car. This was from the undercover agent's car to his concealed car nearby. R. 102. He found that the serial numbers on the twenty dollar bill corresponded to the numbers previously recorded at the pre-buy meeting. R. 104. The clothing worn by the suspects corresponded to the description provided by Green. R. 104.

McElhenny testified to questioning Duckworth. This was after he was apprehended and taken to the jail for booking. Duckworth stated that "he had nothing to do with the drugs. That he did not obtain anything from the other defendant. It wasn't his. " R. 106. The female suspect, Ms. Cawthon, told McElhenny that "Duckworth had nothing to do with it. That it was her dope." R. 106. McElhenny identified Duckworth in the court room. This was the same man he had apprehended for the cocaine transfer at Texas and Polk in Gulfport. R. 106-107.

On cross examination, McElhenny was questioned about the fact that Duckworth had always maintained his innocence, and Cawthon had always maintained her guilt. R. 109-110. He was also questioned about whether transactions are "sometimes" done "inside" an undercover agent's car. R. 113-114.

On redirect, McElhenny testified about why surveillance agents do not usually "see" drug transactions. He testified that in some instances , drug dealers have "look outs." They warn the drug dealers of possible police presence in the area. They will also sometimes have "walkie-talkies" for additional protection to prevent apprehension or surveillance of their illicit activities. R. 115.

An objection was raised to McElhenny's explanation about "the female" claiming the cocaine was hers. This was on grounds of "he doesn't know what she meant." R. 116. The trial court overruled the objection. McElhenny testified that sometimes addicts are used as front men or the actual salesmen. They will sometimes "take the rap" for the dealer. This is to preserve their source of cocaine for later consumption.

After an over night break, the trial court sustained the objection to McElhenny's testimony. This was in connection with answering questions about why Cawthon, the co-defendant, would "take responsibility" for the drug transaction. The trial court instructed the jurors to ignore that

explanation. He questioned the jurors individually if they would do so. They answered individually they would follow his instructions. R. 121-122.

Exhibit 3, the package containing the alleged cocaine, was identified by Ms. Velveeda Harried, a drug analyst. Harried was with the Mississippi crime laboratory. She testified that she determined by several scientific tests that it was crack cocaine. R. 126.

During jury instruction selection, counsel for Duckworth requested a lesser included instruction for possession of cocaine. R. 147. The prosecution pointed out there was a lack of evidence for the instruction. While Duckworth did not testify, Officer McElhenny testified that he stated the cocaine did not belong to him. He told McElhenny that "he had nothing to do" with the alleged cocaine." Co-defendant, Cawthon, claimed "it was hers," even though she was seen by Officer Green receiving it from Duckworth. R. 106; 146-147. The trial court denied the instruction for simple possession. R. 149.

Duckworth was found guilty and given a twenty-five year sentence in the custody of the MDOC. C.P.54-55. A hearing was held on Duckworth's motion for a new trial. The trial court denied relief. R. 180-184. From this conviction, Duckworth appealed to this Court. C.P. 61-62.

SUMMARY OF THE ARGUMENT

1. This issue is lacking in merit. **Chisolm v. State** 529 So. 2d 635, *639 (Miss.1988). The record reflects that Duckworth's counsel struck Officer Brooks peremptorily. R. 38. He did not serve on Duckworth's jury. In addition, the record reflects no basis for thinking that any other member of the jury had any connection to law enforcement. R. 39. There was therefore a total lack of evidence that any incompetent or biased juror served to Duckworth's detriment on his jury.

2. The trial court did abuse its discretion during the testimony of Officers Windell Johnson and Scott McElhenny. **Gilley v. State,** 748 So. 2d 123, 126 (Miss. 1999) The record reflects that Johnson testified based upon his "sixteen years" of experience as a street level police officer. An objection to Officer McElhenny's testimony about why co-defendant Cawthon would "take responsibility" for the alleged cocaine transaction was sustained by the trial court. R. 120-121. The jurors were instructed to ignore that portion of his testimony. They indicated individually that they would do so. R. 120-122.

There was no objection on grounds of alleged inconsistent rulings. R. 117-122. And this issue was not raised with the trial court's motion for a new trial. C.P. 57-58. It was therefore waived. **Haddox v. State**, 636 So. 2d 1229, 1240 (Miss. 1994)

3. The jury were properly instructed. C.P. 34-46. The trial court correctly found that there was a lack of evidence in support of a lesser included instruction for possession. R. 149. Officer McElhenny testified that Duckworth told him the cocaine was not his. R. 106. Co-defendant Cawthon, who was tried separately, told investigators that the cocaine was hers; Duckworth had nothing to do with it,. R. 106. **Sharma v. State** 800 So.2d 1190, *1192 -1193 (¶8 and ¶9) (Miss. App. 2001)

ARGUMENT

PROPOSITION I

THIS ISSUE IS LACKING IN MERIT. OFFICER BROOKS WAS PEREMPTORILY STRUCK BY THE APPELLANT AND DID NOT SERVE ON THE JURY.

Duckworth believes that the trial court erred in not striking Officer Raymond Brooks for cause. Duckworth believes that since Brooks admitted to knowing police officers and witnesses, he would be biased against him during his trial. Duckworth complains of having to use a peremptory strike to remove Brooks from the jury. Appellant's brief page 3-7.

To the contrary, the record reflects that Officer Brooks informed the trial court that he could be "fair and impartial."

> Court: You think you could be fair and impartial even though your job is to investigate crimes and arrest alleged criminals?
>
> Brooks: I think because of that reason I could.
>
> Court: You think that would cause you to be able to be a fair and impartial juror?
>
> Brooks: Yes, sir. R. 11.

Mr. Stewart for Duckworth argued that he did not believe that Brooks could help but be biased against him given his occupation. The trial court took Brooks' statements on the record as indicating that he could be fair and impartial.

> Stewart: Judge, one other that I do have reservations about is Mr. Brooks. He is the Gulfport policeman. Though he states that he would not have any bias of any kind, I believe that-I don't want to say he's not telling the truth, but I think he would have a bias if he sat in on this jury.
>
> Court: All right. I specifically remember him, and as I recall, what he said was that he felt that because of his job and his experience, he thought that's what would make him fair and impartial. He said he could do it, so I'm not going to strike him for cause. R. 34-35.

The record indicates that Duckworth's counsel struck Mr. Raymond Brooks from the jury. Brooks did not serve on Duckworth's jury. R. 39.

Court: All right. State number twenty-one, Raymond Brooks?

Smith: Accept.

Court: Defense twenty one, Raymond Brooks?

Stewart: D-6. R. 38.

In **Chisolm v. State** 529 So. 2d 635, *639 (Miss.1988), the Court found that where a peremptory challenge eliminated a juror, who an appellant thought should be struck for cause, the issue was lacking in merit.

> Chisolm assigns as error the Circuit Court's refusal to sustain his challenge for cause to prospective juror Eva Woodard. The record reflects that on voir dire Woodard stated that she had been robbed before. She emphasized, however, that she could set that experience aside and decide the present case impartially on the law and the facts. The Court denied Chisolm's challenge for cause. Thereafter, Chisolm challenged Woodard peremptorily.
>
> [8] [9] Chisolm fails a threshold test. Prerequisite to presentation to such a claim on appeal is a showing that he had exhausted all of his peremptory challenges and that the incompetent juror was forced upon him by the trial court's erroneous ruling. No such showing may be made in this case, for Chisolm did in fact strike Woodard peremptorily. See **Ross v. Oklahoma**, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988).

The record cited above reflects that juror Raymond Brooks was peremptorily struck by Mr. Stewart on Duckworth's behalf. The record cited above indicates that Duckworth's counsel used his sixth strike to eliminate Brooks. R. 38-39. Therefore, he did not serve on the jury.

In addition, the voir dire record does not indicate that any other juror who served had any connection to law enforcement or showed any bias in favor of law enforcement or the state. R. 39. This distinguishes **Mhoon v. State**, 464 So. 2d 79 (Miss. 1985) and **Taylor v State**, 656 So. 2d 104 (Miss. 1995) from the instant cause. Therefore there was no evidence that any incompetent or

biased juror served on Duckworth's jury to his detriment.

This issue is therefore lacking in merit.

PROPOSITION II

ISSUES ABOUT INCONSISTENT RULINGS AND FAULTY OPINION TESTIMONY WERE WAIVED FOR FAILURE TO RAISE THEM WITH THE TRIAL COURT. AND THE TRIAL COURT DID NOT ABUSE ITS DISCRETION. OFFICER JOHNSON TESTIFIED ABOUT HIS EXPERIENCE WHICH WAS RELEVANT TO ISSUES BEFORE THE JURY.

Mr. Duckworth believes the trial court erred by making alleged inconsistent rulings on alleged "opinion evidence." He believes this occurred during the testimony of Officers Windell Johnson and Investigator Scott McElhenny. The trial court allowed Johnson to testify about two party drug dealer transactions. Then he overruled McElhenny's testimony about why co-defendant Cawthon would take responsibility for the drug transactions to Duckworth's benefit. Appellant's brief page 7-12.

To the contrary, the record reflects that the inconsistent evidentiary ruling was waived for failure to object on that ground with the trial court. R. 117-122. It was also not raised in Duckworth's Motion for a New Trial. C.P. 57-58. The issue raised in that motion was that the trial court allegedly erring in allowing testimony from Officer Johnson about what was "a typical drug transfer." C.P. 58.

In **Haddox v. State**, 636 So. 2d 1229, 1240 (Miss. 1994), the Court stated that issues on appeal not raised with the trial court on the same grounds were waived.

> 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);...

Another issue raised in Duckworth's appellant's brief was that the trial court erred by allowing Police officers to testify as experts. This was under M. R. E. 702, expert testimony. He

believes it was error because the officers were not qualified as experts to give such opinions. C.P. 58. This issue was also waived for failure to raise it with the trial court on the same grounds objected to during the trial. C.P. 58; R. 180.

The record reflects that Officer Johnson and McElhenny testified based upon their experience as police officers. Johnson had sixteen years experience. R. 78. McElhenny had six years experience. In addition, issues about McElhenny's improper "opinion" testimony are moot. We will show with cites to the record that the trial court sustained an objection to McElhenny's opinion. He also instructed the jury to ignore that testimony. R. 120-122.

Mr. Jay Green testified that on November 11, 2004 he was working with Gulfport police. He was working as an undercover agent. He was in casual clothes in an unmarked car. R. 54-55. Around 8:45 P.M., while on Polk Street, he encountered a black male and female. R. 55. Green was wired for sound. He pulled up to the suspects. He said, "do you know where I can get up on something?" R. 55. The female asked, "what are you looking for?" R. 55. Green said, "a twenty." The black male standing within arm's length of the female said, "how much again?" Green repeated "twenty."R. 55.

The female suspect turned to the male suspect. She was standing in front of the male, and near Green's open car window. Green testified to seeing Duckworth take "an off white rocky substance" out of his pocket. R. 56. He handed it to her. She handed it to Green. Green gave her a twenty dollar bill, which had been xeroxed. This occurred at the corner of Polk and Texas in Harrison County. R. 57. Green identified Duckworth as the person who transferred the cocaine. R. 57.

Officer Windell Johnson had sixteen years experience with the Gulfport Police Department. R. 78. Johnson testified that he was near the alleged sale. He and Officer McElhenny provided surveillance. They were in a concealed unmarked car. Johnson monitored the sale by listening to

the conversation over a speaker. It was connected to a microphone on undercover agent Green. Green conducting the alleged drug purchase while McElhenny listened to the three party dialogue. When undercover agent Green indicated the alleged cocaine purchase had been completed, he described two suspects.

One was a male "in a white t-shirt and blue jeans," and "a female that was dressed in a blue coat and blue jeans." R. 79.

Johnson and McElhenny drove up suddenly to the location of the alleged buy. The headlights were on when they arrived. They saw the two suspects in the street. Johnson detained the male who dropped the alleged buy money on the street. McElhenny ran after, tackled and captured a black female. She initially provided a false name to investigators. She was recognized by Officer McElhenny from his previous experience in the area. R. 109.

The trial court sustained an objection to Johnson's testimony about who handled the cocaine. R. 83. This was based upon an objection to his not "seeing" the transfer. Johnson had testified to "hearing" the transmission without seeing the actual events occurring between the undercover agent and the two suspects.

The trial court overruled an objection to Johnson's testimony about how two parties typically can be involved in a drug deal. R. 84. Officer Johnson testified based upon "his experience." He explained that two suspects often work together. This can occur where a drug addict is used as a "go-between.". He or she arranges the hand to hand exchanges of drugs for money. The addict has more public exposure and is sometimes paid in drugs not with money. The dealer had less exposure and more security by not being close to the actual hand exchange. R. 84-85.

Q. **Would it be typical for there to be two parties conducting a drug deal–**

Court: Overruled.

Q.–**in his experience?**

Court: Overruled. He can answer.

Witness: **Yes. That is pretty typical.**

Gargiulo: Okay. How does that happen?

A. Most of the time you get people that are addicted to crack cocaine who will do anything to support their habits, and a lot of times because of the fact we run these types of operations so much, most of the time the dealers will hand them the cocaine to go make the transaction. R. 83-84. (Emphasis by Appellee).

In **Gilley v. State**, 748 So. 2d 123, 126 (Miss. 1999), the Court found that the admission or exclusion of evidence was "within the trial court's discretion."

> This Court has held that 'a trial judge enjoys a great deal of discretion as to the relevancy and admissibility of evidence. Unless the judge abuses this discretion so as to be prejudicial to the accused, the Court will not reverse this ruling.' **Turner v. State**, 732 So. 2d 937, 946 (Miss. 1999)(quoting **Fisher v. State**, 690 So. 2d 268, 274 (Miss. 1996). Similarly, the decision that an error is irreversible and a mistrial should be granted is within the discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion. **Snelson v. State**, 704 So. 2d 452, 456 (Miss. 1997).

In **Jones v. State** 754 So.2d 476, *484 (¶43) (Miss. App.1999), the Court sustained the trial court in allowing an experienced officer to testify about the significance of scales, metal detectors and walkie talkies in the context of a drug sale. He was testifying based upon his twelve years experience as a street level narcotics officer.

> ¶ 43. Although Jones asserts that Detective Renfroe presented expert testimony, we note that Detective Renfroe did not give an opinion as contemplated in Mississippi Rule of Evidence 702. Instead, he answered the questions based upon his experience as a narcotics officer. Detective Renfroe explained his determinations that certain evidence was relevant to the charges against the defendants and should be recovered during the search. He explained why the scales, the walkie-talkies, and the metal detector had evidentiary value. Similarly, Detective Wilson answered Jones's questions during cross-examination based upon his experience:

In the instant cause, after an over night break, the trial court instructed the jury to ignore

Officer McElhenny's testimony about why Ms. Cawthon would "take responsibility for the crime." R. 116 ; R. 120-122.

> Detective McElhenny gave his opinion about what typically happens or what usually happens and why. Such opinions under the law are nothing more than conjecture and speculation, and I should not have allowed those opinions into evidence. So at this time I'm going to sustain the objection of defense counsel, and I'm instructing you to disregard the testimony, the opinion testimony of Detective McElhenny. And the only admissible testimony before you at this time in that regard is that the co-defendant told Detective McElhenny that the defendant had nothing to do with the dope. R. 120-121.

In addition, the trial court questions jurors individually. The jurors indicated that they would follow the trial court's direction. They would ignore McElhenny's testimony about why a suspect would "take responsibility" for a drug transaction. R. 121-122. The jurors should only consider his testimony about Duckworth telling investigators that he had nothing to do with the drug transactions. R. 106.

The trial court also dealt with this "opinion" issue in overruling a motion for a new trial. R. 179-183. He stated that he had instructed the jurors to ignore McElhenny's opinion testimony. He had also questioned them. They indicated they would follow his instruction. There was a presumption that the jurors followed those directions.

> Court: And the next morning when we came in, I had occasion to reflect on it overnight, and I felt that I was in error in the ruling, although the state has some authority that says I may not have been in error. But in any event when the jury was seated, I instructed the disregard that testimony, and I polled the jury individually , and each juror told me that they could disregard the testimony and the evidence. And under the law of the state, it's presumed when you ask a jury to disregard a certain statement or certain evidence and the jury indicates that they can, there's a presumption that they will do so. R. 182-183.

In **Bell v. State**, 631 So. 2d 817, 820 (Miss. 1994), this Court stated that there is a presumption that "the 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 the record reflects that the trial court did not abuse its discretion during the testimony of Officer Johnson. Officer Johnson testified based upon his sixteen years experience as a police officer. Issues related to the alleged inconsistency in the trial court's rulings concerning Officer Johnson and McElhenny's testimony were waived for failure to raise it with the trial court.

In addition, the record reflects that the trial court instructed the jury to ignore McElhenny's "opinion" testimony. The jurors indicated they would do so. R. 120-122. Therefore, the Appellee would submit that, given the record cited, the trial court did not abuse its discretion during the testimony of either Officers Johnson or McElhenny. This combination of issues is therefore lacking in merit.

PROPOSITION III

THE JURY WAS PROPERLY INSTRUCTED.

Mr. Duckworth believes that the trial court erred in denying him a lesser included offense instruction. He believes that since Ms. Gail Cawthon, his co-defendant, claimed that she was responsible for the cocaine sale, and he denied any responsibility, there was a factual basis for granting him a jury instruction for possession of cocaine. Appellant's brief page 12-14.

To the contrary, the record reflects that while Duckworth did not testify, Officer Scott McElhenny testified that Duckworth told him that he did not have anything to do with the cocaine transaction. R. 106. McElhenny also testified that co-defendant, Ms. Cawthon, told him, "it was her dope."

Q. And did the defendant make any statements to you?

A. Yes, sir.

Q. **What did he tell you?**

A. **He said that he had nothing to do with the drugs. That he didn't obtain anything from the other defendant. It wasn't his.**

Q. Did he address the buy money?

A. Yes, sir. He said that he dropped the money because he was scared.

Q. And did the female make a statement?

A. Yes.

Q. **She stated that Mr. Duckworth had nothing to do with it. That it was her dope**. R. 106. (Emphasis by Appellee).

The colloquy over a lesser included jury instruction was as follows:

Smith(for the prosecution): **Sharma v. State**. That case was pretty analogous to this case, 800 So 2d 1190. And the defendant Sharma in his testimony in his defense, which is the defense here today, was that he never sold cocaine to this agent, was

deemed to not support–there was no evidence to support a possession only instruction.

Court: All right.

Stewart(for the defendant): May I respond?

Court: Mr. Stewart.

Stewart: Judge, I think the facts of this case play out that it's reasonable for the jury to deliberate whether or not the defendant did, in fact, transfer cocaine to the undercover agent, Jay Green. Judge, and if you remember, the testimony was from Mr Green, Officer Green, is that the defendant had it and gave it to the co-defendant, Ms. Cawthon, and she, in fact, sold it to Mr Green, Officer Green. Judge, I think the jury should be instructed to consider a lesser included offense. ..

...

Smith: Your Honor, mainly the same argument as D-6, that he is not entitled to a lesser included. **I don't think there is any evidence to support it, and I think that as the Sharma case stated, that that defendant's theory of the case in defense was that he never sold or handled any drugs, and that is the defendant's contention here, that th drugs were never his, that he did not participate in the sale, and he is just–I think the defendant at this point is just trying to have it both ways.**

Court: D6 and D7 will be refused. R. 148-149.

In **Sharma v. State** 800 So.2d 1190, *1192 -1193 (¶8 and ¶9) (Miss. App. 2001), the Court found that Sharma was not entitled to a jury instruction for simple possession. This was based upon Sharma denying that he ever possessed or sold any cocaine to anyone.

¶ 8. In **Humphrey v. State**, 759 So. 2d 368, 380 (Miss..2000), the Mississippi Supreme Court gave this guidance regarding jury instructions:*1193
Jury instructions are to be read together and taken as a whole with no one instruction taken out of context. **A defendant is entitled to have jury instructions given which present his theory of the case; however, this entitlement is limited in that the court may refuse an instruction which incorrectly states the law, is covered fairly elsewhere in the instruction, or is without foundation in the evidence.**(emphasis added).

¶ 9. Sharma testified that he never sold cocaine to Agent Eddie Ray. He claimed that he sold him loose cigarettes. In light of Sharma's testimony, it is impossible to discern an evidentiary foundation for an instruction on simple possession. This

assignment of error lacks merit, as we conclude that the trial judge did not err in failing or refusing to grant an instruction which was devoid of an evidentiary anchor.

In **Perry v. State**, 637 So. 2d 871, 873 (Miss. 1974), relied upon by Duckworth, Perry denied selling marijuana, but admitted to possessing marijuana on other occasions. Perry also denied pulling the bank bag containing 25 marijuana cigarettes out of the car and giving it to the officers. He claimed it was found by police on the floor board of a co-defendant's car.

The Appellee would submit that under the facts of this case, Duckworth was not entitled to a lesser included instruction for possession. The record reflects that both Duckworth and his accomplice, Cawthon, stated to investigators that Duckworth "had nothing" to do with the cocaine. R. 106. This issue was also lacking in merit.

CONCLUSION

Duckworth's conviction and sentence 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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Circuit Court Judge
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Gulfport, MS 39502

Honorable Cono Caranna
District Attorney
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This the 29th day of May 29th, 2007.

W. Glen Watts

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