IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DECARLOS JENKINS — APPELLANT

VS.

NO. 2007-KA-0399

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DECARLOS JENKINS **APPELLANT**

VS. **NO. 2007-KA-0399**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

PROCEDURAL HISTORY:

On February 2, 2007, Mr. Decarlos Jenkins, "Jenkins" was tried for possession of cocaine and marijuana as an habitual offender before a Coahoma County Circuit Court jury, the Honorable Charles E. Webster presiding. R. 1. Jenkins was found guilty of possession of cocaine, one tenth of a gram but less than two grams, and given a life sentence as an habitual offender. C.P. 21; R. 304. From that conviction and sentence, Jenkins filed notice of appeal to the Supreme Court. C.P. 15.

ISSUES ON APPEAL

I.

WAS THERE SUFFICIENT CREDIBLE EVIDENCE IN SUPPORT OF THE TRIAL COURT'S DECISION?

II.

WAS THE VERDICT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE?

III.

WAS EXHIBIT 11 PROPERLY ADMITTED INTO EVIDENCE?

IV.

WAS JENKINS PROPERLY SENTENCED IN ABSENTIA?

V.

WAS JENKINS SENTENCE CRUEL, UNUSUAL AND DISPROPORTIONATE?

VI.

WAS THE JURY PROPERLY INSTRUCTED?

STATEMENT OF THE FACTS

On November 29, 2006, Jenkins was indicted by a Coahoma County Grand jury for possession of cocaine and marijuana as an habitual offender on or about October 11, 2006. C.P. 2.

On February 2, 2007, Jenkins was tried for possession of cocaine and marijuana before a Coahoma County Circuit Court jury, the Honorable Charles E. Webster presiding. R. 1. Jenkins was represented by Mr. Alan Shackleford. R. 1.

Corporal Rickey Bridges, with the Clarksdale Police Department, executed a search warrant at 451 Garfield Street in Clarksdale. He was accompanied by other officers from a drug task force. Jenkins was known to have lived or spent time at this residence. R. 25. When Jenkins was searched, what appeared to be controlled substances were found in his shirt pocket. Bridges testified that exhibit S-11 was the shirt that Jenkins was wearing when arrested. R. 50 ; 57. Bridges testified that he had "no doubt" that this was the shirt Jenkins was wearing when he was arrested. R. 57-58.

See State's photographic exhibit S-1a. R. 47-48. It shows a shirt pocket opened to reveal apparent packages of cocaine and marijuana. Exhibit's S-1g shows an identification badge. It identifies Jenkins as an employee of the Isle of Capri Casino in Tunica. It was sitting on top of a dresser at 451 Garfield Street in Clarksdale. .

Agent James Jones testified that Jenkins had on a grey short sleeve shirt with a front pocket. This was when he was arrested. Jones had Officer Bridges photograph what he saw in his pocket, i.e. the packages of apparent drugs. R. 64-65. Jones testified that the shirt was a grayish white color. Jones also testified that State's photographic exhibit 1(a) was "a true and accurate representation" of what he saw in Jenkins's shirt pocket. R. 48-49.

Officer Joseph Wide, who was present during the search, testified that he recognized exhibit S-11 as the shirt that Jenkins was wearing when he was arrested. R. 102.

Officer Leroy Austin, the Coahoma County jailer, testified that he was the day jailor. R. 120-126. For every inmate booked into jail, a movement sheet is filled out, filed and stored. It indicates in what number bin the inmates' clothes and other personal possessions are stored. The inmate is only allowed to keep his own underwear and socks. This included Mr. Jenkins. His movement sheet was introduced into evidence as State's exhibit 13. R. 124. That movement sheet indicated that Jenkins' clothes were stored in bin 95.

Ms. Teresa Hickman with the State Crime Lab used several scientific tests to determine that the substances contained in exhibit 2, the apparent controlled substances, were controlled substances, cocaine and marijuana. To be more specific, they were cocaine powder, .18 grams, and marijuana, .84 grams. R. 114.

At the conclusion of the state's case, the trial court denied a motion for a directed verdict. R. 129.

Mr. Jenkins testified in his own behalf. Jenkins testified that he was not wearing exhibit S-ll when arrested. R 148. Rather he claimed that he was wearing a tank top which had no pockets. Although he claimed he had on another grey shirt for a job interview, he took it off and supposedly left at his mother's house. This was just before the police arrived with a search warrant. Jenkins also denied having the cocaine and marijuana shown in exhibit 1(a) in his possession at any time. R. 148 .

Jenkins was found guilty of possession of cocaine, one tenth gram but less than two grams, and possession of marijuana, less than 30 grams. C.P. 21.

At Jenkins' sentencing, the trial court and the District Attorney stated for the record that Jenkins had escaped from the custody of the Coahoma Sheriff's Office. He could not be located for sentencing. The trial court also stated for the record that he had sworn "affidavits" from law

enforcement indicating that Jenkins had escaped, and was a fugitive. S.V., R. 6.

Jenkins' counsel was present and also admitted that he did not know where Jenkins was located at that time. S.V. p. 4-5. The trial court gave Jenkins a life sentence on count 1 under M.C. A. § 99-19-83. R. 304. From that conviction and sentence, Jenkins' appeal counsel filed notice of appeal to the Supreme Court. C.P. 15.

SUMMARY OF THE ARGUMENT

1. There was credible, substantial corroborated evidence in support of the trial court's denial of peremptory instructions, and the jury's verdict. This included corroborated eye witness testimony identifying Jenkins as having cocaine and marijuana in his shirt pocket. R. 57; 64. The apparent controlled substances were also photographed as shown in State's photographic exhibit 1a. R. 47-48.

The record reflects that Jenkins was identified by Officers Bridges, and Jones as the person found with apparent controlled substances in his shirt pocket. R. 57; 64. This was at 451 Garfield in Clarksdale. Officer Bridges did not have "any doubt" in his mind that Jenkins was wearing the shirt, exhibit S-ll, admitted into evidence. R. 57; 64. What appeared to be cocaine was seen in the pocket as shown in state's photographic exhibit 1(a). R.47-48..

Officer Austin testified that standard operation procedures were following in collecting Jenkins clothing, which included the shirt he was wearing. R.121-123. Austin testified that no one had access to bin 95 but authorized police officers. R. 126.

Ms. Teresia Hickman testified that the substances submitted for analysis were cocaine , .18 grams and marijuana, .84 grams. R. 114.

2. There was no unconscionable injustice involved in denying Jenkins' motion for a new trial. There was credible, corroborated substantial evidence in support of the trial court's ruling, as summarized above.

3. The trial court did not abuse its discretion in admitting into evidence state's exhibit 11. Failure to have testimony from every person who handled evidence goes to its weight not its admissibility. **Fisher v. State**, 481 So.2d 203, 225 (Miss.1985). Officer Bridges, Jones and Wide testified that they believed exhibit 11 was the same shirt that Jenkins was wearing the night he was searched. They believed it was the same shirt in which apparent drugs were found in the pocket. R. 50 ; 57; 64-65;

102. Officer Austin testified that "standard operating procedures" were used in collecting and storing Jenkins clothing. Jenkins' "movement sheet", exhibit 13 , indicated that his clothes were placed in "bin 95."

Officer Bridges testified that the shirt he brought from bin 95 was the shirt at issue. It was identified by three officers and then admitted into evidence by the trial court. R. 167-168. There was a lack of evidence for inferring any substitution or tampering with the shirt ever occurred.

4. The trial court properly sentenced Jenkins "in absentia." The trial court found that Jenkins voluntarily absented himself from his sentencing after conviction. This was based upon testimony and sworn "affidavits" from law enforcement. S. V. page 6. His counsel admitted on the record he did not know where the defendant was at the time of sentencing. S.V. 4-5. There is a presumption that the trial court's ruling is correct. Appeal counsel has no evidence to the contrary.

5. The record reflects that the trial court found after a hearing which included reviewing documentation and testimony that Jenkins was a M. C. A. § 99-19-83 habitual offender. M. C. A. § 99-19-83 states such an appellant "shall be sentenced to life imprisonment" without benefit of reduction or parole. There was no request for and no need for a proportionality review of Jenkins' sentence where he was found to be a habitual offender. Jenkins' decision to abscond waived any right he had to participate in his sentencing hearing.

6. This issue was waived for failure to raise it on the same grounds raised with the trial court. In addition, jury instruction C-11 was granted along with C-1 and C-10 and other relevant instructions. When the jury instructions were taken together, there was sufficient evidence for determining that the jury was properly instructed. The Appellee would submit that the record reflects that C-11, when read with the other instructions, did not mislead the jury. .

ARGUMENT

PROPOSITION I

THE RECORD REFLECTS THERE WAS CREDIBLE, SUBSTANTIAL CORROBORATED EVIDENCE IN SUPPORT OF THE TRIAL COURT'S DENIAL OF PEREMPTORY INSTRUCTIONS.

Counsel for Jenkins believes there was insufficient evidence in support of the trial court's denial of peremptory instructions, and of the jury's verdict. She also believes evidence of tampering with evidence weakened the case against Jenkins. Appellant's brief page 3-7.

While Jenkins' counsel thinks that there was evidence of tampering, the appellee believes that the record does not support this claim. Her conclusion is derived from the following premises: 1) there was no photo of Jenkins actually wearing the shirt, 2) the prosecution did not call Officer Hite who apparently took the shirt off of Jenkins at the jail and placed it in bin 95, 3) Jenkins testified that he was not wearing this shirt when arrested, and then booked into jail, and 4) there was no testimony about what evidence was found or not found on the other male present in the house along with Jenkins. This was at the time of his arrest at 451 Garfield.

It was not necessary to have a photo of Jenkins wearing the shirt, where there was corroborated, credible testimony that exhibit 11 was the shirt Jenkins was wearing. There was also a photograph of the shirt, photographic exhibit 1(a) and testimony that this was a true depiction of what Jenkins was wearing as well as of what was seen in his pocket.

It was not necessary for Officer Hite to testify, where there was testimony that "standard operating procedures" were followed, and documented. There was no evidence that anyone other than Officers Bridges and Wide had access to the shirt once it was placed in bin 95. R. 126.

According to Jenkins he was wearing a gray shirt just prior to his being arrested. R. 154.

This was the shirt he wore to a job interview. But he allegedly took it off and left it in his mother's house, since he was allegedly not living there.

Jenkins' rambling and contradictory testimony merely made his credibility an issue for the jury to consider along with all the other evidence. He was contradicted by three officers' testimony as well as by photographic evidence 1(a). R. 50 ; 57; 64-65; 102.

Corporal Ricky Bridges with the Clarksdale Police Department testified that he recognized exhibit 11. It was the shirt Jenkins was wearing. This was when a search warrant was executed at 451 Garfield where Jenkins was known to occupy or visit. Bridges also identified Jenkins as the person who was wearing the shirt. He testified that Jenkins was "the same person" who had apparent cocaine in his pocket. R. 57.

> Q. I hand you an item that has been marked for identification as State's exhibit S-11? Do you recognize that item?
>
> A. Yes, I do.
>
> Q. **How do you recognize that item?**
>
> A. **This is the shirt that DeCarlos Jenkins was wearing the night of the search at 451 Garfield.**
>
> Q. **All right. Now, was that the shirt that was searched or a different one?**
>
> A. **This is the same shirt.** R. 50.
>
> ...
>
> Q. All right. Was he wearing that shirt at the time?(of his arrest)
>
> A. Yes. He was.
>
> Q. Where was he taken after he was arrested?
>
> A. Coahoma County Sheriff's Office, jail. R. 51. (Emphasis by Appellee).

Bridges did not have "any doubt" in his mind that Jenkins was wearing the shirt, exhibit S-ll

admitted into evidence. R. 57; 64.

> Q. Is there any doubt in your mind as to whether or not the person sitting right there is the person that was searched and the person that was arrested that day at 451 Garfield?
>
> A. Not a doubt.
>
> Q. **Is there any doubt in your mind as to whether or not he was wearing that shirt that day?**
>
> A. **No doubt.** R. 57-58. (Emphasis by Appellee).

Agent James Jones with the MBN corroborated Officer Bridges. He was also present when Jenkins was searched. He testified that Jenkins had on a grey short sleeve shirt with a pocket. Jones had Officer Bridges photograph the packages of apparent drugs inside that pocket. Jones also testified that the shirt was a grayish white color. Jones testified that State's photographic exhibit 1(a) was "a true and accurate representation" of what he saw in Jenkins's shirt pocket.

> Q. Please proceed.
>
> A. Okay. I located two white rock-like substances in his pocket and also some alleged–greeny leafy like substance in his pocket also. It wasn't removed. When I located the objects, I immediately notified Corporal Ricky Bridges. He came with a digital camera, took a photograph. I pulled the pocket open. He took a photograph of the evidence, and after that, he covered–he retrieved the evidence from Mr. Jenkins' pocket himself.
>
> Q. Do you see that exhibit there on the monitor marked S-1(a)?
>
> A. Yes.
>
> Q. **All right. What is that item?**
>
> A. **That is the greeny leafy like substance. It's going to be one bag–I mean what I located inside Mr. Jenkins' pocket. It look like a pinkish bag with two white–off white rock like substance that was found inside of the pocket also.**
>
> Q. Are those the items you found or different items?
>
> A. No, those are the items.

Q. **Okay. Is that–so that picture–is that picture a true and accurate representation of what you saw?**

A. **That's correct, it is.** R. 62.

...

Q. All right. You said that the person that was searched was Decarlos Jenkins?

A. That's correct.

Court: The record will reflect that the witness has identified the defendant.

Q. If you remember, Agent Jones, what was the defendant wearing at the time you searched him?

A. The shirt–I can remember he was wearing a grayish type shirt, front pocket, sort of a like a dress shirt, but it wasn't. It was like a short sleeve shirt. Pockets like the one I'm wearing here now. I remember the shirt he had on. R. 64.

...

Q. Um-huh.

A.—through my training and experience, ...I immediately took my black glove and pulled open the shirt pocket so I can observe it with my vision, visually observe it. From that point, my training and experience I knew that it was some alleged illegal controlled substance inside of his pocket.

Q. I see. You just took your finger and opened in and looked down in there–

A. Yes, sir.

Q. **Is that right? And then Corporal Bridges came out and struck his camera down there to look down in there; is that right?**

A. **He just took a photograph of it as I pulled it apart, as I pulled his shirt pocket open like in the State Exhibit S-1(a).** R. 66-67. (Emphasis by Appellee).

Officer Joseph Wide, who was present during the search, also testified that he recognized S-11 as the shirt that Jenkins was wearing when he was arrested.

Q. **If you remember, what was the defendant wearing that day?**

A. **He was wearing–It was like a dress shirt. It was kind of grayish white looking with a pocket on the front of it.**

Q. I'm going to show you what has been marked for identification as State's S-11. Do you recognize that item?

A. Yes, sir.

Q. **How did you recognize that item?**

A. **This is the shirt that he was wearing.** R. 102. (Emphasis by Appellee).

Officer Leroy Austin, the Coahoma County jailer, testified that he was the day jailor. R. 120-126. A movement sheet is filled out and stored for each inmate It indicates in what bin, a steel basket container, the inmates' clothes and other personal possessions are stored. The inmate is only allowed to keep his own underwear and socks. This included Mr. Jenkins. His movement sheet was introduced into evidence as State's exhibit 13. R. 124. That movement sheet indicated that Jenkins clothes were stored in bin 95.

Q. Okay. Whose movement sheet is that?

A. This is Carlos Jenkins.

Q. **Okay. If you know, was any clothing taken from Decarlos Jenkins when he was booked in?**

A. **Yes. On this bin sheet, by him having a bin number, 95, that's where his clothes were put.**

Q. Would there be any reason to assign him a bin if he didn't have any clothes?

A. No, it wouldn't. R. 122.

...

Q. All right. Are you aware of any–if any law enforcement officers accessed that bin?

A. Yes.

Q. Who was that if you know?

A. Investigator Wide and Investigator Bridges.

Q. How do you know?

A. I was the one who let them in.

Q. So you were there when they got in there?

A. Right.

Q. **To your knowledge was anyone else–did anyone else get access to that bin between–**

A. **At that particular time no.** R. 126. (Emphasis by Appellee).

Ms. Teresa Hickman with the State Crime Lab used several scientific tests to determine that the substances contained in exhibit 2 were controlled substances, cocaine and marijuana. To be more specific, they were cocaine powder, .18 grams, and marijuana , .84 grams. R. 114.

Q. All right. Based on those tests that were performed, do you have an opinion as to what those items are?

A. Yes, I do.

...

A. **OO1-A contained –it's a white powder, and it's cocaine salt, which is the powder form of cocaine, and there was .18 grams submitted to our laboratory.**

A. 001-B contained marijuana, and there was 0.84 grams submitted to the laboratory. R. 114. (Emphasis by Appellee).

The record reflects that Jenkins was identified by Officers Bridges, and Jones as the person found with apparent controlled substances in his shirt pocket. R. 57;64. Bridges did not have "any doubt" in his mind that Jenkins was wearing the shirt, exhibit S-ll admitted into evidence. R. 57; 64.

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 testimony and evidence summarized above was presented to the jury and taken as true with reasonable inferences, there was more than sufficient credible, corroborated evidence in support of the trial court's denial of all peremptory instructions. It was also sufficient evidence in support of the jury's verdict.

Officers' Bridges, Jones and Wide identified State's exhibit 11 as being the shirt that Jenkins was wearing when apparent drugs were found in his shirt pocket. R. 50; 57;64 ; 102. State's photographic exhibit 1(a) "was a true and accurate depiction of what you(Officer Bridges) saw that day."R. 48-49. Photographic exhibit 1(a) depicted what Bridges and others saw in Jenkins' shirt pocket. R. 46-48. Officer Bridges also testified that Exhibit 3, the apparent cocaine and marijuana, was taken into custody, marked, identified, and taken to the Mississippi State Crime Laboratory. R. 49. Ms. Teresia Hickman, a lab technician, testified that these two substances were found by several separate scientific tests to be cocaine, .18 grams and marijuana .84 grams. R. 114.

The prosecution identified Jenkins as the person with the apparent drugs in his pocket. R.57-58. There was no testimony about any other person in the house having any apparent drugs on their

person. R. 48. The other male was not indicted or tried with Jenkins. Therefore, testimony about other persons present along with Jenkins at the time of the search was irrelevant. The Appellee would submit that this was sufficient credible, partially corroborated evidence in support of Jenkins's conviction. It was also sufficient substantial evidence in support of the trial court's denial of all peremptory instructions.

PROPOSITION II

THERE WAS CREDIBLE, SUBSTANTIAL EVIDENCE IN SUPPORT OF DENYING A MOTION FOR A JNOV OR A NEW TRIAL.

Counsel for Jenkins argues that the trial court should have granted him a motion for a new trial. She believes, as argued under Proposition I, that the alleged break in the chain of custody for the shirt, as well as the lack of testimony about what happened to the other male present with Jenkins was sufficient to raise doubt as to the verdict against Jenkins. Appellant's brief page 8-9.

As shown under Proposition I, Jenkins was identified as the person who had apparent drugs in his shirt pocket. R. 57-58. There was also corroborated testimony about exhibit 11 being the same shirt that Jenkins was wearing when arrested. R. 50,57, 64-65, 102. There was no testimony indicating any other person in the house at the time of the search had any apparent controlled substances on their person.

It is not necessary for every person who handled evidence to testify. **Butler v. State**, 592 So. 2d 983, 985 (Miss.1991). Any alleged break in the chain of custody implicates "the weight of the evidence," not its admissibility. **Fisher v. State**, 481 So.2d 203, 225 (Miss.1985).

There was also a lack of evidence that the failure of Officer Hite to testify indicated that some substitution or tampering of evidence occurred in the instant cause. This issue will be more thoroughly briefed under Proposition III.

In **Jones v. State** , 635 So. 2d 884, 887 (Miss. 1994), the Mississippi Supreme Court stated that a motion challenging the weight of the evidence was in the trial court's discretion. However, it should be denied except to prevent "an unconscionable injustice."

> Our scope of review is well established regarding challenges to the weight of the evidence issue. Procedurally, such challenges contend that defendant's motion for new trial should have been granted. Miss. Unif. Crim. R. of Cir. Ct. Prac. 5.16. The

> decision to grant a new trial rests in the sound discretion of the trial court, and the motion should not be granted except to prevent "an unconscionable injustice." **Wetz v. State**, 503 So. 2d 803, 812 (Miss. 1987).We must consider all the evidence, not just that supporting the case for the prosecution, in the light most consistent with the verdict." **Jackson v. State** , 580 So. 2d 1217, 1219 (Miss. 1991), and then reverse only on the basis of abuse of discretion.

We have shown with cites to the record that Jenkins was identified as the same person that was arrested at 451 Garfield in Clarksdale. R. 57-58; 64. Exhibit 1(a) was identified as a true and correct representation of what was found in his shirt pocket. R. 46-48. There was corroborated testimony that exhibit 11 was the shirt Jenkins was wearing. R. 50, 57, 64-65, 102. And as we shall shown with authority under proposition III, it is not necessary to have every officer or clerk who handled evidence submitted for analysis or identification to testify in order to have the evidence admitted into evidence.

The Appellee would submit that there was sufficient partially corroborated evidence for finding that there was no "substantial injustice" involved in denying Jenkins a motion for a new trial.

PROPOSITION III

THE SHIRT JENKINS WAS WEARING WHEN APPREHENDED WAS PROPERLY ADMITTED INTO EVIDENCE.

Counsel for Jenkins believes that there was insufficient evidence for admitting into evidence the shirt Jenkins was allegedly wearing when he was arrested at his mother's house. She believes that there was insufficient evidence for doing so because there was supposedly evidence of a possible break in the chain of custody. Since the jailor who collected and stored Jenkins' shirt did not testify, she believes its admission was flawed. She believes that this was crucial since it opened up the possibility of tampering or substitution of evidence. Appellant's brief page 9-13.

To the contrary the record reflects that the trial court did not abuse its discretion in admitting exhibit 11, Jenkins' shirt into evidence. R. 170. There was sufficient, credible evidence for admitting the shirt. Failure of every person who handled evidence to testify implicates the weight to be given the evidence by the jury, not whether it should be admitted. Admissibility is left to the discretion of the trial court.

In **Robinson v. State** , 758 So.2d 480, *488 (¶ 31) (Miss. App. 2000), the appeals court relied upon **Fisher v. State, infra**. The Supreme Court held that failure "to establish all the links" in the chain of custody for evidence implicated not its admissibility, but the weight to be accorded the evidence by the jury.

> ¶ 31. The standard of review of a trial court's admission or exclusion of evidence is the abuse of discretion standard. **Thompson Mach. Commerce Corp. v. Wallace**, 687 So.2d 149, 152 (Miss.1997). Under the circumstances of the case sub judice, we find that the trial court was well within its discretion in allowing the admission of the gun into evidence. The failure of the prosecution to establish all of the links in the chain of custody implicates the weight to be accorded the evidence by the jury, not its admissibility. **Fisher v. State**, 481 So.2d 203, 225 (Miss.1985). This issue lacks merit.

Officer Bridges, Jones and Wide testified that exhibit 11 was the same shirt that Jenkins was wearing when apparent drugs were found in its pocket. R. R. 50 ; 57; 64-65; 102. While Officer Hite did not testify, it is not necessary to have "every officer who handled the evidence" testify. **Ormond, infra.** Hite was allegedly the officer who took the shirt from Jenkins at the jail in the evening when he was booked.

While Jenkins' counsel thinks that there was evidence of tampering, the record does not support this claim. Her conclusion is derived from the following premises: 1) there was no photo of Jenkins' face while actually wearing the shirt, 2) the prosecution did not call Officer Hite who took the shirt off of Jenkins at the jail and placed it in bin 95, 3) Jenkins testified that he was not wearing the shirt when arrested, and booked into jail, and there was no testimony about what happened with another male present during the execution of the search warrant..

It was not necessary to have a photo of Jenkins' face while wearing the shirt, where there was corroborated, credible testimony that this was the shirt Jenkins was wearing. R. 50 ; 57; 64-65; 102. There was also a photograph of the shirt, exhibit 1(a), and testimony that it was a true depiction of what Jenkins was wearing as well as of what was seen in his pocket at that time. R. 4.6-48. It was not necessary for Officer Hite to testify, where there was testimony that "standard operating procedures" were followed. The record reflects that there was no evidence that anyone other than Officers Bridges and Wide had access to the shirt once it was placed in bin 95. R. 126.

According to Jenkins he was wearing a gray shirt just prior to his being arrested. R. 154. This was the shirt he wore to a job interview. But he allegedly took it off and left it in allegedly his mother's house, since he was allegedly not living there.

Jenkins' rambling and contradictory testimony merely made his credibility an issue for the jury to consider along with all the other evidence. He was contradicted by three officers testimony

and photographic evidence 1(a). R. 50 ; 57; 64-65; 102.

Officer Austin testified that the movement sheet, exhibit 13, indicated that the clothes Jenkins was wearing when arrested were placed in bin 95. Officer Bridges testified that he brought the shirt contained in bin 95 to the court room. R. 167-168.

In **Wilburn v. State** 856 So. 2d 686, *689 (Miss. App. 2003), the Court relied upon **Wells v. State, infra.**, in finding that the burden was on the defendant for showing tampering. In that case, as the instant cause, testimony from officers as to where the evidence was at all times was sufficient. This testimony included evidence about the collection, storage, and removal of evidence in preparation for its introduction into evidence It was sufficient to have testimony about who had the evidence and where it was located at all times.

> ¶ 9. A defect in a chain of custody arises if there is any suggestion of tampering or substitution of evidence. **Wells v. State**, 604 So.2d 271, 277 (Miss.1992). The test for improper chain of possession of evidence is whether there is any reasonable inference of likely tampering with or substitution of evidence. **Williams v. State**, 794 So.2d 181, 185 (¶ 10) (Miss.2001). The burden of proof in establishing tampering with evidence is on the defendant. Id. In this case, Wilburn did not present any evidence that the tape was tampered with. While the envelope the tape was placed in did not have the metal tab, the envelope was not placed in evidence. Furthermore, the testimony of the officers provided the jury with information of who had the tape and where the tape was located at all times. Therefore, we find that there was no abuse of discretion by the trial court.

The prosecution presented testimony indicating that standard operating procedures were followed for Jenkins' belongings, including his clothing and shirt. His clothing was collected when he was arrested and booked. His movement sheet indicated that they were placed in bin 95. See "inmate movement sheet," exhibit 13, in manila envelop marked "Exhibits." The shirt, exhibit 11, was brought to court from that bin and identified by three officers prior to its being admitted into evidence. .

Officer Ricky Bridges with the Clarksdale Police Department testified that he did not have

"any doubt" that state's exhibit 11 was the gray shirt that Jenkins was wearing when drugs were found in its front pocket. R. 58. Bridges testified that he participated in the search at 451 Garfield Street on October 11, 2006. Bridges identified a grey shirt, exhibit 11, as appearing to be the same shirt that Bridges was wearing when drugs were found in the pocket. R. 51. Bridges testified that the shirt was not seized at the arrest. However, he photographed the apparent drugs in the shirt pocket, exhibit-1(a). He testified that it was a true and accurate depiction of what he saw in Jenkins pocket that day. R. 46 - 48. See State's Exhibit 1(a) in manila envelop marked Exhibits.

> Q. **Is there any doubt in your mind as to whether or not he was wearing that shirt that day?**
>
> A. **No doubt.** R. 57-58. (Emphasis by Appellee).

Officer James Jones testified that Jenkins was wearing a grayish shirt with a front pocket. What appeared to be packaged drugs were found in the shirt pocket. He identified S-11 as being the shirt Jenkins had on when he was arrested.

> Q. How did you recognize that item?
>
> A. That is the grayish type shirt that was on October 11th, that was--the evidence was located inside of this pocket of this shirt/
>
> Q. **So where was the shirt at the time you searched it?**
>
> A. **It was on Mr. Jenkins person, on his body is where.** R. 64-65. (Emphasis by Appellee).

Officer Joseph Wide testified that he recognized S-11 as being the grayish shirt that Jenkins was wearing when searched for drugs and then arrested. R. 102.

> Q. **How do you recognized that item?**
>
> A. **This is the shirt that he was wearing.** R. 102. (Emphasis by Appellee).

Sergeant Leroy Austin testified that he was a supervisor who ran the jail during the day. R.

120. Austin was responsible for booking inmates into jail, collecting their clothing and other personal items, and then issuing them jail clothing. Each inmate received "a movement sheet." On that sheet the number of the bin in which the inmate's clothing is contained is recorded. In Jenkins case his bin was 95. R. 122. The bins were contained in a property room which was kept locked. R. 124.

Austin testified that Officers Bridges and Wide had access to Jenkin's bin because he had let them into the property room. R. 125. See copy of "Inmate Movement Sheet" , exhibit 13. found in manila envelop marked Exhibits. It shows at the top of the page that officer Wide and Bridges had access to bin R. 95. Austin also testified there was no evidence that anyone other than Bridges and Wide had access to bin 95 and its contents prior to the shirt being presented in court. R. 126.

> Q. Okay. If you know, was any clothing taken from Decarlos Jenkins when he was booked in?
>
> A. Yes. On this bin sheet, by him having a bin number, 95, that's where his clothes were put.
>
> Q. **Would there have been any reason to assign him a bin if he didn't have any clothes?**
>
> A. **No, it wouldn't.** R. 123. (Emphasis by Appellee).
>
> ...
>
> Q. **To your knowledge was anyone else–did anyone else get access to that bin between–**
>
> A. **At that particular time no.** R. 126. (Emphasis by Appellee).

> Kirkham: Your Honor, we have testimony as to the standard operating procedure for every person who is processed into that jail, and with the exception of their underwear, every piece of clothing is taken from every inmate who is processed into that jail. An inmate movement sheet is assigned, just as it was assigned in this case, and the property is tracked to a specific bin.
>
> Court: All right. I've heard enough. Y'all go back. I'm going to receive the shirt. R.

170-171.

In **Ormond v. State** 599 So.2d 951, *959 (Miss.1992), the Supreme Court pointed out that the Court had never required "every handler of the evidence" to testify in order to support its admission into evidence. It was only necessary for the proponent to show that the evidence was "what its proponent claims" it was. M. R. E. 901(a).

> The rule of evidence governing the requirement of authentication or identification holds that the: "condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Miss. R. Evid. 901(a). The advent of the current rules of evidence has not changed the rule that "the proponent must satisfy the trial court that there is no reasonable inference of material tampering with or (deliberate or accidental) substitution of the evidence"; this state's law has never required a proponent of evidence to produce every handler of the evidence. **Butler v. State**, 592 So.2d 983, 985 (Miss.1991).
>
> This case presents no evidence of alteration or substitution or tampering with the gonorrhea test at any time. Under the abuse-of-discretion standard, although the chain may not have been thoroughly demonstrated, in the absence of any contention of alteration or tampering, the trial court did not abuse its discretion in admitting the laboratory results of the gonorrhea test.

The Appellee would submit that the evidence indicates that the prosecution met its burden of proof. There was sufficient testimony for showing that the shirt was what the prosecution claimed it to be. It was the shirt that Jenkins was wearing when arrested. Jenkins did not meet his burden of proof for establishing evidence of tampering or substitution of evidence. Therefore, this issue is also lacking in merit.

PROPOSITION IV

THE RECORD REFLECTS THAT JENKINS ESCAPED AND COULD NOT BE FOUND FOR SENTENCING.

Jenkins' appeal counsel believes that the trial court should not have sentenced Jenkins in absentia. He should not have done so because there was allegedly insufficient evidence that Jenkins had "intentionally" absented himself from the court at the time appointed for sentencing. Appellant's brief page 13-15.

To the contrary, the record indicates the trial court did not err during sentencing. The trial court found that Jenkins had "intentionally" absented himself from sentencing by escaping from the custody of the Coahoma Sheriff's Office. The trial court based this upon sworn "affidavits." The District Attorney corroborated the absence of Jenkins for the record. Jenkins' counsel was present and further corroborated that he did not know where Jenkins was. R. 5.

The trial court stated for the record that Jenkins had "escaped" from custody..

> Subsequent to the defendant's conviction, it was made known to the Court–I'll permit the Assistant District Attorney to further–make further comment on the matter, but it was made known to the court that Mr. Jenkins has escaped his custody from the Coahoma County jail, and his whereabouts continue to be unknown to the Court at this time. The defendant's attorney, Mr Allan Shackleford, is before the court.
>
> Kirkham: Well, your Honor, everything that I would offer would be essentially hearsay from the Sheriff's department , but it's my understanding of Mr Jenkins, the defendant, was in the custody of the Coahoma County Sheriff's Department after the adjudication of guilty in his trial, and that sometime after that, he escaped custody, and that a search is still ongoing for him, but that his current whereabouts are not known.
>
> Court: **Let me just inquire, Mr. Shackleford. I won't ask you where the defendant might be at this time, but do you know the whereabouts of Mr Jenkins?**
>
> Shackelford: **No, I do not.** I have not had occasion to seek-to confer with him since the day of the verdict. Supp. V., page 4-5. (Emphasis by Appellee)

> ...the Court was advised by members of law enforcement, including members of the Coahoma County Sheriff's Department, that Mr Jenkins and, I think, one or two other individuals had escaped custody, and since such, time, **the court has been presented and has signed various orders and search warrants with affidavits attached thereto as concerns efforts by law enforcement to locate and obtain custody of Mr. Jenkins.** It's the Court's current understanding all those efforts at this time have been to no avail, and not withstanding the Defendant's objection, the court is going to proceed with the sentencing and the Court's understanding,...**that Mr Jenkins is not in custody but voluntarily left the custody of the Sheriff's Department, as a such, has voluntarily waived his right to be present at these proceedings.** R. 6-7. (Emphasis by Appellee)

In **Clark v. State** , 503 So. 2d 277, 280 (Miss. 1987), this Court stated there is a presumption that a trial court's judgement is correct. The burden is upon an appellant to prove otherwise.

> We have held, "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." **Branch v. State**, 347 So. 2d 957, 958 (Miss. 1977). 'It is the duty of counsel to make more than an assertion, they should state reasons for their propositions, and cite authorities in their support...' **Johnson v. State**, 154 Miss. 512, 122 So. 529 (1929).

In **Jefferson v. State** 807 So.2d 1222, *1226 -1227 (Miss.2002), the Supreme Court found that where a defendant voluntarily, and willfully absents himself, he can be sentenced "in absentia." In that case, there was evidence that Jefferson was aware of the date of his trial, as well as that he absented himself because he was attempting to avoid being tried and possibly found guilty.

> ¶14...These facts demonstrate that Jefferson was well aware of the date his trial was set. Beyond that, the most glaring evidence of Jefferson's deliberate intent to evade justice was the unrefuted testimony of Andrea Dillon, his long-time acquaintance, that Jefferson had informed him of his plan to run and avoid trial. Thus, as the trial court found, Jefferson "knowingly, willingly, freely, voluntarily and intentionally ... absented himself from a trial in this cause without reason or justification after receiving proper and direct notification of the date, place and time of his trial, all for the specific purpose of escaping prosecution."
>
> ¶ 15. The trial court also found that Jefferson suffered no prejudice due to his willful absence. The State asserts that this finding is supported by the fact that while Jefferson was indicted for possession of 119 grams of marihuana with the intent

*1227 to distribute, he was only found guilty by the jury of the lesser-included offense of simple possession. We agree that Jefferson suffered no prejudice due to his absence.

¶ 16. Jefferson also asserts that Article 3, Section 26 of the Mississippi Constitution guarantees his right to be present at his trial, to be heard at his trial, and to be confronted by the witnesses against him, that the Sixth Amendment to the United States Constitution guarantees his right to an impartial jury and to be confronted with the witnesses against him, and that the Fourteenth Amendment to the United States Constitution guarantees that he shall not be deprived of his liberty without due process of law.

¶ 17. There is a long history of precedent for the constitutionality of trial in absentia under § 99-17-9 clearly established by this Court. See **Thomas v. State**, 117 Miss. 532, 78 So. 147 (1918); **Williams v. State**, 103 Miss. 147, 60 So. 73 (1912). As for Jefferson's contentions that his being tried in absentia violates the U.S. Constitution, there is no support for this claim. The United States Supreme Court has held that it is proper to continue a trial where the defendant has fled after trial has commenced. **Taylor v. United States**, 414 U.S. 17, 94 S.Ct. 194, 38 L.Ed.2d 174 (1973). As for cases where the defendant has not been present at any point during the trial, while the United States Supreme Court has ruled that proceeding with trial in such a case is not allowed under Rule 43 of the Federal Rules of Criminal Procedure, it specifically refrained from deciding whether such action would violate the Constitution. **Crosby v. United States**, 506 U.S. 255, 113 S. Ct. 748, 122 L. Ed.2d 25 (1993).
¶ 18. By our ruling today, we do not overrule **Sandoval** and its progeny; rather, we carve out an exception based on willful, voluntary and deliberate actions by a defendant in avoiding trial, such as those presented here.

In that case, there was evidence that Jefferson was aware of his trial date, and that he intentionally avoided trial to avoid being judged and found guilty by his peers. In the instant cause, Jenkins attended his trial, and was found guilty upon credible, substantial evidence. R. 1-214. He was also present when the trial court granted the prosecution a continuance for sentencing. R. 214.

This continuance was needed because of the need for additional time to obtain the certified copies of Jenkins prior felony convictions. Jenkins was indicted as an habitual offender under M. C. A. §99-19-83. C.P. 2.

The record cited indicates that the trial court found based upon sworn affidavits as well as from testimony of both the prosecution and defense that Mr. Jenkins had escaped from custody and

could not be located. The Appellee would submit that the trial court correctly found that Jenkins had "voluntarily" absented himself from his sentencing hearing. Therefore, the trial court found that Jenkins had "waived" his right to be present at his sentencing. Supp. V, page 7.

After the hearing in his absence, the trial court found the certified copies of judgments of conviction and prison records sufficient for determining that Jenkins was an "habitual offender" under that M. C. A. § 99-19-83. C.P. 2. There was no evidence of any prejudice to Jenkins by his not being present for sentencing. **Jefferson, supra,** ¶15.

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

PROPOSITION V

JENKINS' SENTENCE AS AN HABITUAL OFFENDER WAS JUSTIFIED UNDER THE CIRCUMSTANCES.

Jenkins' appeal counsel believes that his life sentence without parole was excessive. Although she admits that Jenkins had prior offenses, she does not think them serious enough to warrant such an harsh sentence. She believes that the trial court should have conducted "a proportionality review" prior to sentencing him. This was based upon what she considers to be the small amount of cocaine found in his pocket. Appellant's brief page 15-19.

To the contrary, the record reflects that after a hearing, Jenkins was found to be a M. C. A. § 99-19-83 habitual offender. Supp. V, page 17. There was no evidence that a life sentence for possession of cocaine was a "grossly disproportionate" sentence.

In **Oby v. State** 827 So. 2d 731, *734 -735 (Miss. App. 2002), relied upon by appellant counsel, the Court used the Supreme Court case of **Wall, infra**, to reject Oby's request for proportionality analysis. The Court found that Oby as a 99-19-83 habitual offender convicted of "possession of cocaine" was not entitled to a proportionality analysis.

The Court also pointed out that "the proportionality analysis" in **Clowers** was the "exception not the rule." Rather the general rule is that "if the sentence does not exceed the maximum provided by statute it will not be disturbed."

> ¶ 9. This Court has noted that **Clowers** is "not the rule, but the exception." **Bell v. State**, 769 So.2d 247, 252 (¶ 12) (Miss. Ct. App.2000). "As a general rule, a sentence that does not exceed the maximum period allowed by statute will not be disturbed on appeal." Id. at (¶ 9).
>
> ...
>
> ¶ 12. Oby contends that life imprisonment is grossly disproportionate punishment for mere possession of cocaine. This contention is thwarted by the scope of *735 the proportionality inquiry. The correct proportionality analysis for a habitual offender sentence does not consider the present offense alone, but within the habitual

offender statute. **Bell**, 769 So.2d at 251 (¶ 9) (citing **McGruder v. Puckett**, 954 F.2d 313, 316 (5th Cir.1992)). Oby's situation parallels the Wall case. Both Wall and Oby were convicted for possession of a controlled substance and sentenced as habitual offenders because of prior convictions for one violent felony and one non-violent felony. On its threshold inquiry, the Wall court found that the sentence of life without parole was not grossly disproportionate to a habitual offender's crime of possession of a controlled substance. **Wall**, 718 So.2d at (¶ 30). Oby's claim is without merit.

In **Jones v. State** 902 So.2d 593, *603 (Miss. App. 2004), the Appeals Court found no need for a proportionality review of Jones sentence. He was found, like Jenkins, to be a 99-19-83 habitual offender with two prior offenses, one a crime of violence.

> ¶ 42. Jones next argues that the trial court erred in invoking a sentence grossly disproportionate to the crime of which he was charged. As already observed, Jones was convicted of robbery. At the sentencing hearing, the State presented evidence that Jones had been previously convicted of attempted robbery in 1979, automobile burglary in 1981, and grand larceny in 1990. The State further affirmed that Jones had served at least a year on each conviction. The circuit court found that Jones was an habitual offender under section 99-19-83 for sentencing purposes. Shortly thereafter, counsel for Jones argued that the sentence under section 99-19-83 was disproportionate with the crime of which Jones was convicted and urged that the court conduct a proportionality analysis. After hearing rebuttal arguments from the State, the circuit judge commented, "The Court is of the opinion that the facts of this case do not even rise to the necessity of a proportionality review ... there's no inference that the sentence is disproportionate given the fact that this defendant has four felony convictions, two of those being crimes of violence...."
>
> ¶ 43. We agree with the circuit court. Therefore, we find no merit in this issue, as all requirements of section 99-19-83 were met. Moreover, Jones presented no evidence to justify the invocation of a proportionality analysis. **While the sentence Jones received is indeed harsh for the offense he committed, the Mississippi Legislature has determined that the sentence Jones received is a proper sentence for an habitual offender. It is not up to us to change the sentencing scheme. That responsibility lies exclusively with the legislature.** (Emphasis by Appellee).

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

PROPOSITION VI

THE RECORD REFLECTS THE JURY WAS PROPERLY INSTRUCTED.

Appeal counsel believes that the trial court improperly allowed the jury to receive an alleged abstract circumstantial evidence instruction, instruction C-11, which she believes was an attempt at providing a definition for the jury. She believes that this instruction may have mislead the jury. Appellant's brief page 19-20.

To the contrary, the record reflects that the jury was properly instructed. Instruction C-11 was granted along with a host of other instructions including instruction C–10 on constructive possession. C.P. 22-37.

The record reflects that there was never any specific objection by Jenkins' counsel that C-11 was "an abstract instruction." The only objection was that the instruction "goes beyond the law."

> Shackelford: I'm going to object to these examples, Judge. **I believe it goes beyond the law.** R. 191. (Emphasis by Appellee).

The record also reflects while the granting of jury instruction C-11 was included in a motion for a JNOV, there was no statement of the specific grounds for why this was alleged error by the trial court. C.P. 13.

In **Haddox v. State**, 636 So. 2d 1229, 1240 (Miss. 1994), the Court stated without an objection on the same grounds argued on appeal the issue was 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);...

In **Kitchens v. State** 300 So.2d 922, *925 (Miss. 1974), the Court found that the granting of what the defense regarded as an abstract instruction was not error. It was granted along with other

instructions applicable to the evidence presented in that case. There was a lack of evidence that the jury was mislead by the said instruction when taken along with the others instructions granted.

The trial court granted the following jury Instruction No. 5 for the State of Mississippi:

> 'The Court instructs the jury for the State of Mississippi that malice aforethought mentioned in the indictment in this case may be presumed from the unlawful and deliberate use of a deadly weapon.'
>
> Appellant says this instruction is an abstract statement of the law and should not have been granted.
>
> The appellant is correct in that this Court has often condemned abstract jury instructions. In most instances appearing in the records of this Court, the trial court refused abstract instructions, as was the case in **Browning v. State**, 30 Miss. 656 (1856). In **Kidd v. State**, 258 So.2d 423 (Miss.1972), this Court did point out that an abstract instruction granted the state was an error. However, there were other errors in that case for which the case was reversed. The general rule in regard to abstract instructions has been succinctly expressed in 26 Am. Jur. Homicide s 517, at 515-16 (1940), wherein it is stated:
>
> 'The court is not bound and should not be bound to instruct the jury respecting the abstract rules of the law of homicide, but only respecting the principles applicable to the evidence of killing in the case at bar, but the giving of an abstract instruction is a cause for reversal only when it is reasonably apparent that the jury has been misled.' (Footnotes omitted).
>
> [1] We are unable to say from this record that it is reasonably apparent that the jury was misled by the instruction.

In **Taylor v. State**, 597 So. 2d 192, 195 (Miss. 1992) this Court stated that the trial court's instructions must be taken together and need not cover every point of importance as long as the point is fairly presented elsewhere.

> Our well settled rule is that on appeal we consider complaints of error in jury instructions by reading the instructions as a whole. All instructions "are to be read together and if the jury is fully and fairly instructed by other instructions the refusal of any similar instruction does not constitute reversal error." **Laney v. State**, 486 So. 2d 1242, 1246 (Miss. 1986). Not every instructions need cover every point of importance, so long as the point is fairly presented elsewhere.
>
> In **Keys v. State** 478 So.2d 266, *268 (Miss. 1985), the Court found that there was no need

for an instruction that Keys must be found guilty beyond a reasonable doubt and to the exclusion of every reasonable inference consistent with innocence. There was evidence that Keys had five grocery bags of marijuana in his bathroom. This was more than one would use for personal consumption, and he was in possession it in his home.

While there was no confession, the court found the possession of the five bags, under those circumstances, direct evidence of Keys' guilt and therefore no "exclusion of every reasonable inference consistent with innocence" instruction was required. The Court found that . constructive possession can be established by direct evidence, circumstantial evidence or a combination of the two, as it was in the instant cause. There was no burden to establish actual physical possession.

> Here there is no proof here that Albert Keys was physically holding the marijuana and in this sense it cannot be denied that inference is necessary to move from the evidence that Keys occupied and inhabited the apartment and had dominion and control over it, coupled with the presence of the five grocery bags of marijuana in the bathroom, to the conclusory fact that Keys possessed the marijuana. The inference is a short one, one which in an analogous context of years gone by did not hinder this Court's holding that, when intoxicating liquor was found on search of a residence of an accused who was the head of a family residing in the home, a prima facie case of possession by him had been made. **Peeples v. State**, 216 Miss. 790, 798, 63 So.2d 236 (1953); **Williamson v. State**, 191 Miss. 643, 646, 4 So.2d 220, 221 (1941).
>
> [2] Today's riddle is resolved by getting well in mind what it is that the State is expected to prove-and then asking whether this has been established by direct or circumstantial evidence. Here the State is not required to prove actual physical possession. The positive law of this state declares it unlawful for one to have constructive possession of an illegal controlled substance with intent to sell. Martin v. State, 413 So.2d 730, 732 (Miss.1982); **Curry v. State**, 249 So.2d 414, 416 (Miss.1971). An item is within one's constructive possession when it is subject to his dominion or control. Constructive possession may be established by direct evidence or circumstantial evidence.

The jury in the instant cause was instructed under jury instruction C-1 that were to draw "such reasonable inferences from the evidence" as seen justified in light of their common experience.

They were instructed not to single out one instruction but to take the instructions together as a whole. They were to judge "the credibility" of the witnesses and "what weight" to infer from their testimony.

> You are not to single out one instruction alone as stating the law but you must consider these instruction as a whole. C.P. 22.
>
> ...As sole judges of the facts in this case, you are to determine what weight and what credibility will be assigned the testimony and supporting evidence of each witness in this case. You are required and expected to use your good common sense and sound honest judgment in considering and weighing the testimony of each witness who has testified in this case. The evidence which you are to consider consists of the testimony and statements of the witnesses and the exhibits offered and received. **You are also permitted to draw such reasonable inferences from the evidence as seem justified in the light of your experience...** C.P. 23. (Emphasis by Appellee).

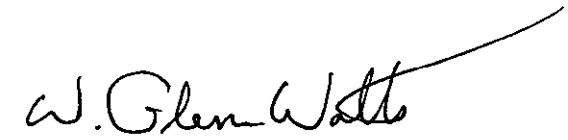
The Appellee would submit that when the jury instructions were taken together as a whole, the record reflects that the jury was properly instructed. C-11 was not given in isolation but was given along with C-1, on taking the instructions together as a whole, C-10, on constructive possession, and the instruction on the elements for possession of cocaine. The Appellee would submit that this issue is also lacking in merit.

CONCLUSION

Jenkins' conviction and sentence should be affirmed for the reasons cited in this brief.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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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 30th day of January, 2008.

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