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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JUREKA BROWN — APPELLANT

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SUPREME COURT
COURT OF APPEALS

VS. — NO. 2007-KA-0420

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

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JUREKA BROWN **APPELLANT**

VERSUS **NO. 2007-KA-0420**

STATE OF MISSISSIPPI **APPELLEE**

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STATEMENT OF THE CASE

Procedural History

Jureka Brown was convicted in the Circuit Court of Marion County on a charge of sale or transfer of a controlled substance within 1500 feet of a church and was sentenced to a term of 60 years in the custody of the Mississippi Department of Corrections with 45 years to serve and 15 years suspended. (C.P.49-51) Aggrieved by the judgment rendered against him, Brown has perfected an appeal to this Court.

Substantive Facts

Commander Bobby Patterson of the Pearl River Basin Narcotics Task Force testified that on February 8, 2002, he "met with an undercover police officer and a confidential informant," Donna Davis and Irvin Powell, respectively. Powell was searched and provided with an undercover vehicle, which was wired "for audio and video." Officer Davis was given money to buy illegal drugs. According to the plan, Officer Davis and Mr.

Powell went to the residence of Jureka Brown and Chastity Cranford to make the transaction. Commander Patterson provided surveillance. (T.67-73)

Mr. Powell corroborated Commander Patterson's testimony regarding the pre-buy meeting. He went on to testify that after that meeting, Officer Davis drove straight to Brown's residence. Cranford answered the knock and invited Mr. Powell in.[1] They "talked ... for a few minutes" and then walked to the back of the apartment where Brown was lying in bed watching a movie. Cranford introduced Powell to Brown, who then asked Cranford about purchasing "crack or weed." Cranford "then ... looked at Jureka and he shook his head okay." Brown handed her a set of keys and told her the substance was "in the car." (T.98-103) Mr. Powell recounted what happened next as follows:

> She [Cranford] went outside and I followed her out. I had to get the money from the agent, undercover agent.
>
> * * * * * *
>
> Went to the passenger side door of the van and told the agent that I needed the money, that it was here. She was getting it out of the car. And then she got it out and we both proceeded back inside. We went in there, she poured it out of a Newport box, cigarette box, and broke off a piece, held it up to Jureka and he said, you know, that's okay to sell.
>
> (T.103)

Cranford handed the substance to Mr. Powell, who in turn "handed her the $20." Cranford gave the bill to Brown, who "laid it beside the bed on a nightstand." Mr. Powell "talked with her [Cranford] for a few minutes and then ... left." After Mr. Powell and Officer Davis got back into their vehicle, he handed her the cocaine. Thereafter, they went back to the

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[1]Mr. Powell was married to Cranford's cousin. (T. 101)

meeting place" where Commander Patterson and Agent Mike Cooper searched him and "checked the cocaine and the audio." (T.103-05)

Officer Davis corroborated the testimony of Commander Patterson and Mr. Powell. (T.128-33)

Cranford testified that she sold the cocaine to Mr. Powell; that Brown had nothing to do with it; and that she put the $20 in her pocket. (T.147-50)

SUMMARY OF THE ARGUMENT

The verdict is based on legally sufficient proof and is not contrary to the overwhelming weight of the evidence. The state introduced substantial credible evidence that the defendant joined with Chastity Cranford in the consummation of the sale and that he was therefore guilty as a principal.

Furthermore, Brown's fourth proposition is procedurally barred by his failure to bring to the trial court's attention the alleged deficiencies in the state's proof of the sentence-enhancing factor. Alternatively, the state contends the prosecution presented legally sufficient proof that the sale occurred within 1500 feet of a church.

Finally, any arguable error in the court's resolution of the sentence-enhancing factor is harmless beyond a reasonable doubt. No rational jury would have made a finding other than the one rendered by the trial court on this uncomplicated issue.

PROPOSITION ONE:

THE VERDICT IS BASED ON LEGALLY SUFFICIENT PROOF AND IS NOT CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE

Under his Propositions 1 and 2, Brown challenges the sufficiency and weight of the evidence undergirding his conviction. To prevail on the assertion that he is entitled to a judgment of acquittal, he must satisfy the following formidable standard of review:

> When on appeal one convicted of a criminal offense challenges the legal sufficiency of the evidence, our authority to interfere with the jury's verdict is quite limited. We proceed by considering all of the evidence--not just that supporting the case for the prosecution--in the light most consistent with the verdict. We give [the] prosecution the benefit of all favorable inferences that may reasonably be drawn from the evidence. If the facts and inferences so considered point in favor of the accused with sufficient force that reasonable men could not have found beyond a reasonable doubt that he was guilty, reversal and discharge are required. On the other hand, if there is in the record substantial evidence of such quality and weight that, having in mind the beyond a reasonable doubt burden of proof standard, reasonable and fair-minded jurors in the exercise of impartial judgment might have reached different conclusions, the verdict of guilty is thus placed beyond our authority to disturb.
>
> *Manning v. State*, 735 So.2d 323, 333 (Miss.1999), quoting *McFee v. State*, 511 So.2d 130, 133-34 (Miss.1987).

Furthermore,

> The jury is charged with the responsibility of weighing and considering conflicting evidence, evaluating the credibility of witnesses, and determining whose testimony should be believed. [citation omitted] The jury has the duty to determine the impeachment value of inconsistencies or contradictions as well as testimonial defects of perception, memory, and sincerity. *Noe v. State*, 616 So.2d 298, 302 (Miss.1993) (citations omitted). **"It is not for this Court to pass upon the credibility of witnesses and where evidence justifies the verdict it must be accepted as having been found worthy of belief."** *Williams v. State*, 427 So.2d 100, 104 (Miss.1983).

(emphasis added) *Ford v. State*, 737 So.2d 424, 425 (Miss. App. 1999).

See also *Jackson v. State*, 580 So.2d 1217, 1219 (Miss.1991) (on appellate review the state "is entitled to the benefit of all favorable inferences that may reasonably be drawn from the evidence"), and *Noe*, 616 So.2d at 302 (evidence favorable to the defendant should be disregarded). Accord, *Harris v. State*, 532 So.2d 602, 603 (Miss.1988) (appellate court "should not and cannot usurp the power of the fact-finder/ jury"). "When a defendant challenges the sufficiency of the evidence to support a conviction, the evidence which supports the verdict is accepted as true by the reviewing court, and the State is given the benefit of all reasonable inferences flowing from the evidence." *Dumas v. State*, 806 So.2d 1009, 1011 (Miss. 2000).

This rigorous standard applies to the claim that Brown is entitled to a new trial:

> The standard of review in determining whether a jury verdict is against the overwhelming weight of the evidence is well settled. "[T]his Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial." *Dudley v. State*, 719 So.2d 180, 182(¶ 8) (Miss.1998). On review, the State is given "the benefit of all favorable inferences that may reasonably be drawn from the evidence." *Griffin v. State*, 607 So.2d 1197, 1201 (Miss.1992). "Only in those cases where the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal." *Dudley*, 719 So.2d at 182 . "This Court does not have the task of re-weighing the facts in each case to, in effect, go behind the jury to detect whether the testimony and evidence they chose to believe was or was not the most credible." *Langston v. State*, 791 So.2d 273, 280 (¶ 14) (Miss. Ct. App. 2001).
>
> *Smith v. State*, 868 So.2d 1048, 1050-51 (Miss. App. 2004),

Furthermore,

> The jury is charged with the responsibility of weighing and considering conflicting evidence, evaluating the credibility of witnesses, and determining whose testimony should be believed. [citation omitted] The jury has the duty to determine the impeachment value of inconsistencies or contradictions as well as testimonial defects of perception, memory, and sincerity. *Noe v. State*, 616 So.2d 298, 302 (Miss.1993) (citations omitted). **"It is not for this Court to pass upon the credibility of witnesses and where evidence justifies the verdict it must be accepted as having been found worthy of belief."** *Williams v. State*, 427 So.2d 100, 104 (Miss.1983).
>
> (emphasis added) *Ford v. State*, 737 So.2d 424, 425 (Miss. App. 1999).

It has been "held in numerous cases that the jury is the sole judge of the credibility of the witnesses and the weight to be attached to their testimony." *Kohlberg v. State*, 704 So.2d 1307, 1311 (Miss.1997). As this Court recently reiterated in *Hales v. State*, 933 So.2d 962, 968 (Miss. 2006), criminal cases will not be reversed "where there is a straight issue of fact, or a conflict in the facts..." [citations omitted] Rather, "juries are impaneled for the very purpose of passing upon such questions of disputed fact, and [the Court does] not intend to invade the province and prerogative of the jury. " [citations omitted]

Finally, in this case "[t]here was not a great deal of evidence for the fact finder to weigh since the defendant did not testify." *White v. State*, 722 So.2d 1242, 1247 (Miss.1998). The defendant's failure to do so left the jury free to give "full effect" to the testimony of the state's witnesses. *Id.*

We incorporate by reference the proof set out in our Statement of Substantive Facts to support our position that the prosecution presented substantial credible evidence of Brown's guilt of sale or transfer of cocaine. A person "is guilty of the sale or transfer of a controlled substance" is he is "personally present at a drug transaction and aids and abets

the sale" even if he "never has control of the drug and receives no remuneration or consideration." *Bingham v. State*, 723 So.2d 1193, 1196 (Miss. App. 1998), citing Johnson v. State, 642 So.2d 924, 927 (Miss. 1994). Accord, *Hollins v. State*, 799 So.2d 118, 121-22 (Miss. App. 2001). Here, the state presented evidence that Brown was present when Powell inquired about purchasing drugs; that Cranford "looked at Jureka and he shook his head okay"'; that Brown then handed her a set of keys and told her the substance was "in the car." Cranford retrieved the cocaine and, back inside the apartment, showed it to Brown, who indicated his approval of the sale. Still in Brown's presence, Cranford handed the substance to Powell, and Powell handed a $20 bill to Cranford, who in turn gave it to Brown. These facts provided substantial credible proof that Brown constructively sold cocaine to Powell. See *Hollins*, 799 So.2d 118 at 121. No basis exists for disturbing the jury's verdict. Brown's first and second propositions should be denied.

PROPOSITION TWO:

BROWN'S FOURTH PROPOSITION IS PROCEDURALLY BARRED; IN THE ALTERNATIVE, THE STATE SUBMITS THE PROSECUTION PRESENTED LEGALLY SUFFICIENT PROOF THAT THE SALE OCCURRED WITHIN 1500 FEET OF A CHURCH[2]

Brown's final argument is that the evidence was insufficient to show the transaction occurred within 1500 feet of a church. The state counters first that Brown made no challenge to the adequacy of the state's proof after the hearing on this issue and interposed no objection to the court's finding and sentencing. (T.205-11) Because he failed to point out the alleged deficiencies to the trial court, he cannot be heard to do so for

[2]Because our response to Brown's third proposition will require reference to our response to his fourth, we address Brown's fourth issue at this juncture for the sake of convenience.

the first time here. *Moore v. State*, 958 So.2d 824, 831 (Miss.2007); *Foster v. State*, 928 So.2d 873, 881 (Miss. 2005); *Banks v. State*, 394 So.2d 875, 877 (Miss. 1981). His fourth proposition is procedurally barred.

Solely in the alternative, the state submits Commander Patterson testified that he had personally measured the distance in question with "a measuring device that has two wheels on it, a foot marker... " In his words, "I got as close as I could to the center of the front door on the apartment, of his [Brown's] apartment. And I walked north until I got to the center of the front of the church building." He had determined the distance to be "[a]pproximately 720 feet." When the court told him that this matter was "very vital" and pressed him to be more specific, he clarified that the distance was 720 feet, giving or taking only two or three feet either way. (T.200-03)

On cross-examination, he testified that while he did not "check and see if it was active," the church appeared to be "open." (T.203-04) On redirect examination, he testified that the grounds of the church appeared to be maintained; that the windows were not boarded up; and that the parking lot "seemed like it was kept up ... " The church was in a state of repair and there was no indication that it had been abandoned. (T.204-05)

The defense rested without presenting evidence. The court then found in pertinent part "that this sale or transfer of the controlled substance took place within 1,500 feet of Columbia Seventh Day Adventist Church." (T.206) This finding is supported by substantial credible, uncontroverted evidence. Commander Patterson testified unequivocally that he had measured the distance himself and found it to be 720 feet, giving or taking only two or three feet in either direction, thus putting the span at well under one half of the statutory 1500 feet. He also testified that the church appeared to be in repair, that its grounds were

maintained, its windows were not boarded up and it did not appear to be abandoned. The defense put on no proof to the contrary.

In *Jones v. State*, 791 So.2d 891, 895 (Miss.App.2001), the undercover officer testified that she "drove off" the distance between the location of the sale and a nearby church and that she knew the distance was within 1,500 feet. The Court of Appeals denied a challenge to the sufficiency of proof of the enhancing factor. Much more definite proof was presented here. See also *Johnson v. State*, 904 So.2d 162, 167 (Miss. 2005) (rejecting argument that the state had failed to prove the church in question housed an active congregation); *Anderson v. State*, 749 So.2d 234 , 237 (Miss.1999).

The state presented substantial proof that this sale occurred within 1500 feet of a church. Brown's fourth proposition should be denied.

PROPOSITION THREE:

ANY ARGUABLE *APPRENDI* ERROR IS HARMLESS UNDER THE CIRCUMSTANCES PRESENTED HERE

Immediately prior to the seating of the jury, the following was taken in chambers:

> MR. IRVIN: Are we going to go on record at some point before we get started as to the exclusion of the enhancement?
>
> THE COURT: Yeah. Let the record show that the case of Willie Lee Williams A/K/A Black Bill versus State of Missisippi, Number 1999-KA-01666-SCT discussed the enhanced penalty of sales within distances of schools and churches. And rightfully determined that this is an enhancement to the punishment, not an element of the crime. Unlike a felony DUI where the DUI first or DUI second are definitely elements of the crime. This is like a second or subsequent offender. Now, the Uniform Rules of Circuit and County Court only speak to enhancement based on prior convictions. But the gist of the rule, I believe, goes to any enhanced penalty. **And by agreement of the defense, State and the Court this case will be tried on the issue of whether or not Jureka Brown did, in fact, transfer or sale**

> **[sic] cocaine a Schedule II controlled substance, on the date of 8 February, 2002, in Marion County, Mississippi. And there will be no testimony or charge brought out to the jury about the possible enhancement due to the 1,500 feet of the church.** That if the jury were to find him guilty of the charge of sale or transfer of a controlled substance, then a bifurcated hearing will be held to see whether or not it was within the required distance of the church. And then and only then would the enhanced penalty be imposed. And the jury instructions will just direct the intention of the jury to sale or transfers.
>
> (emphasis added) (T.52-53)

After the verdict was returned and the jury was excused, the court proceeded to try the issue of whether the sale occurred within 1500 feet of a church. The defendant did not object to these proceedings. (T.195-96) From this record it may be concluded rationally that the defense not only acquiesced in but prompted this procedure.[3]

Citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000), Brown now asserts that he was entitled to a jury determination of the issue whether the sale transpired within 1500 feet of a church. The state cannot disagree. *Apprendi* clearly holds that fact-based sentencing enhancing factors must be resolved by the jury. 530 U.S. at 490. Moreover. we must acknowledge that while a defendant may waive his *Apprendi* rights, such waiver is valid only if he stipulates to the relevant facts or consents to judicial factfinding. *Blakely v. Washington*, 542 U.S.296, 310 (2004).

The state has found no authority for the narrow proposition that a waiver of *Apprendi* rights is not effective unless it is made personally by the defendant rather than through counsel. Assuming *arguendo* that *Apprendi* error occurred here, the state submits it clearly

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[3]Defense counsel's use of the term "exclusion" when he first broached this matter suggests that the defense, seeking to exclude the evidence of the distance between the apartment and the church, was the proponent of this course of action.

would be harmless beyond a reasonable doubt[4] under the facts presented here. In *Washington v. Recuenco*, 548 U.S. 212 (2006), the United States Supreme Court held that *Apprendi/Blakely* error is subject to harmless error analysis and would be considered harmless if it were determined that upon remand, had the sentencing factor been properly submitted to the jury, the jury would have found the element proved beyond a reasonable doubt. See also *United States v. Hollis*, 490 F.3d 1149 (9th Cir.2007).

In this case, the sentencing factor was clear-cut. The state presented substantial, uncontradicted evidence[5] that the sale occurred well within 1500 feet of a church. It is inconceivable that any rational juror would have made a finding other than the one rendered by the trial court. In light of these facts, any arguable error is harmless beyond a reasonable doubt. Brown's third proposition should be denied.

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[4]*Chapman v. California*, 386 U.S. 18, 24, (1967). See also *Thomas v. State*, 711 So.2d 867, 872 (Miss.1998) (holding that constitutional errors may be harmless where evidence of guilt is "overwhelming").

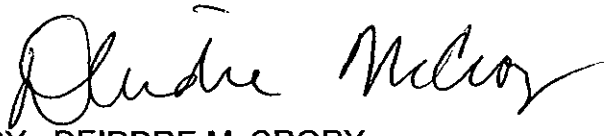
[5]Of course, it was the state's burden to prove this fact, and the defendant was not required to put on proof. The fact that he declined to do so, however, left the fact finder free to give full effect to the state's evidence. *White*, 722 So.2d at 1247. Had the jury been charged with resolving this issue, it would have had the same liberty.

CONCLUSION

The state respectfully submits that no reversible error was committed in this case. Accordingly, the judgment rendered against Brown should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL
STATE OF MISSISSIPPI



BY: DEIRDRE McCRORY
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CERTIFICATE OF SERVICE

I, Deirdre McCrory, 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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