IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JAMES RILEY A/K/A/ "BOO-LU" — APPELLANT

VS. — NO. 2007-KA-0445-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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BRIEF FOR THE APPELLEE

PROCEDURAL HISTORY:

On March 6, 2007, James Riley, "Riley" was tried for multiple counts of burglary of dwellings and trafficking by knowingly selling, delivering or transferring "two or more stolen firearms" in the Circuit Court of Attala County, the Honorable Joseph H. Loper presiding. R. 1. Riley was found guilty of two counts of trafficking in stolen firearms and given two thirty year concurrent sentences in the custody of the Mississippi Department of Corrections. R.143-144 ; C.P. 26-27. From that conviction, he appealed to the Mississippi Supreme Court. C.P. 34-35 .

ISSUES ON APPEAL

I.

WAS THIS ISSUE WAIVED AND WAS 97-37-35 (3)(C) (2006 SUPP.) UNCONSTITUTIONAL?

II.

WAS THERE CREDIBLE, SUBSTANTIAL EVIDENCE IN SUPPORT OF THE TRAFFICKING CONVICTIONS?

III.

WAS THIS ISSUE WAIVED AND WAS RILEY'S SENTENCE DISPROPORTIONATE?

IV.

WAS THIS ISSUE WAIVED AND WAS JURY INSTRUCTION 4 PROPERLY GIVEN WITH ALL THE OTHER INSTRUCTIONS?

STATEMENT OF THE FACTS

On September 5, 2006, Riley was indicted for burglaries of dwellings on or about August 2, 2006 and two counts of trafficking in stolen firearms for knowingly selling, delivering or transferring "two or more stolen firearms" on or about August 13 and 16, 2006 by an Attala County Grand jury. C.P. 2.

On March 6, 2007, Riley was tried for burglary and trafficking in stolen firearms in the Circuit Court of Attala County, the Honorable Joseph H. Loper presiding. R. 1. Riley was represented by Mr. Jim Davis Hull.

When Ms. Michelle Cheek came home from her grandmother's funeral, she testified that she found "my door kicked in." R. 29. It was the back door. See state's photographic exhibit 6 showing exterior of the Cheek home. R. 30. Exhibits 1, 2, 3 and 5 are photographs of the broken open back door to Ms. Cheek's home. R.30-31. The telephone wires "had been pulled" away from their connections on the outside wall. R. 32. See state's photograph 4 showing telephone wires pulled out of their connections. R. 32.

It was during the day, and Mrs. Cheek's husband was away working. She called the Sheriff's department. They came to investigate. Among the items found missing was a pistol. It was "an AMT 9 mm." R. 33. She identified the handgun shown in state's exhibit 22 as being a photograph of the 9 millimeter handgun stolen which was later returned. R. 34. She knew it was the same pistol because the serial numbers were the same. R. 34. This burglary occurred on August 2, 2006. R. 35.

Ms. Brenda Rosemond testified that someone had "broken into" her house. R. 39. This was on August 11, 2006. R. 38. Among the items missing was a gun. R. 39. Mr. Jerry Rosemond testified that photographic exhibit 27 was an accurate depiction of the shot gun taken from their

home. R. 42.

Mr. Martin Ickom testified that he was a long time friend of Riley's. Ickom testified that he went with Riley to the house of James and Michelle Cheek. R. 84. He pulled the phone lines out. Riley broke into the house. Riley came out of the house with exhibit 22, a handgun. R. 86. Ickom testified that Riley sold that hand gun to Mr. William Robinson. R. 86. Ickom and Riley shared the money from the sale. R. 86. See State's Exhibit 22, a photograph of a 9 millimeter handgun with the name "James Cheek" attached in manila envelop marked "Exhibits."

Mr. William Robinson testified that on August 13, 2006, "Boo-Lo", Riley, came to his house. R. 65. Riley wanted to sell him some firearms. R. 65. Robinson only had about $125.00. R. 66. Riley checked with a friend. He then agreed to sell him three guns for that amount. R. 65. Robinson knew there was a 9 millimeter and two .22 caliber handguns. He identified state's photo exhibit 22, 25, and 26 as being the three weapons he purchased on that date. R. 66.

Mr. Robinson testified that Riley returned on August 16, 2006. R. 67. When asked about buying some more guns, Riley again told him he only had about $125.00. R. 67. Riley checked with his friend. Robinson identified this friend as Ickom. Riley agreed to sell Robinson five guns for that price. R. 67. When contacted by law enforcement and questioned about the purchasing of stolen weapons, Robinson surrendered all the firearms into the police's custody. R. 69.

Officer Martin Roby testified that he recovered numerous stolen firearms from William Robinson. R. 77. Based on information provided by Robinson and others, Roby interviewed Mr. Riley. Riley told Officer Roby where a .380 caliber hand gun was located. It was "located underneath the steering column, just below the steering wheel." R. 78. This was concealed inside Ickom's car. R. 78. This .380 handgun was reported stolen from Ms. Nowell's house. R. 78.

Officer Zeely Shaw testified that he also interviewed Riley. While Riley denied knowing

about the house burglaries, he admitted to knowing where the stolen guns "had been sold." R. 108.

At the conclusion of the state's case, the trial court denied a motion for a directed verdict. R. 114. After being advised of his right to decide to testify, based upon his own decision, Riley decided not to testify. R. 115-116.

The trial court granted jury instruction S-4. R. 120. There was no objection to the granting of the instruction. R. 119-120. This was the instruction on recent possession of stolen property. The Court found that there was a basis for the instruction since there was testimony that Riley aided and abetted Ickom in stealing the property at issue. There was evidence that he came into possession of the stolen weapons in this surreptitious manner. R. 120. Jury instructions S-1 for counts 4 and 5 were also included which included knowingly, intentionally selling two or more stolen firearms to Mr. William Robinson. C.P. 9-10. Riley was given an instruction on how an accomplice's testimony must be viewed by the jury "with great caution and suspicion." C.P. 13.

Riley was found guilty of two counts of trafficking by knowingly selling, or transferring two or more stolen firearms. He was given two thirty year "concurrent" sentences in the custody of the Mississippi Department of Corrections. There was no objection to his sentences raised with the trial court on any grounds. R. 143 ; C.P. 26-27. The trial court denied a motion for a J. N. O. V. or a New Trial. C.P. 33. There was no issues raised about Riley's sentences in this post trial motion. C.P. 33.

From that conviction, Riley appealed to the Mississippi Supreme Court. C.P. 34-35 .

SUMMARY OF THE ARGUMENT

1. This issue was waived for failure to raise it with the trial court. R. 143-144; C.P. 30-31. **Patterson v. State**, 594 So. 2d 606, 609 (Miss. 1992). And contrary to Riley's argument on appeal, M. C. A. §97-37-35(3) (C) (2006 Supp.) provides sufficient notice as to what conduct is prohibited. It forbids the knowing or intentional selling of "two or more stolen firearms," which is exactly what Riley was convicted of doing based upon credible, substantial evidence.

The statute provides for enhanced sentencing where one convicted possessed "two or more stolen firearms." This sentence of "not less than fifteen" was provided by the legislature, given the serious consequences which result when stolen firearms are transferred or sold to others. Judicial review of sentences is limited to accepting the will of the people as expressed through the legislature. Since the statute does not specify an upper limit, Riley's "concurrent" sentences were arguably within the range provided by statute. The statute provides for graduated sentences from five, to ten to fifteen based upon the number of sales that have been committed, as well as for a conviction for selling where "two or more stolen firearms" are involved. M. C. A. §97-37-35 (3) (c).

2. There was credible, substantial eye witness testimony in support of the trial court's denial of a peremptory instruction, and in support of the jury's verdict. There was credible, corroborated testimony that on August 13, and 16, 2006, Riley knowingly and intentionally transferred or sold "two or more stolen fire arms" to Mr. William Robinson. R. 64-68.

Robinson identified Riley as the person who sold him multiple firearms on these two dates. R. 64. He sold him a total of some eight fire arms on these two different dates. R. 64-68. Various victims, including Ms. Cheek, Mr. Rosamond, Mr. Sims, Ms. Moorehead, and Mr. Harrell identified various photographic exhibits of firearms as being faithful depictions of those which had been stolen from their burglarized homes. This was during August, 2006. These identifiable fire arms were

returned to them by the police. R. 34; 42; 49; 55, 60.

Mr. Martin Ickom identified exhibit 22, 23, 24, 25, and 26 as being photographs of the firearms he helped steal from various homes in Attala County. R. 84-87. Ickom also identified photographic exhibits of the various houses that he and Riley had burglarized, including the Cheeks and the Sims. R. 84-88. He testified that they obtained the stolen fire arms by burglarizing various houses. This was with the aid and assistance of Mr. Riley. R. 86-90. He also identified the stolen firearms depicted in the photographs as being the same weapons Riley sold to Mr. Robinson. R. 86-95.

Mr. Ickom testified that their "modus operandi" was to visit homes during the day. They looked for houses where no one answered the door. R. 93. Ickom would tear out telephone wiring to prevent any 911 calls. R. 85; 92. Then Riley would break into the house by forcing open the doors. R. 85. Riley would then return to Ickom's car with stolen firearms, and other items, including jewelry. R. 93. Ickom also testified that Riley kept the stolen firearms at his house. They used Ickom's car for transportation when they went to sell the guns. They shared the proceeds from the sales. R. 88.; 90.

Officer Zeely Shaw testified that Riley told him he knew where the stolen guns "had been sold." R. 108. Officer Martin Roby testified that Riley told him where one of the stolen guns was "located." It was concealed "underneath the steering column in Ickom's car." R. 78. This firearm, a .350 caliber hand gun, was stolen from Ms. Glynnis Nowell's residence. R. 77-78.

3. Issues related to Riley's sentence were waived for failure to raise them with the trial court. R. 143-144; C.P. 30-31. In addition, Riley's thirty year "concurrent" sentences were within the guidelines provided by statute for one convicted of trafficking where "two or more stolen fire arms" were involved. M. C. A. § 97-37-35(3)(C). The statute provides for a sentence of "not less than

fifteen." The statute does not include an upper limit. It was therefore not cruel or unusual or disproportionate. The Mississippi legislature established this sentence, rather than the leaders of some other sovereign entity, whether state or federal.

Co-defendant Martin Ickom's thirty-two year sentence was for various burglary convictions and not for a conviction for trafficking in stolen firearms. R. 93. Since Riley's sentence was a concurrent sentence, and within the limits provided by statute there was no need for any proportionality analysis. Furthermore, as admitted by Riley's counsel, there were no other comparable state sentence with which it could be compared. Riley has no standing to complain of a "non-habitual" life sentence since he did not received one.

4. This issue was waived for failure to object to the granting of the instruction. R. 119-120. In addition, the record reflects that the jury was properly instructed. There was testimony from Mr. Ickom from which it was reasonable to infer that Riley was in possession of recently stolen fire arms. R. 84-95. There was also testimony that Riley knowingly transferred and sold to Mr. William Robinson what was determined by investigators to be recently stolen fire arms. R. 64-95.

There was also testimony from officers Roby and Shaw that Riley was knowledgeable about where a stolen gun was concealed as well as where stolen handguns had been sold. R. 77-78; 108. There was therefore evidence from which it could be inferred that Riley knew the firearms were stolen. However, Riley provided no explanation to the jury as to how he came into possession of these recently stolen fire arms.

Jury instruction S-4 on possession of recently stolen property was given along with S-1 for the elements of selling stolen weapons on August 13, 2006, count 4 and on August 16, 2006 for count 5, along with all the other instructions provided by the trial court. C.P. 3-25.

ARGUMENT

PROPOSITION I

THIS ISSUE WAS WAIVED. AND M. C.A. §97-37-35(3)(2006 SUPP.) IS CONSTITUTIONAL.

Riley's appeal counsel believes that the statute forbidding trafficking in stolen firearms is unconstitutional. He believes that it is unconstitutional because it is "vague" as to the elements, particularly the "mens rea" element. He believes it is vague as to the number of weapons required for enhanced punishment. He believes that by increasing the punishment from mere possession to trafficking based on the number of stolen weapons involved, it reduces the state's burden of proof. And finally, he believes that it provides for sentences which are "grossly disproportionate" to the criminal conduct of the perpetrators. Appellant's brief page 4-16.

The record reflects that these issues were not raised with the trial court. They were not raised during the trial, at sentencing or in any post trial motions with the court. R. 143-144; C.P. 30-31. In **Patterson v. State**, 594 So. 2d 606, 609 (Miss. 1992), the Court stated that constitutional issues not raised with the trial court were waived on appeal.

> The rule that questions not raised in the lower court will not be reviewed on appeal is particularly true where constitutional questions are involved. **Stewart v. City of Pascagoula**, 206 So. 2d 325 (Miss. 1968). These questions were waived–forfeited, if you please–if not asserted at the trial level. **Contreara v. State**, 45 So. 2d 543, 544 (Miss. 1984) [Appellant did not raise in lower court the constitutionality of statute proscribing crime against nature, and for that reason the question could not be considered on appeal].

In addition, contrary to appeal counsel's argument, the statute clearly makes it unlawful for any person to knowingly and intentionally sell, deliver, or transfer stolen firearms. Where there is evidence that one convicted possessed "two or more stolen firearms," then the statute provides for a sentence of "not less than fifteen years."

In **Davis v. State** 806 So. 2d 1098, *1102 (Miss. 2001), the Mississippi Supreme Court stated that the test for unconstitutionality for vagueness was whether " the statute defines the criminal offense with sufficient definiteness such that a person of ordinary intelligence has fair notice of what conduct is prohibited."

> ¶ 11. Although neither party has questioned the statute's constitutionality, the issue involving the proper intent for a conviction under Miss. Code Ann. § 97-41-1 forces this Court to consider whether this statute is unconstitutional for vagueness. "The test to be used in determining whether a statute is unconstitutionally vague is whether the statute defines the criminal offense with sufficient definiteness such that a person of ordinary intelligence has fair notice of what conduct is prohibited." **Lewis v. State**, 765 So.2d 493 (Miss.2000) (citing, **Posters 'N' Things, Ltd. v. United States**, 511 U.S. 513, 525, 114 S. Ct. 1747, 1754, 128 L. Ed. 2d 539, 552 (1994)); **Roberson v. State**, 501 So. 2d 398, 400 (Miss.1987).

Contrary to appeal counsel's argument, there is a lack of evidence for holding that Riley believed that he was in possession of and transferred or sold firearms which he did not know had in reality been stolen. Rather there was evidence from which it could be inferred that Riley knew that the firearms he was selling were stolen. R. 64-70. He informed investigators that he knew where a stolen weapon was hidden, as well as he knew where the weapons were sold. R.77-78; 108.

Riley is not entitled to give himself the benefit of reasonable inferences in favor of his innocence on issues never raised with the trial court.

Rather there was evidence, which we will cite more fully under proposition II, from which it could be inferred that Riley was in possession of many recently stolen firearms. R. 64-68. He was also actively involved in transferring and selling these firearms to Mr. Robinson. R. 64-68. Robinson testified that he acquired some eight fire arms from Riley. He bought the weapons on two separate occasions on August 13 and August 16, 2006.

Mr. Martin Ickom testified that he and Riley acquired these numerous firearms during a burglary crime spree in August, 2006. R.84-104. The same fire arms Ickom identified as having

been stolen were identified by the victims of the burglaries as being firearms removed from their homes during August, 2006. R. 34; 42; 49; 55, 60. Ickom testified that he and Riley sold these weapons to Mr Robinson on several occasions. R. 86-95.

Officers Roby and Shaw testified that Riley told him he knew where a stolen hand gun was concealed in Ickom's car, as well as where stolen guns had been sold. R. 77-78; 108.

Therefore, there was record evidence in support of finding that Riley not only transferred and sold more than two firearms on two occasions, but also that he did so knowing that there were stolen.

This issue was waived for failure to raise it with the trial court and the record reflects that it is also lacking in merit.

PROPOSITION II

THERE WAS CREDIBLE, SUBSTANTIAL EYE WITNESS TESTIMONY IN SUPPORT OF RILEY'S CONVICTIONS.

Riley's appellant counsel believes that there was insufficient evidence in support of his two convictions for trafficking in stolen weapons. He believes that there was inadequate evidence because the actual stolen fire arms were not introduced into evidence. Rather the only things admitted into evidence were the photographs of the various stolen weapons contained in the exhibits volume.

In addition, he believes there was insufficient evidence that Riley "knew" the fire arms were stolen. He thinks the only evidence for that conclusion came from co-defendant Martin Ickom. R. 111. He believes that Ickom's accomplice's testimony was impeached as well as unreliable. This was shown in the jury's verdict acquitting Riley of the burglaries. They did not believe the accomplices' testimony on this issue. Appellant's brief page 16-18.

To the contrary, the record reflects that there was no objection to the introduction of the

photographs of the many stolen firearms. R. 24-25. In addition, the record reflects no objection to the identification of the actual stolen guns by the victims or law enforcement by use of the mounted photographic depictions used during the trial. R. 34; 42; 49; 55; C.P. 30-31. A reviewing of the photographic exhibit evidence reveals that the serial numbers can be seen on many of the firearms. The white tags attached to the weapons also contain the serial numbers, the type of weapon, e.g. "AMT 9mm," as well as the various owners, e.g. "James Cheek."

And finally, the issue of "the authenticity" of the hand guns identified as being the same as those stolen through the use of photographic evidence was not raised during the trial or in Riley's Motion for a JNOV. C.P. 30-32.

This issue of whether the actual weapons stolen from Attala County home owners was sufficiently well established to distinguish them from some other type of imaginary weapons was therefore waived.

In **Holland v. State**, 587 So. 2d 848, 868 (Miss. 1991), this court stated that issues not raised with the trial court were waived on appeal.

> Holland also raises several related sub-issues and cites "critical occasions" when errors were allegedly committed. Holland's discussion of these issues comprises several sentences. Appellant's Brief pag 36. Holland is procedurally barred from raising these issues because he either cites support for his contention which is different from the support he cited at the trial level or he failed to raise the issue at trial. "A trial judge cannot be put in error on a matter which was not presented to him for decision." **Pruett v. Thigpen**, 665 F. Supp. 1254, 1262 (N.D. Miss. 1986); see **Read v. State**, 430 So. 2d 832, 838 (Miss. 1983)...

In addition, the argument of appeal counsel about the unreliability of the evidence in support of Riley's guilty verdict based upon the fact that Riley was not found guilty of burglary is wide of the mark. That there was conflicting evidence which the jury resolved in their collective deliberations does not make whatever aspects of the testimony the jury accepted in reaching their

verdict unreliable.

In **Gandy v. State**, 373 So. 2d 1042, 1045 (Miss. 1979), the Supreme Court stated that conflicting evidence does not necessarily create reasonable doubt. A reviewing court does not have to determine exactly what conflicting testimony the jury believed when they collectively reached their verdict.

> As is usual in criminal cases, the evidence conflicted, but conflict does not necessarily create a reasonable doubt of appellant's guilt. Jurors are permitted, indeed have the duty to resolve conflicts in the testimony they hear. They may believe or disbelieve, accept or reject, the utterances of any witness. No formula dictates the manner in which jurors resolve conflicting testimony into findings of fact sufficient to support their verdict. That resolution results from the jurors hearing and observing the witnesses as they testify, augmented by the composite reasoning of twelve individuals sworn to return a true verdict. A reviewing court cannot and need not determine with exactitude which witness or what testimony the jury believed in arriving at its verdict. It is enough that conflicting evidence presented a factual dispute for jury resolution. **Shannon v. State**, 321 So. 2d 1 (Miss. 1975).

The Appellee would submit that there was credible, substantial evidence in support of finding from the evidence that Riley both "knew" the firearms he was selling to Robinson were stolen, and that exhibits 22-27, the photographs of the said stolen firearms, were an accurate and faithful representation of the actual stolen firearms rather than toys or fakes.

Mr. Martin Ickom testified that he and Riley committed numerous burglaries. This was during August, 2006. R. 84-104. He testified that after Riley took the weapons out of the burglarized houses, he kept them at his house. Riley placed them in Ickom's car when they went together to sell them. They did so in order to share the income. The jury was instructed to view this accomplice's testimony "with great caution and suspicion." C.P. 13.

> Q. Your testimony today is that Riley kept the guns at his house and that he would call you, and you would pick him up and put the guns in your car and take them to sell the guns?
>
> A. Yes, sir.

Q. And that's consistent with the statements that you've given before?

A. Yes.

Q. The only time the guns were in your car was when you were taking him to sell the firearms, is that correct?

A. Yes. R. 105.

Mr. William Robinson testified that on August 13th, 2006, he bought three guns from "Boo-Lu", Riley. R. 65. Robinson identified Riley before the jury. R. 64. Riley came to Robinson's house to offer him a chance to buy some fire arms. R. 65. Robinson identified exhibit 22, 25, and 26 as being three firearms he purchased from Riley for "either $125 or $130." R. 66.

On August 16, 2006, Riley returned to his house with "some more guns for sale." R. 67. This time Robinson purchased five guns for "$125.00." R. 67. Both of these purchases were in Attala County. R. 67.

Robinson testified that on both occasions Riley consulted with someone else before agreeing to sell the guns for the agreed upon price. R. 65; 67. Robinson thought the name of the man with Riley was Ickom. R. 68. Robinson saw the guns in Ickom's car. R. 70.

Officer Martin Roby, an investigator with the Attala County Sheriff's Office, testified that he investigated a series of houses burglarized in Attala County. This was in August, 2006. R. 74. As a result of that investigation he recovered numerous fire arms from William Robinson. R. 75. He identified state's exhibit 21, 22, 23, 24, 25, 26, and 27 . R. 77. He "recognized the guns in those pictures." They were photographs of the numerous stolen firearms recovered on August 18, and 24, 2006 from Mr. Robinson. R.77. These exhibits depicted firearms that were reported stolen to the Attala's Sheriff's Office. R. 78. See exhibits in manila envelop marked "Exhibits" for photographs of various stolen firearms, guns mounted on red cardboard.

Officer Zeely Shaw, an investigator with the Attala County Sheriff's office, testified that he interviewed Mr. Riley on two occasions. R. 107. After initially denying any knowledge about either the burglaries or the sale of the stolen guns, in his second interview, Riley admitted to knowing where the stolen guns "had been sold." R. 108.

> Q. And from the time you've been dealing with him, it's been his story that he had nothing to do with the burglaries, that he bought this gun. Then he decided to help this guy and show him places where he could sell the guns?
>
> A. **He stated, as I said earlier, that he knew people, knew the places where they could get rid of the guns. Plain and simple.** R. 111. (Emphasis by Appellee).

Officer Martin Roby testified that Riley told him where a .380 caliber hand gun reportedly stolen could be located. It could be found "underneath the steering column in Ickom's car." R. 78. This was where Roby found the gun. He recovered the other weapons reported stolen from William Robinson. R. 77. This .380 caliber hand gun had been stolen "from Ms. Glynnis Nowell"s residence." R. 78.

The trial court denied a motion for a directed verdict. R. 114. The trial court also denied a motion for a JNOV or a New Trial. C.P. 33.

In **McClain v. State, infra,** the Court found there was sufficient credible evidence for inferring that McClain had "knowingly" received stolen property. This was based upon the circumstance involved in his conduct subsequent to his receiving possession. The Court found that the element of McClain's "guilty knowledge" could be inferred from testimony about McClain's actions involving "temporary disposal and concealment." This evidence made the knowledge issue a jury question.

> In **McClain v. State** 625 So.2d 774, *778 -779 (Miss. 1993)
>
> We remain mindful that in prosecutions for receiving stolen property, guilty knowledge is the gist of the offense and must be proved. **Tubwell v. State,** 580 So.2d

1264, 1266 (Miss.1991); **Thompson** at 954; *779
Ellett v. State, 364 So.2d 669, 670 (Miss.1978); **Crowell v. State**, 195 Miss. 427, 15 So.2d 508 (1943). This does not mean that the accused shall have personally witnessed the theft, but that he received the property under circumstances that would lead a reasonable man to believe it was stolen. **Tubwell** at 1266; **Ellett** at 670.
In 66 Am. Jur. 2d Receiving Stolen Property § 25, 313-14 (1973), we are told:
Evidence of the unexplained possession of recently stolen goods by one charged with unlawfully receiving them is admissible in a prosecution for the offense and is a strong circumstance to be considered with all the evidence in the case on the question of guilty knowledge. Such evidence may be sufficient to warrant a conviction where it is coupled with ... attempts at concealment....
....

Guilty knowledge may be proved by direct evidence, or, since it is rarely the subject of direct and positive proof, by any surrounding facts or circumstances from which knowledge may be inferred.

The cases of **Tubwell, Whatley, Thompson**, and **Johnson** are distinguishable. In each of those cases we held that a defendant's possession of recently stolen property was insufficient to sustain conviction. Here, we have additional elements of temporary disposal and concealment. This assignment is without merit. (Emphasis by Appellee).

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 evidence presented by the prosecution was taken as true together with reasonable inferences, there was more than sufficient credible, substantial evidence in support of the jury's verdict. Riley was identified by Robinson as being the person who sold him some eight fire arms on August, 13 and 16, 2006. R. 64-68. On both occasions, he testified that "Boo-Lu" approached him about buying "more than two" firearms. On both occasions, Robinson gave Riley around $125.00 for multiple firearms. Robinson believed he had purchased some eight different firearms. While Robinson saw Ickom in a car with firearms in the trunk of a car, it was Riley with whom he dealt in purchasing the weapons. R. 72.

Ickom testified that Riley sold some eight firearms stolen firearms to William Robinson on August 13, and 16, 2006. R. 86-95.

Officer Martin Roby testified that while Riley denied knowing about the burglaries, he admitted that he knew where a .38 caliber hand gun was located. R. 77. It was "underneath the steering column of Ickom's car," a brown Crown Victoria. R. 78. This gun was stolen from Ms. Nowell's residence. R. 78. Officer Zeely Shaw, an investigator with the Attala County Sheriff's Office, testified that while Riley denied knowing about the burglaries, he "knew where the guns had been sold." R. 109.

When this partially corroborated evidence was taken as true with reasonable inferences there was more than sufficient evidence for inferring that the prosecution had made out all the elements of trafficking in firearms, including circumstances from which it could be inferred that Riley had "guilty knowledge" that the "two or more firearms" he was disposing of for cash were "stolen."

This issue is lacking in merit.

PROPOSITION III

THIS ISSUE WAS WAIVED, AND RILEY'S SENTENCE WAS PROPER UNDER TRAFFICKING STATUTE.

Riley's appeal counsel argues on appeal for the first time that he believes Riley's sentence was un-constitutionally disproportionate. He believes receiving thirty year concurrent sentences for the mere sale of eight stolen weapons was disproportionate to the offense prohibited. Appellant's brief page 18-21.

The record reflects that this issue was not raised with the trial court at sentencing. R.143-144. Nor was it raised in Riley's Motion for a JNOV. C.P. 30-32.

In **Reed v. State**, 536 So. 2d 1336, 1339 (Miss. 1988), the Court stated that failure to object to a sentence on the same grounds proposed on appeal waived the issue.

> At the outset, we note that the record reflects appellant did not present to the trial court the proposition that his sentence was unconstitutional, that he may not assert that allegation on appeal, and it is procedurally barred.

In addition, two thirty year "concurrent" sentences for one convicted of two convictions of trafficking with more than two stolen firearms is "within the statutory limits" provided by M. C. A. § 97-37-35 (3)(c), which provides "for a not less than fifteen year sentence" for one convicted of knowingly transferring or selling "two or more stolen firearms." No upper limit sentence was included in the statute.

In **Denton v. State** 955 So.2d 398, *400 (Miss. App. 2007), the court found that Denton's "concurrent" sentence was well within the statutory limits, was not grossly disproportionate to the crime he committed, and there was no need for a **Solem** "analysis to take into account a sentence imposed on other criminals in the same jurisdiction." Denton, who was sixty five, received two sentences after he was convicted of burglary and aggravated assault.

¶ 10. Here, the trial court decided to allow the sentences to run concurrently. Denton could have received the maximum sentence for each crime committed, and the trial court could have decided to allow the sentences to run consecutively. Consecutive sentences could have resulted in total sentence of forty-five years imprisonment. Denton was given a much more lenient sentence.

¶ 11. Denton broke into a house wielding a pistol and then began to hit the victim. He hit the victim more than once with the weapon. This was a very violent act that left the victim and the victim's family traumatized. As part of his sentencing, the trial court took into account Denton's age and lack of a prior criminal record, as well as the effect the crime had on the victim and her family. After reviewing the record, it is clear that the sentence Denton received is proportionate to the crimes that he committed. Regardless of whether another individual in a different county received a slightly less imprisonment sentence, Denton has failed to show that his sentence is "grossly disproportionate" to the violent acts which he committed. **Sims**, 928 So.2d at 989(¶ 23) (citing **Williams v. State**, 784 So.2d 230, 236(¶ 15) (Miss. Ct. App.2000)). Therefore, we do not proceed to the **Solem** analysis to take into account a "sentence imposed on other criminals in the same jurisdiction." **Fleming**, 604 So.2d at 302-03 (citing **Solem**, 463 U.S. at 292, 103 S.Ct. 3001).

¶ 12. We find that Denton's sentence was not grossly disproportionate to the crime he committed. Therefore, the judgment denying post-conviction relief is affirmed.

Riley's council's reliance upon **White v. State**, 742 So. 2d 1126, 1135-38 (Miss. 1999), and **Davis v. State**, 724 So. 2d 342, 334-335 (Miss. 1998) is of no avail. For in both those cases, the defendants received maximum sentences for their offenses without any use of "discretion" by the trial court. Whereas, in the instant cause, the applicable statute provides for no maximum sentence, but rather only a minimum sentence of "not less than fifteen years." In addition, how can Riley complain of a maximum sentence for multiple convictions, where he received "concurrent" and not consecutive sentences. Therefore, Riley's thirty year "concurrent sentences" was not a maximum sentence under the facts of this case.

In addition, since the thirty year concurrent sentence is within that provided by statute there is no need for a **Solem v. Helms** , 463 U.S. 277 (1983) analysis. Co-defendant's Ickom's thirty two year sentence was for burglary, rather than for trafficking in stolen firearms. As admitted by Riley's counsel, he could find no other trafficking sentence for any other state jurisdiction to make a

comparison with Riley's meaningful. Appellant's brief page 21. Under federalism a federal statute is not applicable to a state which has its own separate independent legislative branch.

In **Harper v. State**, 463 So. 2d 1036, 1041 (Miss. 1985), the Supreme Court rejected Harper's request for a reduced or at least a concurrent sentence. This was based upon Harper having a separate conviction for which he could received a thirty year sentence. It was also based upon the fact that his sentence in his case was to be "less than life."

> Nonetheless there is no merit to Harper's assertion that his first sentence must be considered in arriving at a second sentence "reasonably calculated to be less than life." For us to hold as Harper urges would create an unacceptable result. It is conceivable that the Court would be unable to sentence a defendant for crimes because he was already serving consecutive terms of what actuarial tables tell us is just short of a life imprisonment. By outliving the span of life predicted by the actuarial table, the defendant would go unpunished for the crimes the court was not permitted to sentence him to. The Scott county rape was an independent criminal act for which Harper may be punished independently. The crimes were totally unrelated to each other and the punishment imposed in the second case is not required to bear any relation to the first.

The Appellee would submit that this issue was waived for failure to raise it with the trial court. It is also lacking in merit. The record reflects that Riley received a sentence within the range provided by statute. The statute provides only for a sentence "not less than fifteen." The record also reflects that Riley received "concurrent" sentences for two separate convictions for trafficking in stolen fire arms. Other applicable state or federal sentences for a similar offense in is irrelevant in this state jurisdiction.

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

PROPOSITION IV

THIS ISSUE WAS WAIVED FOR FAILURE TO OBJECT. AND THE RECORD REFLECTS THE JURY WAS PROPERLY INSTRUCTED.

Riley's counsel believes the trial court erred in granting jury instruction S-4. He believes that this instruction improperly shifts the burden of proof to the defendant. He believes it somehow relieves the state from having to prove the knowledge element of the crime. And he believes it is also a comment on the failure of the defendant to testify. Appellant's brief page 22-27.

To the contrary, the record reflects there was no objection to the granting of jury instruction S-4. R. 119-120.

The colloquy over jury instruction 4 was as follows:

Court: What's the defense position on S-4?

Hull; Your Honor, our position on it is that the possession is not unexplained.

Court: Okay. I didn't hear any testimony from the defense at all, so–

Hull: We think the evidence itself shows that there's some explanation that, even in our opening, even though that's in the evidence but--

Howie: The only explanation that was given about the possession of the property was that the testimony–the testimony was that he, in fact, aided and abetted Martin Ickom in stealing the property. There's no evidence of any other way that he received the property.

Court: I'm going to given S-4. The last one which is a regular–it's just a form of the verdict instruction. I'm going to mark that as C-5. It will be given. R. 120.

In **Harris v. State** 908 So.2d 868, *872 -873 (¶13) (Miss. App. 2005), the Court found that failure to make a specific objection waived the issue on appeal.

> ¶ 13. The State urges a denial of appellate review of this issue because while Harris objected to the granting of instruction S-3, he failed to state the specific reason for his objection. We have reviewed the record and find that the State is correct in its assertion that Harris failed to offer specific reasons for his objection to the

> instruction. "It is well established that objections must be made with specificity*873 to preserve [the issue] for appeal." **Oates. v. State**, 421 So.2d 1025, 1030 (Miss.1982).

In addition, the trial court found that there was a basis for the instruction. The record reflects testimony from Mr. Ickom indicating that Riley was knowingly in custody of the fire arms. He and Ickom acquired them by removing them from various houses after breaking and entering with intend to steal them. R. 86-93. After they were stolen, Riley took the initiative in transferring and or selling the fire arms for cash which was divided equally. R. 84-104

Mr. William Robinson corroborated Mr. Ickom. R. 64-72.. Robinson testified that on August 13,and 16, 2006 Riley came to his house and wanted to sell him some guns. Robinson testified that Riley had to check with Ickom about selling the guns on both occasion for some $125.00. R. 64-72 The guns were kept in Ickom's car.

Jury instruction 4 stated as follows:

> The Court instructs the jury that possession of property recently stolen is a circumstance which may be considered by you, and from which, in the absence of a reasonable explanation, you may infer guilt of larceny or theft of the property. C.P. 12.

While it is true that Riley did not testify, there was testimony from Officers Martin Roby and Zeely Shaw about comments Riley made during their interviews with him. It could be inferred from Riley's statements to investigators that he had knowledge about stolen weapons. He told Officer Roby where a stolen firearm was located "underneath the steering column in Mr. Ickom's car." R. 78. And Officer Zeely Shaw testified that Riley told him he knew where the stolen firearms "had been sold." R. 108.

In **Nicholson on behalf of Gollott v. State**, 672 So. 2d 744, 752 (Miss. 1996), the Court stated that where there was no contemporaneous objection to the failure to grant an instruction, the

court need not consider that issue on appeal. The Court also stated that instructions are proper where supported by the evidence.

> This Court does not review jury instructions in isolation. **Malone v. State**, 486 So. 2d 360, 365 (Miss. 1986). If the instructions given provide correct statements of the law and are supported by the evidence, there is no prejudice to the defendant. **Sanders v. State**, 313 So. 2d 398, 401 (Miss 1975). This Court has fully examined the instructions granted by the trial court in the case sub judice and finds that, taken together, the jury was correctly and completely charged.

Jury instruction S-4 was given along with all the other instructions, including jury instruction S-1 for stating the elements of trafficking as stated in counts 4 and 5 . C. P. 9-10.

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.

Jury instructions S-1 included the element "did knowingly or intentionally, sell, deliver or transfer two or more stolen firearms to Williams Robinson." C.P. 9-10. That the same jury that found Riley guilty of trafficking did not find him guilty of burglary does not provide a basis for believing there was insufficient evidence for inferring that Riley knew the firearms he was selling to Mr. Robinson were stolen. As cited above, testimony from officers Roby, Shaw and co-defendant Ickom provided evidence from which this could be inferred. R. 78; 86-93; 108.

Therefore, contrary to this argument on appeal never before raised with the trial court, there was record evidence indicating a basis for inferring "guilty knowledge" on the part of Riley as well as for establishing all the other elements included in jury instructions S-1 for counts 4 and 5. C. P.3-

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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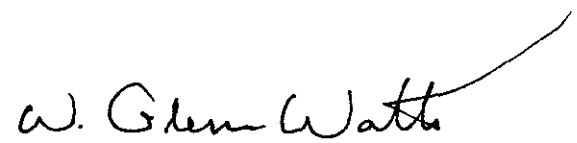
This the 19th day of October, 2007.



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