IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JAMES EARL JONES — APPELLANT

VS. — NO. 2007-KA-0928-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

Following a bench trial, James Earl Jones was convicted of burglary of a dwelling house and recidivism.

Jones's conviction was based largely, but not entirely, upon the testimony of two used furniture dealers, Rayford Cathey and Harold Judon, both of whom testified that on Saturday, November 12th , 2005, Jones sold to them various items of furniture identified by Mrs. Eaver Moss as having been stolen between the 6th and 12th of November from her mobile home in Lafayette County. (Cathey: R. 43-50; Judon: R. 91-95; Moss: R. 32-43)

Notwithstanding both ear and eyewitness testimony describing the after effects of a breaking and entry and placing no fewer than six (6) or seven (7) of the stolen items in the recent possession of James Jones, Jones assails both the "weight" of the evidence used to convict him, as well as its legal sufficiency. It was the position of Jones at trial and on appeal as well that the State proved no

crime greater than possession and sale of stolen goods.

JAMES EARL JONES, a forty-two (42) year old African-American male and self-professed small businessman in Lafayette County (R. 117), prosecutes a criminal appeal from his convictions of dwelling house burglary and recidivism following a bench trial conducted April 25-26, 2006, in the Circuit Court of Lafayette County, Andrew K. Howorth, Circuit Judge, presiding.

Jones was indicted on February 16, 2006, for burglary of a dwelling. (C.P. at 6) His indictment, omitting its formal parts, charged that

> JAMES EARL JONES, . . . on or about the 12TH day of November 2005, . . . did then and there unlawfully, willfully, feloniously and burglariously break and enter the dwelling of Charles Moss and Eaver Moss, located at 839 Highway 30 East, in Lafayette County, Mississippi, there situated in which dwelling there were, then and there, goods, wares, chattels or merchandise kept for use, sale, deposit or transportation with the felonious intent to unlawfully, willfully and feloniously take, steal and carry away the goods, wares, chattels or merchandise in said dwelling then and there being, in violation of the provisions of Section 97-17-23 of the Mississippi Code of 1972, Annotated, as amended, which offense is punishable by imprisonment not less than three (3) years nor more than twenty-five (25) years, . . . (C.P. at 1-2)

The indictment also charged Jones with recidivism under Miss. Code. Ann. §99-19-83 by virtue of his prior felony convictions in 1991, 1992, and 1996. A fourth felony conviction in the year 2000 was later added to the charge by way of an amendment. (C.P. at 5)

Jones elected to waive his right to a trial by jury and requested trial before judge alone. (C.P. at 3)

Following a bench trial conducted on April 25-26, 2006, Judge Howorth found Jones guilty beyond a reasonable doubt of burglary of a dwelling. (R. 150-51)

On July 7, 2006, following a hearing dealing with recidivism and sentence-enhancement (R. 154-193), Judge Howorth adjudicated Jones an habitual offender and sentenced him to life

imprisonment " . . . without the possibility of early release, probation, or parole pursuant to 99-19-83; . . .". (R. 189; C.P. at 6-7)

Jones's conviction of recidivism has not been assailed on appeal.

Months later, on February 7, 2007, a hearing was conducted for the purpose of adjudicating the merits of Jones's motion for new trial. (R. 194-224) Jones testified in his own behalf and produced James Brassel as a witness in Jones's behalf. Representing the defendant at this hearing was one of Jones's appellate attorneys, Ms. Helen Kelly.

At the conclusion of the post-trial hearing Judge Howorth overruled Jones's motion for new trial. (R. 220-21)

Jones invites this Court to reverse and render but, if not, to at least remand the case for a new trial. (Brief of the Appellant at 18) Two (2) issues are raised by Jones on appeal to this Court:

A. "The court erred in failing to grant a motion for judgment notwithstanding the verdict or in the alternative a new trial because the verdict was against the overwhelming weight of the evidence."

B. "The court erred in refusing to grant a motion for [a] continuance to allow Jones an opportunity to hire [new] counsel and prepare for trial."

Put another way, Jones assails both the sufficiency and the weight of the evidence used to convict him of burglary of a dwelling as well as the denial of a last minute continuance based largely upon an inadequate amount of time to prepare for trial.

STATEMENT OF FACTS

James Earl Jones is a criminal entrepreneur, having been previously convicted in 1991 of aggravated assault, in 1992 of grand larceny, in 1996 of possession of cocaine, and in 2000 of burglary of a dwelling. (C.P. at 2, 5)

During either the day or nighttime hours between Sunday, the 6th, and Saturday, the 12th of November, 2005, a mobile home owned by Charles and Eaver Moss and located in Lafayette County was burglarized. Among the many items taken were four (4) dining room chairs, a blue-green recliner, and a "bathtub surround" kit. Each one of these items was subsequently recovered from used furniture stores in the surrounding area. (R. 37-39)

While shopping for replacement glass for the damaged front door of their burglarized mobile home, the Mosses passed a used furniture store known as "A New Leaf." To both their good fortune and perhaps dismay, they observed their four missing dining room chairs on display in front of the store. (R. 37-39)

The Mosses later found their stolen blue recliner and a "bathtub surround" kit at another used furniture store. (R. 39, 93-94)

Two dealers, Rayford Cathey and Harold Judon, testified unequivocally that on Saturday, November 12, 2005, James Earl Jones, who was known to both Cathey and Judon from prior transactions, came to their stores by himself in a Chevrolet pickup truck loaded with furniture and sold them the four dining room chairs, the blue recliner, and the "bathtub surround" kit. (R. 43, 91) Both men made positive in-court identifications of James Earl Jones as the seller who received money directly into his hand for the items he sold to Cathey and Judon. (R. 47-48, 92, 95, 119)

Four (4) witnesses testified for the State during its case-in-chief, including Rayford Cathy and Harold Judon who positively identified Jones as a man in possession of the Mosses' furniture on Saturday morning, November 12th. (R. 47-48, 92)

Eaver Moss, the wife of Charles Moss, victims of the break-in and theft, testified they were residents of Corinth but owned a mobile home situated on 2 ½ acres of land off highway 30 in Lafayette County. (R. 33)

Eaver Moss left for Corinth on Sunday, November 6th. She returned to the mobile home around noon on Monday, November 14th, at which time she discovered the burglary. (R. 34-36, 88) The day Moss left for Corinth could also have been Monday, the 7th day of November or Tuesday the 8th. (R. 88)

Mrs. Moss identified the stolen items in the following colloquy:

> Q. [BY PROSECUTOR:] Okay. Can you tell the court now what was taken from your mobile home?
>
> A. Just about everything. It was a bakers rack, a TV, a little stereo system that you can carry around of my daughters, microwave, recliner, the chairs to my dining room table, kit that goes around my bathtub, sewing machine brand new, microwave, coffee pot and antique percolator, and my husbands all his tools. His saws, his drills, wrenches everything, you know, that could be picked up and carried out. Camera, instamatic camera. My wedding band set. My mothers ring. Everything in there was gone except a table, stove, refrigerator [,] a couch and a bed.
>
> Q. Now, what?
>
> A. And also some guns.
>
> Q. A couple of guns?
>
> A. 410 shotgun and a pistol * * * also a lawn mower stolen, gas tank, gas can. (R. 35-36)

The items recovered and constituting the fruits of the burglary were the four dining room chairs, a blue recliner, and the bathtub surround kit. (R. 37-39)

Rayford Cathey, a dealer, testified he bought and sold used furniture and antiques at his place of business on Highway 30 known as "A New Leaf." (R. 44-45)

On Saturday, November 12th, James Jones drove up to his store in a Chevrolet pickup truck loaded with various articles of furniture, tools, "all kinds of stuff." (R. 46) Cathey gave Jones $!5 to $30 for the four dining room chairs later identified by Eaver Moss as the chairs taken from her

mobile home. (R. 46-47)

Jones told Cathey he got the items out of an abandoned trailer house located somewhere down highway 30. (R. 49, 53) Jones " . . . said the lady was getting a divorce and she wanted the house cleaned out." (R. 49)

"He was by his self when I bought these chairs." (R. 58)

Harold Judon, who owns Sue's Rummage, is in the "junk" business, "[u]sed clothing, used furniture." (R. 91) He has known James Jones for "about 20 years" and has bought a lot of stuff from Jones over the years. (R. 92)

Judon, who identified Jones in court (R. 92), testified he purchased from Jones a chair, i.e, the blue-green recliner depicted in exhibit 4, and the "wrap around for a shower" depicted in exhibit 3. This transaction took place on the Saturday prior to Tuesday, November 15th. (R. 93-94) Judon, who paid Jones $40 for the two items, did not observe anyone with Jones at the time of the sale. (R. 95-96)

On Tuesday, November 15th, Eaver Moss came by and claimed those two items. (R. 92, 94)

Scott Mills, an investigator with the Lafayette County Sheriff's Department, testified he investigated the burglary of the Mosses mobile home on highway 30. (R. 98) The initial report was made on Monday, November 14, 2005, when the Mosses reported they saw some of their stuff - dining room chairs - on display at the New Leaf. (R. 98-99)

Mills and another officer later went to Sue's Rummage where they recovered the blue-green recliner and bath tub wall kit belonging to the Mosses. (R. 100) Mills photographed these items. (R. 100)

Mills was asked if Mr. Cathey had stated to Mills the defendant's explanation of possession. According to Mills, "[i]t was said that Mr. Jones had told Mr. Cathey that a man and woman were

going through a divorce, that the woman owned a mobile home out on the Highway 30 area and that he could have or get the stuff out of the mobile home and do what he would with it." (R. 103)

Jones never said anything to Mills about where he got the items in question. (R. 103-04) Jones was asked about it "[a]nd he simply elected not to make a statement." (R. 107)

Mills acknowledged there was no confession in this case, no physical evidence of a burglary, and no eyewitnesses to the burglary. (R. 105)

At the close of the State's case-in-chief, Jones moved for a judgment of acquittal on the ground the State, at best, had only proved Jones guilty of selling stolen goods. (R. 108-12)

Following argument, Judge Howorth agreed the State had made out a *prima facie* case of burglary and overruled the motion. (R. 112)

After being advised of his constitutional right to testify or not to testify, the defendant, **James Jones**, elected to testify in his own behalf. (R. 114-16)

The defendant, who asserted a general denial in defense of the charge, testified he came into possession of the property lawfully. Jones denied burglarizing the Mosses mobile home on highway 30 in Lafayette County. (R. 116-134)

> Q. [Direct Examination:] Why don't you tell the judge what really happened with respect to this, this furniture and any contact you might have had with it?
>
> * * * * *
>
> A. I have my own business and Jones Small Detail Service and I put my flyers and my flyers and my cards out at different places. I stick them on the windows and on the doors and everything and I had Mrs. Nora Mosby had called me and told me she had some stuff that she wanted to move. She asked me how much would I charge her. She had a chair and some tables. A chair and tables and some stuff like that but it wasn't nothing but a few items so I told her ten dollars but she asked where can she sell them she wanted to pay a bills or whatever she said had. The first place I told her was the . . .

took place across the street from Hodge's funeral and the guy there he, you know, he bought it. He bought the stuff but it was a lady with me when I went there. Also when I went, we went left there went across the street to Mrs. Sue the same lady that was there. The lady gave money to her. No money never did hit my hand. Nothing but ten dollars. The ten dollars that she paid me for taking her up there.

Q. Sir, did you, did you, where did you pick up the furniture at. Where did you, where did you put that into your truck at?

A. Out 30. If you go out to Little John's Store, you take a left and you go about four houses down. It's a wooden house setting off but people stay there. You know, and she had furniture out there.

Q. Okay. And was there any other person there when you loaded up the furniture?

A. Yes, her brother. Her brother was there. She was there. That was I help them load it.

Q. Did you ever mention her name to any investigator while you were being questioned about this?

A. Yes, sir.

Q. Did you tell them what you just told the judge?

A. Yes, sir. (R. 118-19)

The defendant also produced as a witness his wife, **Stella Jones.** She testified she was seeing her husband on and off during the month of November and that she never saw her husband driving a white chevy pickup truck or an older model white Dodge automobile during this time frame. (R. 113) Rather, James Jones's Chevrolet pickup was red with a tan stripe down both sides. (R. 113)

The State produced **Scott Mills, Rayford Cathey,** and **Eaver Moss** in rebuttal. (R. 134-43)

Scott Mills testified he developed a second suspect named Nora Mosby from sources other than the defendant who " . . . didn't want to say anything about it." Mills's investigation of Mosby " . . . was strictly as an accomplice type situation." (R. 136) Mosby's relatives told Mills she had

moved to Memphis, and she was never located for trial. (R. 135-37) Neither was her brother who allegedly helped Nora and Jones load the furniture.

Rayford Cathey testified in rebuttal there was no female around at the time he handed the purchase money directly to James Jones. (R. 139) Cathey also observed a "baker's rack" in the back of Jones's pickup truck. (R. 140)

Eaver Moss testified in rebuttal that one of the items stolen from her mobile home was a "baker's rack." (R. 141)

Following closing arguments, Judge Howorth retired to chambers to review his notes and the exhibits introduced into evidence. (R. 149-50)

After a recess, Judge Howorth ruled as follows:

> BY THE COURT: For the record the court considers all motions made to have been renewed and previous rulings will stand at each relevant phase of the proceedings.
>
> * * * * * *
>
> [BY JUDGE HOWORTH:] " * * * [T]he court has retired and deliberated on the charges and reviewed the exhibits offered and introduced into evidence and the court is of the opinion that the State of Mississippi has met its burden of proof. By clear and convincing evidence beyond a reasonable doubt that James Earl Jones is in fact guilty of the crime of burglary of a dwelling and the Court adjudicates you James Earl Jones guilty of that offense." (R. 150-51)

On July 7, 2006, following a hearing dealing with recidivism and sentence-enhancement (R. 154-193), Circuit Judge Howorth adjudicated Jones an habitual offender and sentenced him to life imprisonment " . . . without the possibility of early release, probation, or parole pursuant to 99-19-83; . . .". (R. 189; C.P. at 6-7)

Months later, on February 2, 2007, a hearing was conducted for the purpose of adjudicating the merits of Jones's motion for new trial. (R. 194-224)

Jones testified in his own behalf and produced James Brassel as a witness in support of his motion. Brassel testified he worked for Mr. Cathey and had known the defendant most of his life. (R. 199-200) He was present at Cathey's furniture store the day Jones pulled up with a pickup truck loaded with furniture and other items. According to Brassel, ". . . he (Jones) had a lady with him when he pulled up." (R. 199) Brassel was not present, however, when money changed hands. "(R. 199) "I didn't see it. I had went on the inside of the building when they were doing it." (R. 200)

When Jones pulled up at Cathey's store he was driving a maroon and beige Chevrolet truck. (R. 202)

Representing the defendant at this belated hearing dealing with the merits of Jones's motion for a new trial was Jones's appellate attorney, Ms. Helen Kelly. (R. 194)

At the conclusion of this hearing Judge Howorth overruled the motion for new trial. (R. 220-22)

Tom Levidiotis, a public defender and practicing attorney in Oxford, did a splendid job of representing Jones during the trial of this cause.

Helen B. Kelly and Adam A. Pittman, private practitioners in Oxford, have been equally effective in their appellate representation of Jones.

SUMMARY OF THE ARGUMENT

Because this is an appeal from a bench trial adjudicated by judge alone, there are no jury instructions in the record.

"In absence of anything in the record appearing to the contrary, [the Supreme Court] presumes that the trial court acted properly." **Moawad v. State,** 531 So.2d 632, 635 (Miss. 1988)

A. "Under Mississippi law, possession of recently stolen property is a circumstance which may be considered by the jury and from which, in the absence of a reasonable explanation, the jury

may infer guilt." **Rushing v. State,** 461 So.2d 710, 712 (Miss. 1984).

The "plausibility or truth" of a defendant's explanation of his possession of property recently stolen is for the jury, i.e., the fact finder, to determine. **Riddles v. State,** 471 So.2d 1234, 1237 (Miss. 1985).

"[W]hen the fact of recent possession of stolen property is supplemented with other facts inconsistent with the idea that the possession is honest, it then becomes a question of fact for the jury to pass upon guilty or innocence of the defendant." **Shields v. State,** 702 So.2d 380, 382 (Miss. 1997), relying upon **Jones v. State,** 468 P.2d 805 (Okla.Crim.App. 1970).

In the case at bar, Jones's possession was personal, recent, exclusive and no "reasonable explanation" was presented by Jones. It was permissible for Judge Howorth, as finder of fact, to give little weight to Jones's dubious explanation. Indeed, the mysterious Nora Mosby, investigated by Scott Mills as an alleged accomplice, was never found, and her absence, as well as the absence of her brother, was conspicuous.

The State's proof was legally sufficient to support Jones's conviction of burglary.

In resolving the question of legal sufficiency , " . . . the [trial] court must determine that a reasonable, fair-minded juror could find that the accused committed the offense charged beyond a reasonable doubt, and that every element of that offense existed, given the evidence. presented." **Watts v. State,** No. 2006-KA-01057-COA (¶10) decided June 12, 2007 [Not Yet Reported], citing **Brown v. State,** 907 So.2d at 339 (¶8) (citing Carr v. State, 208 So.2d 886, 889 (Miss. 1968)).

The question to be answered by the reviewing court, in viewing the evidence in a light most favorable to the prosecution, is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." **Id.**

This is not a case where reasonable and fair-minded judges and jurors could only find the accused not guilty. **Id.** Rather, there is substantial and credible evidence in the record to support a finding by a reasonable and fairminded fact finder that Jones was guilty of burglarizing the Mosses' mobile home.

Accepting as true the evidence in favor of the State, including the testimony of Cathey, Judon, and Mills, together with all favorable inferences, it is clear the evidence was sufficient for a reasonable, fair-minded, hypothetical juror to find beyond a reasonable doubt that Jones was the person who broke and entered the Mosses' mobile home and removed a majority of its contents.

Defense counsel's closing argument, we note, focused upon the " . . . credibility of the witnesses" and " . . . the discrepancies in the police report." (R. 146)

The credibility of Cathey, Judon, and Mills, as well as the credibility of Jones, a convicted felon, was a matter for the judge as finder of fact and not for a reviewing Court. "The jury [in this instance the judge] is the *sole* judge of the weight and credibility of the evidence." **Byrd v. State**, 522 So.2d 756, 760 (Miss. 1988) [emphasis supplied].

B. The denial of a continuance is not subject to appellate review because such was not distinctly assigned as a ground for a new trial.

In any event, a review of this record leads to the inescapable conclusion that no manifest injustice ensued from the denial of a last minute continuance. The trial judge did not abuse his judicial discretion in denying a continuance.

ARGUMENT

A.

THE TRIAL JUDGE DID NOT ERR IN OVERRULING THE DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL NOTWITHSTANDING THE VERDICT BECAUSE THE PROOF WAS LEGALLY SUFFICIENT TO SUPPORT JONES'S GUILT OF BURGLARY.

THE VERDICT OF THE JURY WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Jones was convicted of burglary by virtue of a prosecution brought under Miss.Code Ann. §97-17-23 which states that "[e]very person who shall be convicted of breaking and entering the dwelling house or inner door of such dwelling house of another, whether armed with a deadly weapon or not, and whether there shall be at the time some human being in such dwelling house or not, with intent to commit some crime therein, shall be punished by imprisonment in the Penitentiary not less than three years nor more than twenty-five (25) years."

Jones argues that "[i]n presenting their case against Jones the state failed to present any direct evidence of Jones' involvement in the burglary of the Moss[es] [mobile] home, relying instead solely upon the inference raised by Jones' possession of some of the burgled items." (Brief of the Appellant at 11)

As such, says Jones. " . . . this is a circumstantial evidence case and it follows that the test to be applied in considering the sufficiency of the proof is whether a rational fact finder might reasonably conclude that the evidence excludes every reasonable hypothesis inconsistent with guilt of the crime charged." (Brief of the Appellant at 11)

According to Jones, a judge or jury composed of reasonable and fair-minded persons could have only found him not guilty of the charge against him because

> "[c]onsidering all of the indicia of strength of the inference together, it must be concluded that under the circumstances of this case the inference is insufficient to support the conviction of burglary. In other words the evidence presented failed to exclude every reasonable hypothesis consistent with innocence and was therefore insufficient to sustain the conviction in this case." (Brief of the Appellant at 14-15)

Jones also suggests the testimony of the State's star witnesses was too inconsistent and contradictory to be credible or worthy of belief. (Brief of the Appellant at 14-15)

Although these are legitimate and well-tailored arguments, we disagree on each count.

First, neither trial defense counsel nor the prosecutor nor the circuit judge were really of the opinion this was a *purely* circumstantial evidence case requiring proof beyond a reasonable doubt and to the exclusion of every reasonable hypothesis.

> [BY MR. TROUT:] " * * * The State has proven beyond a reasonable doubt and now I would say very clearly to the exclusion of every reasonable hypothesis of innocence *which is not necessary.*" (R. 146) [emphasis ours]

> [BY MR. LEVIDIOTIS:] " * * * Judge *the standard of proof is proof beyond a reasonable doubt* and there has been plenty of proof but proof of what." (R. 147) [emphasis ours]

> [BY MR. LEVIDIOTIS:] "Judge, we started this trial with presumption of innocence. It's up to the State to remove that presumption *beyond a reasonable doubt.*" (R. 147-48) [emphasis ours]

> [BY JUDGE HOWORTH:] " * * * [T]he court has retired and deliberated on the charges and reviewed the exhibits offered and introduced into evidence and the court is of the opinion that the State of Mississippi has met its burden of proof. By clear and convincing evidence *beyond a reasonable doubt* that James Earl Jones is in fact guilty of the crime of burglary of a dwelling and the Court adjudicates you James Earl Jones guilty of that offense." (R. 150-51) [emphasis ours]

Although the actual identity of Jones as the burglar was established circumstantially, the

State, via the testimony of Eager Moss who described the front door of her mobile home and the missing contents, proved directly the breaking, entry, and intent required in a burglary prosecution.

Moreover, the defendant himself testified at trial he got the stuff out of an abandoned house on highway 30. (R. 118-19) The Mosses' mobile home was located "7 miles east on [highway] 30." (R. 33) This was an admission - direct evidence, if you please - by Jones he possessed property that was shown by others to have been recently stolen.

The defendant's possession of the stolen items was also established directly by the testimony of Cathey, Judon, and Moss who were both eye and ear witnesses to this fact.

In this posture, it was not necessary for the trial judge, as finder of fact, to exclude every reasonable hypothesis consistent with Jones's innocence. Rather, it was only necessary for the judge to find the State proved each element of the offense beyond a reasonable doubt.

"The well-established rule of this Court is that when the collection of admitted evidence is either direct evidence, or a combination of both direct and circumstantial evidence, circumstantial evidence jury instructions are not necessary." **Sullivan v. State,** 749 So.2d 983, 992 (Miss. 1999). *See also* **Bennett v. State,** 933 So.2d 930 (Miss. 2006), reh denied [Circumstantial evidence cases for which a circumstantial evidence instruction is required lack direct evidence.]

But even if otherwise, there is no reasonable hypothesis consistent with Jones's innocence because his explanation was demonstrably false, and there are other facts present that are simply inconsistent with the idea that Jones's possession was honest. For example, Jones testified "no money never did hit my hand." (R. 118) The testimony of Mr. Cathey and Mr, Judon reflects otherwise. (Cathey: R. 47, 139; Judon: R. 95) Jones also testified that Judon was not present the day Jones sold the recliner and tub surround to Judon at Judon's place of business. (R. 124, 127) The testimony of Judon reflects that Judon dealt with Jones directly. (R. 95-96)

Second, in **Rushing v. State,** 461 So.2d 710, 712 (Miss. 1984), we find the rule of law applicable to this case.

> "Under Mississippi law, possession of recently stolen property is a circumstance which may be considered by the jury and from which, in the absence of a reasonable explanation, the jury may infer guilt. *Harper v. State,* 355 So.2d 314 (Miss. 1978); *Engbrecht v. State,* 268 So.2d 507 (Miss. 1972); *Minor v. State,* 234 Miss. 140, 106 So.2d 41 (1958). In order to give rise to an inference of guilt from the fact of possession, the State has the burden of proving possession by the accused of stolen property to have been personal, recent, unexplained, and exclusive." *Engbrecht v. State,* 268 So.2d 507, 509 (Miss. 1972).

See also Johnson v. State, 452 So.2d 850 (Miss. 1984) [Presumption or inference that a defendant in recent possession of stolen property is guilty of burglary attaches unless he offers a "reasonable explanation" for his possession.]

The "plausibility or truth" of a defendant's explanation of his possession of property recently stolen is for the jury, i.e., the fact finder, to determine. **Riddles v. State,** 471 So.2d 1234, 1237 (Miss. 1985).

In the case at bar, Jones's possession was personal, recent, and exclusive, and no "reasonable explanation" was presented by Jones. It was permissible for Judge Howorth, as finder of fact, to give little weight to Jones's dubious explanation. Indeed, the mysterious Nora Mosby, investigated by Scott Mills as an alleged accomplice, was never found. The absence of Mosby and her brother was conspicuous.

"[W]hen the fact of recent possession of stolen property is supplemented with other facts inconsistent with the idea that the possession is honest, it then becomes a question of fact for the jury to pass upon guilt or innocence of the defendant." **Shields v. State,** *supra,* 702 So.2d 380, 382 (Miss. 1997), relying upon **Jones v. State,** 468 P.2d 805 (Okla.Crim.App. 1970).

The **Shields** case, *supra*, cited and relied upon by Jones, offers further guidance as follows:

> Extrapolating from that case we can arrive at common sense circumstances to be considered:
>
> 1. The temporal proximity of the possession to the crime to be inferred.
>
> 2. The number or percentage of the fruits of the crime possessed.
>
> 3. The nature of the possession in terms of whether there is an attempt at concealment or any other evidence of guilty knowledge.
>
> 4. Whether an explanation is given and whether that explanation is plausible or demonstrably false.
>
> *Id. see also West v. Wright,* 931 F.2d 262 (4th Cir. 1991), rev. on other grounds, 505 U.S. 277, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992). In the instant case, the inference must gain strength from the circumstances of possession as there exist no other corroborating evidence.

Insofar as we can tell, the **Shields** case contains the current state of the law in this area. *See* **Cheeks v. State,** 843 So.2d 87 (Ct.App.Miss. 2003), reh denied; **Cunningham v. State,** 828 So.2d 208 (Ct.App.Miss. 2002), reh denied, cert denied 829 So.2d 1245 (2002).

Temporal (of or relating to time) proximity. A permissible inference gleaned from all the testimony is that the burglary of the Mosses' mobile home occurred during the day or night time hours between the 6th and 12th of November.

Eaver Moss left her mobile home on Sunday, November 6th. She returned on Monday, November 14th, and found that a burglary had taken place. It is perfectly clear that Jones had the stolen items in his possession at the used furniture stores on Saturday, November 12th. Thus, there was a seven (7) day window of opportunity during which time the burglary could have taken place.

Moss testified it was possible she left for Corinth on Monday, the 7th of November or Tuesday, the 8th of November. (R. 88) If this is the case, the window of opportunity for a burglary would have been only five (5) or six (6) days.

The bottom line is that James Jones would have been in possession of the stolen items on highway 30 anywhere from five (5) to seven (7) days after the burglary. This passes muster with respect to the requirements of recency and temporal proximity. *See* **Weaver v. State,** 481 So.2d 832 (Miss. 1985), where we find the following:

> We need to also briefly emphasize that in order for an inference of guilt to arise from possession of stolen property, the theft must have been *recent.* This word "recent" is of some flexibility, depending upon the circumstances of each case. Weaver likewise meets this test, in having the jacket in his possession in not exceeding one month's time at the most following the burglary. *See: Smith v. State,* 278 So.2d 408, 410 (Miss. 1973).

Number or percentage of fruits in possession. Eaver Moss identified approximately twenty-five (25) items that were missing from her mobile home on Monday, November 14th. (R. 35-36) Seven (7) items, including a "baker's rack" (R. 35-36, 140) - not three (3) items as Jones suggests in his analysis at p. 12 - were either sold to Cathey and Judon on Saturday, November 12th, or observed in the bed of Jones's pickup truck. Seven (7) out of twenty-five (25) or 28% - nearly a third - passes muster under the test articulated in **Shields.** This is especially true where, as here, the items recently possessed - four (4) dining room chairs, a blue-green recliner, a bath tub surround kit, and a baker's rack - were very large and distinct items.

We note also that tools belonging to Eaver Moss's husband were stolen from the mobile home. Jones admitted at trial he had tools in the back of his truck when he went to the used furniture stores but claimed the tools belonged to him. (R. 125-26)

Guilty knowledge. Admittedly, there is no flight involved in this case, and Jones certainly

did not try to conceal the presence of the Mosses' stolen chattels that were observed in his pickup truck and purchased by Cathey and Judon. In addition, Jones made no effort to conceal his identity. This is the only **Shields'** factor detracting from the inference that Jones committed the burglary.

The reasonableness of Jones's explanation. A reasonable and fair-minded fact finder, i.e., judge or jury, could have found beyond a reasonable doubt that Jones's explanation was not plausible and was, in fact, demonstrably and inherently false. Indeed, there can be no question about it. The conflicts between Jones's version and the versions testified to by both Cathey and Judon, as well as Investigator Mills, are both numerous and conspicuous.

Three (3) out of the four (4) factors articulated in **Shields** lend strength to the inference that Jones committed, for monetary gain, the burglary of the Mosses' mobile home.

Jones's version, we note, reflects he got the property from an abandoned house on highway 30. The Mosses' mobile home, as previously noted, was located seven (7) miles east on highway 30..

Jones complained at trial, and he complains on appeal as well, about the lack of any confession, eyewitness testimony describing the breaking at the time of the breaking, and the lack of any so-called "physical evidence,"

Jones majors on the minors.

The State's lack of physical evidence is no impediment to Jones's conviction. *See* **Robinson v. State,** 749 So.2d 1140 (Ct.App.Miss. 1999) [Defendant's possession of property recently stolen was sufficient to support conviction of burglary notwithstanding defendant's alibi and lack of physical evidence."]

In short, "[t]he absence of physical evidence does not negate a conviction where there is testimonial evidence." **Graham v. State,** 812 So.2d 1150 (Ct.App.Miss. 2002), cert denied 828

So.2d 200 (2002).

We reiterate for good measure.

Jones's possession was personal, recent, exclusive according to Cathey and Judon, and no "reasonable explanation" was presented by Jones. It was permissible for Judge Howorth, as finder of fact, to give little weight to Jones's dubious explanation of possession.

The judge, as trier of fact, was charged with the task of deciding whether Rayford Cathy and Harold Judon, the owners of the furniture stores where the stolen items were found, were telling the truth, the whole truth, and nothing but the truth on this occasion. It decided that question adversely to Jones who testified in his own defense.

At the close of all the evidence, Judge Howorth adjudicated guilt with the following observations:

> BY THE COURT: Cause number LK 06-109 the State of Mississippi versus James Earl Jones, the Court has heard all the testimony and the arguments of respective counsel in this case and the court has retired and deliberated on the charges and reviewed the exhibits offered and introduced into evidence and the court is of the opinion that the State of Mississippi has met its burden of proof. By clear and convincing evidence beyond a reasonable doubt that James Earl Jones is in fact guilty of the crime of burglary of a dwelling and the Court adjudicates you James Earl Jones guilty of that offense. And the Court is going to order that the defendant be held at the Lafayette County Detention Center until a sentencing hearing can be held at a later date in this matter. All right. I appreciate the courtesy the attorneys have shown the court and this matter will stand adjourned. Any thing further?

Jones notes " . . . that Mr. Cathey's testimony itself was riddled with inconsistencies apparently because Mr. Cathey['s] mind was, admittedly, not on the case but was instead with his father who had just had a stroke." (Brief of the Appellant at 14)

No matter.

We respectfully submit there was enough evidence which, if true, was sufficient to support the guilty verdict. It is well settled that "[t]he jury has the duty to determine the impeachment value of inconsistencies or contradictions as well as testimonial defects of perception, memory and sincerity." **Jones v. State**, 381 So.2d 983, 989 (Miss. 1990). *See also* **Blocker v. State,** 809 So.2d 640, 645 (Miss. 2000); **Hill v. State**, 199 Miss. 254, 24 So.2d 737 (1946).

Jones suggests that reasonable and fair-minded jurors could only have found him not guilty of house burglary. This is the standard of review for the "sufficiency of the evidence" as opposed to its "weight." **Gibson v. State,** 895 So.2d 185, 189 (Ct.App.Miss. 2004). We submit that reasonable minds could have differed and found Jones guilty of each essential element of the offense of burglary of a dwelling house.

"Requests for a directed verdict and motions JNOV implicate sufficiency of evidence." **Franklin v. State**, 676 So.2d 287, 288 (Miss. 1996). This Court must review the trial court's finding regarding sufficiency of the evidence at the time the motion for JNOV was overruled. **Holloman v. State**, 656 So.2d 1134, 1142 (Miss. 1995), citing **Wetz v. State**, 503 So.2d 830, 868-68 (Miss. 1987).

In judging the legal sufficiency, as opposed to the weight, of the evidence on a motion for a directed verdict or request for peremptory instruction or motion for judgment notwithstanding the verdict, the trial judge is required to accept as true all of the evidence that is favorable to the State, including all reasonable inferences that may be drawn therefrom, and to *disregard* evidence favorable to the defendant. **Hubbard v. State,** 819 So.2d 1192 (Miss. 2001), reh denied; **Yates v. State**, 685 So.2d 715, 718 (Miss. 1996); **Ellis v. State**, 667 So.2d 599, 612 (Miss. 1995); **Clemons v. State**, 460 So.2d 835 (Miss. 1984); **Forbes v. State**, 437 So.2d 59 (Miss. 1983);

Bullock v. State, 391 So.2d 601 (Miss. 1980). *See also* **Jones v. State,** 904 So.2d 149, 153-54 (Miss. 2005) ["The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."]

If under this standard, sufficient evidence to support the jury's verdict of guilty exists, the motion for a directed verdict, request for peremptory instruction or motion for JNOV should be overruled. **Brown v. State**, 556 So.2d 338 (Miss. 1990); **Davis v. State**, 530 So.2d 694 (Miss. 1988).

A finding the evidence is insufficient results in a discharge of the defendant. **May v. State**, 460 So.2d 778, 781 (Miss. 1984).

Viewing and weighing all of the evidence in the light most favorable to, and consistent with, the fact finder's verdict, it seems clear to us the circuit judge did not abuse his judicial discretion in overruling Jones's motions for a directed verdict and judgment notwithstanding the verdict.

Jones also argues the verdict of the jury was against the overwhelming weight of the evidence because there were serious inconsistencies in the state's case-in-chief regarding Jones's involvement in the burglary. (Brief of the Appellant at 14-15) We submit, on the other hand, the evidence does not preponderate heavily, if at all, in favor of the defendant. Affirmation of this appeal, quite clearly, would not work an unconscionable injustice.

Inconsistencies and defects in the trial testimony were not egregious and are not fatal to a guilty verdict. The judge or jury is the judge of both the weight and credibility of the testimony and is free to accept or reject all or some of the testimony given by each witness. **Love v. State,** 829 So.2d 707 (Ct.App.Miss. 2002). *See also* **Carter v. State,** 799 So.2d 40 (Miss. 2001) [Jurors may

believe or disbelieve, accept or reject, the utterances of any witness.]; **Milano v. State,** 790 So.2d 179, 191 (Miss. 2001), reh denied quoting from **Taylor v. State,** 733 So.2d 251, 257 (Miss. 1999) ["The jury may accept the testimony of some witnesses and reject that of others, and may accept in part or reject in part the testimony of any witnesses, or may believe part of the evidence on behalf of the state and part of that for the accused."]

Jones, as noted previously, suggests the absence of physical evidence negates his conviction. We disagree. As stated previously, "[t]he absence of physical evidence does not negate a conviction where there is testimonial evidence." **Graham v. State,** *supra*, 812 So.2d 1150 (Ct.App.Miss. 2002), cert denied 828 So.2d 200 (2002).

Viewing all of the evidence in the light most consistent with the jury's verdict, it cannot be said the circuit judge abused his judicial discretion in overruling Jones's motion for a new trial. (R. 222; C. P. at 16) This is especially true where, as here, the testimony of Brassel simply contradicted the testimony of Cathey and Judon that Jones was by himself.

One of the alleged inconsistencies relied upon by Jones deals with testimony concerning the color of his pickup truck. Stella Jones, the defendant's wife testified the truck was red with a tan stripe down both sides. (R. 113) Mr. Cathey testified he could not tell the color of the truck Jones was driving that Saturday (R. 46) while Mr. Judon testified Jones came around 11:00 a.m. on Saturday in a blue or black truck. (R. 95)

James Brassel, who worked for Cathey, testified during the hearing on the motion for a new trial that Jones pulled up that Saturday in a maroon and beige Chevrolet truck. (R. 202) There is no egregious inconsistency here. Mr. Judon was simply mistaken.

The law applicable to Jones's sufficiency and weight of the evidence complaint is summarized in **Nobles v. State,** 879 So.2d 1067, 1071 (Ct.App.Miss. 2004), where we find this

language:

> The jury is charged with weighing and considering conflicting evidence and the credibility of the witnesses. *McClain v. State*, 625 So.2d 774, 778 (Miss. 1993). In questioning the sufficiency of the evidence, we are required to review that evidence in a light most favorable to the State, giving it the benefit of all reasonable inferences which may be drawn from it and accepting as true that evidence which supports guilt. *Id.* This Court is authorized to reverse only where, with respect to one or more elements of the offense charged, the evidence is such that reasonable and fair-minded jurors could only find the accused not guilty. *Id.*
>
> Reviewing the record in a light most favorable to the State, we find that there was more than sufficient evidence to support the jury's findings. The jury heard the audiotape of the transaction between Sturdivant, the confidential informant, and Porter. Porter testified that Nobles sold him the crack cocaine used in the transaction with Sturdivant. * * *
>
> A motion for a new trial asks the Court to hold that the verdict was contrary to the overwhelming weight of the evidence. *Crowley v. State*, 791 So.2d 249 (¶15) (Miss.Ct.App. 2000). "[T]his Court must accept as true the evidence presented as supportive of the verdict, and we will disturb a jury verdict only when convinced that the circuit court has abused its discretion in failing to grant a new trial or if the final result will result in an unconscionable injustice." *Ford v. State*, 753 So.2d 489 (¶ 8) (Miss.Ct.App. 1999). Because the jury's verdict is supported overwhelmingly by the evidence in the record, the circuit court did not abuse its discretion in refusing to grant Nobles' motion for a new trial. Accordingly, we affirm his conviction and sentence.

Also relevant here is the following language found in **Stewart v. State,** 909 So.2d 52, 56-57(¶¶13-20) (Miss. 2005):

> Stewart moved for a directed verdict at the close of the State's case-in-chief. The trial court denied Stewart's motion. Stewart also made a post-trial motion for judgment notwithstanding the verdict, or alternatively, motion for a new trial, and the trial court also denied said motion.
>
> This Court has made a distinction between the review of the denial of a motion for J.N.O.V. based on the legal sufficiency of the

evidence and review of a motion for new trial based on the weight of the evidence.

* * * * * *

On the issue of the legal sufficiency of the evidence, this Court held in **Pinkney v. State,** 538 So.2d 329, 353 (Miss. 1988), *vacated on other grounds*, 494 U.S. 1075, 110 S.Ct. 1800, 108 L.Ed.2d 931 (1990), that reversal can only occur when evidence of one or more of the elements of the charged offense is such that "reasonable and fair minded jurors could only find the accused not guilty." (Quoting **Wetz v. State**, 503 So.2d 803, 808 (Miss. 1987)). A motion for J.N.O.V. challenges the legal sufficiency of the evidence. **McClain v. State**, 625 So.2d 774, 778 (Miss. 1993). "[T]his Court properly reviews the ruling on the last occasion the challenge was made in the trial court." **Id.** at 778. Here, this occurred when the trial court denied Stewart's motion for J.N.O.V. *See* **Id.**

* * * * * *

A motion for new trial challenges the weight of the evidence. **Sheffield v. State,** 749 So.2d 123, 127 (Miss. 1999). A reversal is warranted only if the trial court abused its discretion in denying a motion for new trial. **Id.**

This Court held in **Bush v. State,** 895 So.2d 836, 844 (Miss. 2005) as follows:

> When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, we will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. **Herring v. State,** 691 So.2d 948, 957 (Miss. 1997). We have stated that on a motion for new trial, the court sits as a thirteenth juror. **The motion, however, is addressed to the discretion of the court, which should be exercised with caution, and the power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict. Amiker v. Drugs For Less, Inc.,** 796 So.2d 942, 947 (Miss. 2000). However, the evidence should be weighed in

> the light most favorable to the verdict. **Herring,** 691 So.2d at 957. A reversal on the grounds that the verdict was against the overwhelming weight of the evidence, "unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict." **McQueen v. State,** 423 So.2d 800, 803 (Miss. 1982). Rather, as the "thirteenth juror," the court simply disagrees with the jury's resolution of the conflicting testimony. **Id.** This difference of opinion does not signify acquittal any more than a disagreement among the jurors themselves. **Id.** Instead, the proper remedy is to grant a new trial.
>
> In the case *sub judice*, the verdict is consistent with the weight of the evidence, and a new trial is not warranted. Without repeating the facts previously stated, the jury heard the testimony from all the witnesses called by the State. Stewart did not testify, and the defense did not call any witnesses to testify. The jury determined that Stewart was guilty on Count II for the burglary of Gray's house. When polled as to Count II, all jurors stated that was their verdict. The jury had the opportunity to weigh the evidence presented and the credibility of the State's witnesses. This assignment of error is without merit. [emphasis supplied]

See also **Watts v. State,** *supra*, No. 2006-KA-01057-COA decided June 12, 2007, (¶¶ 6-12) [Not Yet Reported].

Jones points to inconsistencies in the trial testimony, police report, and pretrial statements made to local authorities. A similar argument was made and rejected in **Collier v. State,** 711 So.2d 458, 462 (Miss. 1998), where we find the following:

> "We are asked to reverse this case on the grounds that there are inconsistencies and contradictions in her testimony. If this be true, it would still be a question for the jury." *Blade*, 240 Miss. at 188, 126 So.2d at 280; *e.g. Allman*, 571 So.2d at 253. In the instant case, any inconsistencies found in C.H.'s testimony go [to] the weight and credibility of her testimony, clearly a jury question. **In addition, C.H.'s testimony was not at all inconsistent on the issue at the heart of this matter** - Collier's fondling of her. This contention is without merit. [emphasis ours]

The same is true here. Testimony "on the issue at the heart of this matter," *viz.*, Jones's

possession of recently stolen property and the inference attached to it was not inconsistent.

To reverse this case in light of the facts presented would be an invasion of the province and prerogative of the judge who decided the question of guilt or innocence against the defendant after listening to discredited testimony from Jones concerning his explanation of possession.

The posture of Jones's weight of the evidence complaint is controlled by the wise rule of law that the jury, not the reviewing Court, resolves issues regarding weight and credibility of evidence. **Holloman v. State,** 656 So.2d 1134 (Miss. 1995).

Credibility of the witnesses, including Cathey, Judon, and Mills, the State's star performers, as well as the credibility of Jones himself, was a factual issue for the judge as finder of fact. **Doby v. State,** *supra*, 532 So.2d 584, 590-91 (1988); **Byrd v. State,** 522 So.2d 756, 760 (Miss. 1988).

"The jury [here the judge] is the *sole* judge of the weight and credibility of the evidence." **Byrd v. State,** *supra*, 522 So.2d 756, 760 (Miss. 1988) [emphasis supplied].

"[I]t is not for this court to pass upon the credibility of witnesses, and where the evidence justifies the verdict it must be accepted as having been found worthy of belief." **Grooms v. State,** 357 So.2d 292, 295 (Miss. 1978) quoting from **Murphree v. State,** 228 So.2d 599, 601 (Miss. 1969). *See also* **Pinson v. State,** 518 So.2d 1220, 1224 (Miss. 1980) ["It is not our function to determine whose testimony to believe."]

Put another way,

> "**[w]e do not sit as jurors.** That fact-finding body, while being overseen by the trial court, has the constitutional duty to decide which witnesses are relating an accurate account of the occurrences giving rise to the trial. * * * " **Griffin v. State,** 381 So.2d 155, 157 (Miss. 1980) [emphasis supplied]

In **Hyde v. State,** 413 So.2d 1042, 1044 (Miss. 1982), this Court, quoting from **Evans v.**

State, 159 Miss. 561, 132 So. 563 (1931), opined:

> We invite the attention of the bar to the fact that **we do not reverse criminal cases where there is a straight issue of fact, or a conflict in the facts;** juries are impaneled for the very purpose of passing upon such questions of disputed fact, and we do not intend to invade the province and prerogative of the jury. (159 Miss. at 566, 132 So.2d at 564) [emphasis ours]

"The motion for a new trial is addressed to the sound discretion of the trial court." **Burge v. State**, 472 So.2d 392, 397 (Miss. 1985). Put another way, this Court reviews the trial court's denial of a post-trial motion for new trial under the abuse of discretion standard. **Flowers v. State**, 601 So.2d 828, 833 (Miss. 1992); **Robinson v. State**, 566 So.2d 1240, 1242 (Miss. 1990). No abuse of judicial discretion has been demonstrated here.

Finally, in **Maiben v. State**, 405 So.2d 87, 88 (Miss. 1981), this Court announced that

> . . . . . we will not set aside a guilty verdict, absent other error, **unless it is clearly a result of prejudice, bias or fraud, or is manifestly against the weight of credible evidence.** [emphasis supplied]

The following observations made in **Groseclose v. State**, 440 So.2d 297, 300 (Miss. 1983), are also worth repeating here:

> We will not order a new trial unless convinced that the verdict is so contrary to the overwhelming weight of the evidence that, to allow it to stand, **would be to sanction an unconscionable injustice.** *Pearson v. State*, 428 So.2d 1361, 1364 (Miss. 1983). Any less stringent rule would denigrate the constitutional power and responsibility of the jury in our criminal justice system. [emphasis supplied]

In short, this Court will not set aside a guilty verdict unless the verdict is manifestly against the weight of credible evidence [**Maiben v. State,** 405 So.2d 87, 88 (Miss. 1981)] and unless this Court is convinced that to allow the verdict to stand, would be to sanction an unconscionable injustice. **Hilliard v. State,** 749 So.2d 1015, 1016 (Miss. 1999); **Groseclose v. State**, 440 So.2d

297, 300 (Miss. 1983). Contrary to Jones's position, the case at bar does not exist in this posture.

B.

THE DENIAL OF A CONTINUANCE IS NOT SUBJECT TO APPELLATE REVIEW BECAUSE SUCH WAS NOT DISTINCTLY ASSIGNED AS A GROUND FOR A NEW TRIAL.

IN ANY EVENT, NO MANIFEST INJUSTICE ENSUED. ACCORDINGLY, THE TRIAL JUDGE DID NOT ABUSE HIS JUDICIAL DISCRETION IN DENYING A CONTINUANCE.

Jones argues the trial judge abused his judicial discretion in denying a last minute continuance on Monday, April 24th, the day prior to the morning of trial on Tuesday, April 25th. Jones points to " . . . the extremely short period of time between the appointment of defense counsel and the trial." He claims " . . . the trial court's denial of Jones' continuance resulted in an extremely short period of time for Defense Counsel to prepare for trial [and] [t]he effect of this became apparent during trial from Defense Counsel's lack of knowledge about the facts and necessary witnesses in the case." (Brief of the Appellant at 17)

We note there was no formal request for a continuance by appointed counsel or by the defendant. Rather, Mr. Levidiotis, appointed by Judge Howorth to represent Jones, simply informed the court during a brief motion hearing conducted on April 24th that Jones refused to cooperate with him and wanted a continuance so Jones could hire a new lawyer. (R. 7-8)

During this motion hearing (R. 7-12), Judge Howorth handled the matter with a great deal of wisdom and circumspection. He pointed out to Jones that Jones had written him and requested a quick disposal of the charges pending against him. Several days earlier Judge Howorth had Jones transported from the penitentiary to Lafayette County where he met personally with Jones prior to the 24th. He appointed Jones a lawyer, Tom Levidiotis. (R. 8)

During the motion hearing on the 24th, Jones acknowledged in the presence of Judge Howorth he wrote to the Judge with this request for a speedy disposition of the charges. (R. 8-12) In the end, Judge Howorth got it right when he told Jones, "Well[,] you asked for a trial and I'm going to give you one." (R. 12)

During the new trial hearing Ms Kelly made the following observation: "Now according to Mr. Jones and he will testify to this. He (Jones) and Mr. Levidiotis did not get along from the get go." (R. 196)

It has been said that "[a] defendant cannot base a claim of inadequate representation upon his refusal to cooperate with appointed counsel [because] [s]uch a doctrine would lead to absurd results." **Evans v. State,** 273 So.2d 495, 498-99 (Miss. 1973). Moreover, a defendant may not use his right to proceed without counsel " . . . to play a 'cat and mouse' game with the court . . . or by ruse or stratagem fraudulently seek to have the trial judge placed in a position where, in moving along the business of the court, the judge appears to be arbitrarily depriving the defendant of counsel." **Id.**

The situation here is analogous.

The refusal of a defendant to cooperate with appointed counsel is no grounds for a last minute continuance where, as here, the judge has conferred directly with the defendant, and a petit jury has been summoned for trial scheduled for the following day.

Jones freely concedes the proof required under Miss.Code Ann. §99-15-29 is absent as is a " . . . demonstrative affidavit from Jones of evidence and prejudice against him." (Brief of the Appellant at 17)

Moreover, Jones acknowledges ". . . that when an accused appears on the morning of trial with a new lawyer and asks for a continuance, the trial court does not abuse its discretion in denying

the continuance." **Byrd v. State,** 522 So.2d 756, 759 (Miss. 1988).

And, while Jones laments that he did not have sufficient time to prepare an adequate defense, the record reflects the defense presented at trial - a general denial coupled with honest possession - was more than adequate. The fact that Jones is now arguing with great vigor the judge's verdict was against the overwhelming weight of the evidence speaks for itself.

Scrutiny of this trial record will reflect that Tom Levidiotis was aggressive in his defense of James Jones from the get-go. It was not Mr. Levidiotis who claimed he needed additional time to prepare for trial. Indeed, Levidiotis repeatedly stated to the judge he was ready to try both cases. (R. 3-4, 17-18)

> "I have had ample opportunity this afternoon to confer with my client to review the district attorney's files in these matters. We have announced ready with respect to whichever one of them the district attorney wishes to bring and I talked to my client about several things, one of which he had the option if the Court were to grant his desire to have the court sitting without a jury to decide both the facts and law in this case." (R. 18)

The decision to request a bench trial was based largely upon Jones's willingness to testify in his defense and his concern over the possible use of his prior felony convictions for impeachment purposes. (R. 17-22, 221)

We respectfully submit the "interest of justice" did not require a continuance.

More importantly, perhaps, the denial of a continuance is not an issue capable of being reviewed on appeal where, as here, the denial of the continuance is not distinctly assigned as a ground for a new trial in the defendant's post-trial motion for a new trial. (C.P. at 10-12)

Jones's motion for a new trial, while lamenting a lack of sufficient "notice and time to prepare for trial," does not mention a "continuance.' The word "continuance" does not appear anywhere in the motion. Rather, Jones simply claimed he was not allowed sufficient time to retain

an attorney.

In our opinion, this will not do at all.

On motion for a new trial, certain errors must be brought to the attention of the circuit judge so that he may have the opportunity to pass upon their validity before the Supreme Court, a reviewing tribunal, is called upon to review them. **Shelton v. State,** 853 So.2d 1171, 1182 (Miss. 2003), citing **Metcalf v. State**, 629 So.2d 558 (Miss. 1993), and **Farris v. State,** 764 So.2d 411, 423 (Miss. 2000). One of those errors is the denial of a continuance in the trial court which is not reviewable unless the party whose motion for continuance was denied makes a motion for a new trial on this ground. **Crawford v. State,** 787 So.2d 1236 (Miss. 2001).

We go no further than the following language found in **Pool v. State**, 483 So.2d 331, 336 (Miss. 1986), which appears to be dispositive of Jones's complaint:

> Finally, Pool is procedurally barred from raising this issue on appeal, as it was not listed as grounds in his motion for a new trial.
>
> > The denial of a continuance in the trial court is not reviewable unless the party whose motion for continuance was denied makes a motion for a new trial on this ground, making the necessary proof to substantiate the motion.
> >
> > *Colson v. Sims*, 220 So.2d 345, 347, n. 1 (Miss. 1969); *see also Jackson v. State*, 423 So.2d 129 (Miss. 1982).

See also **Morgan v. State**, 741 So.2d 246, 255 (Miss. 1999)["Morgan's motion for new trial and for judgment notwithstanding the verdict made no mention of the denial of a continuance. Because the issue was not properly preserved, and because the trial court did not have the opportunity to rule on this claimed error, this issue is not properly before this Court and is procedurally barred."]; **Reeves v. State,** 825 So.2d 77 (Ct.App.Miss. 2002)[Denial of a continuance in the trial court is not reviewable in the appellate court unless the party whose motion for a continuance was denied makes

a motion for a new trial on this ground.]

Admittedly, Ms Kelly made the following observations during the new trial hearing: "The Court has heard that evidence and heard my prior argument. * * * How he was not allowed to have a continuance to hire a lawyer." (R. 215)

Nevertheless, there is no direct reference to the denial of a continuance in Jones's written motion for a new trial or in argument made in support thereof. (C.P. at 10-12) Jones has failed to demonstrate the issue was preserved for appellate review. **Johnson v. State,** 926 So.2d 246 (Ct.App.Miss. 2005), reh denied. *But see* **West v. State,** No. 2006-KA-01353-COA (¶11) decided November 20, 2007 where the Court of Appeals held " . . . that West's post-trial claim of a discovery violation [was] sufficient for us to address any error in failing to grant West a longer continuance to review the documents."

In any event, counsel for Jones has not stated how Jones's defense to the charge would have been any different had he had additional time to prepare for trial. No prejudice to Jones has been seriously alleged or demonstrated.

Regrettably, there is nothing in the present record demonstrating that Judge Howorth abused his broad discretionary powers in failing to grant a continuance. Stated differently, there is nothing in this record demonstrating the denial of a last minute continuance resulted in a "manifest injustice."

This Court has repeatedly said that trial judges have vested in them broad discretionary powers in granting or refusing to grant a continuance. **Payton v. State,** 897 So.2d 921 (Miss. 2003) citing Rule 9.04, Uniform Circuit and County Court Rules; **Smiley v. State,** 815 So.2d 1140 (Miss. 2002), reh denied; **Richardson v. State**, 722 So.2d 481 (Miss. 1998); **Wilson v. State**, 716 So.2d 1096 (Miss. 1998), citing Miss.Code Ann. Section 99-15-29; **Greene v. State**, 406 So.2d 805 (Miss.

1981), citing section 99-15-29, Mississippi Code 1972 Annotated (1973); **Clay v. State,** 829 So.2d 676 (Ct.App.Miss. 2002), reh denied, cert denied 829 So.2d 1245; **Gilbert v. State,** 934 So.2d 330 (Ct.App.Miss. 2006), reh denied; **McFadden v. State,** 929 So.2d 365 (Ct.App.Miss. 2006), reh denied.

Unless the trial court abuses its discretion to the prejudice of the defendant, its action will not be held error. *See* **Carter v. State,** 473 So.2d 471 (Miss. 1985); **Greene v. State,** *supra*; **Woods v. State,** 393 So.2d 1319 (Miss. 1981); **Norman v. State,** 385 So.2d 1298 (Miss. 1980).

Moreover, the decision to grant or to deny a motion for a continuance will not be grounds for reversal unless it is shown to have resulted in "manifest injustice." **Coleman v. State,** 697 So.2d 777 (Miss. 1997); **Atterberry v. State,** 667 So.2d 622 (Miss. 1995); **Lambert v. State,** 654 So.2d 17 (Miss. 1995), appeal after remand 724 So.2d 392; **Johnson v. State,** 631 So.2d 185 (Miss. 1994); **McGee v. State,** 828 So.2d 847 (Ct.App.Miss. 2002); **Peters v. State,** 920 So.2d 1050 (Ct.App.Miss. 2006).

One of this Court's many expressions on the subject matter is found in **Jackson v. State,** 538 So.2d 1186, 1188-89 (Miss. 1989), where we find the following:

> The standards our courts employ when one criminally accused requests a continuance may be found in Miss.Code Ann. Section 99-15-29 (1972). [footnote omitted] The granting or denial of a continuance rests within the sound discretion of the trial judge. [citations omitted]
>
> Our dispositive inquiry is whether denial of Jackson's motion for a continuance resulted in substantial prejudice to his right to a fair opportunity to prepare and present his defense. Indeed, the last line of Section 99-15-29 reads
>
> > [D]enial of continuance shall not be grounds for reversal unless the Supreme Court shall be satisfied that injustice resulted therefrom.

Jones, try as he might, has failed to demonstrate that a "manifest injustice" resulted from the denial of a last minute continuance the day before trial was to begin. (R. 7-17) This is especially true where, as here, Jones's lawyer requested a speedy trial and, in fact, announced that he was "ready to go." (R. 3-4)

An application for a continuance submitted on the ground that an attorney has not had sufficient time to prepare for trial is subject to proof and to facts as they may appear from that which is known to the trial court. **Barnes v. State**, 249 So.2d 383 (Miss. 1971). *See also* **Oates v. State**, 421 So.2d 1025 (Miss. 1982); **McFadden v. State**, 408 So.2d 476 (Miss. 1982).

The facts gleaned on the day of trial - April 25th - and prior to trial - April 24th - do not demonstrate an abuse of broad judicial discretion in denying the motion for a continuance sought by Jones for the purpose of obtaining new counsel. (R. 7-12. 26-133)

The representation of trial counsel, Mr. Levidiotis, was commendable. Jones, who testified in his own behalf, proffered a general denial in defense of the charge and produced his wife as a witness. He sought to discredit the testimony of Mr. Cathey. (R. 50-59) The witnesses for the State, including Cathey and Judon were cross-examined with great vigor and expertise. Inconsistencies and possible flaws in the testimony of Cathey and as well as possible defects in the identifications by Cathey and Judon were fully explored. In short, it appears from the completed trial of this case that counsel had an adequate time and opportunity to prepare. His exceptional performance is a testament to this observation.

At the very least, Jones should have produced some additional evidence at a hearing on his motion for a new trial to substantiate any claim the denial of a continuance worked a "manifest injustice." Where was the affidavit of the mysterious Ms. Mosley and her brother who allegedly help load certain pieces of furniture from the home of the mysterious Charles Mosley?

Where was the affidavit or testimony of the two unidentified white ladies who were allegedly present at Mr. Judon's store when Judon allegedly was not? (R. 127-28) What would have been the nature of their testimony which was not proffered?

> What stones, we ask, were left unturned?
> What bridges, we ponder, were left unburned?
> What theories, we question, were then forsaken?
> What roads, we wonder, were never taken?

Because Jones failed to produce evidence, post-trial, demonstrating actual prejudice, nothing in the official record points to a "manifest injustice" resulting from the denial of a last minute continuance the day prior to the day of trial.

CONCLUSION

Appellee respectfully submits that no reversible error took place during the trial of this cause. Accordingly the judgment of conviction as an habitual offender under 99-19-83 of burglary of a dwelling house, together with the life sentence without the benefit of probation or parole imposed in its wake, should be forthwith affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Billy L. Gore, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the above **BRIEF FOR THE APPELLEE** to be the following:

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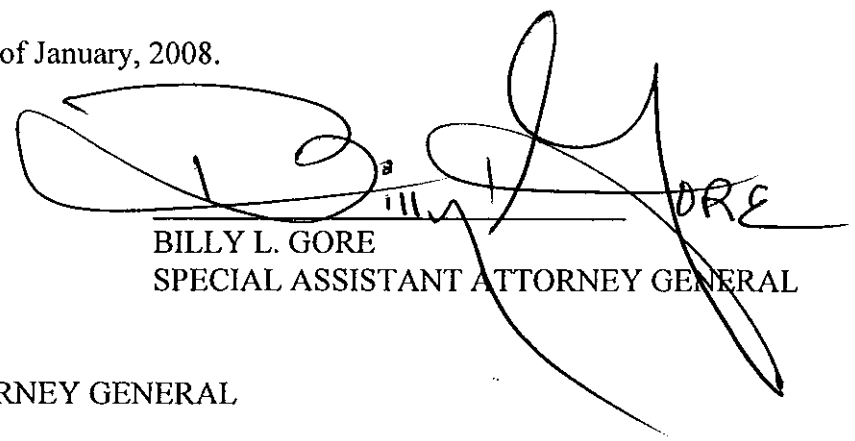
This the 8th day of January, 2008.



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