

COPY

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NATHANIEL THOMPSON

APPELLANT

VS.

FILED

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NO. 2007-KA-1338-COA

**OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS**

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF THE FACTS	3
SUMMARY OF THE ARGUMENT	7
ARGUMENT	10
PROPOSITION I	
THOMPSON RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL. .	10
PROPOSITION II	
THERE WAS CREDIBLE, SUBSTANTIAL EVIDENCE IN	
SUPPORT OF DENYING ALL PEREMPTORY INSTRUCTIONS.	14
PROPOSITION III	
THERE WAS CREDIBLE, SUBSTANTIAL PARTIALLY	
CORROBORATED EVIDENCE IN SUPPORT OF THE DENIAL	
OF A NEW TRIAL.	24
CONCLUSION	29
CERTIFICATE OF SERVICE	30

TABLE OF AUTHORITIES

FEDERAL CASES

Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064-65, 80 L. Ed. 2d 674, 693-95 (1984)	12
---	-----------

STATE CASES

Ahmad v. State, 603 So. 2d 843, 848 (Miss. 1992)	10, 12, 13
Catchings v. State, 394 So.2d 869 (Miss.1981)	12
Davis v. State, 472 So.2d 428 (Miss.1985)	12
Derden v. State 522 So. 2d 752, *754 -755 (Miss.1988)	12
Ferguson v. State, 507 So. 2d 94, 97 (Miss. 1987)	13
Fisher v. State, 481 So. 2d 203, 212 (Miss. 1985)	21
Fleming v. State, 319 So.2d 223 (Miss.1975)	12
Gilmer v. State, 271 So.2d 738, 740 (Miss.1973)	22
Gleeton v. State, 716 So.2d 1083, 1088 (Miss.1998)	22
Green v. State 456 So.2d 757, 758 (Miss. 1984)	11
Groseclose v. State, 440 So. 2d 297, 301 (Miss. 1983)	9, 26
Hammond v. State, 465 So. 2d 1031, 1035 (Miss. 1985)	21
Harveston v. State, 493 So. 2d 365, 370 (Miss. 1986)	21
Holmes v. State, 481 So.2d 319, 322 (Miss.1985)	12
Howard v. State , 755 So.2d 1188, *1190 (Miss. App.1999)	22
Hussey v. State, 473 So.2d 478 (Miss.1985)	12
Jackson v. State , 580 So. 2d 1217, 1219 (Miss. 1991)	8, 26
Johnston v . State, 730 So. 2d 534, 538 (Miss. 1997)	12

Jones v. State , 635 So. 2d 884, 887 (Miss. 1994)	8, 25
Jones v. State, 381 So.2d 983 (Miss.1980); cert. denied, 449 U.S. 1003, 101 S.Ct. 543, 66 L.Ed.2d 300 (1980)	12
Leatherwood v State, 473 So. 2d 964, 968 (Miss. 1985)	11
Lindsay v. State, 720 So. 2d 182, 184 (Miss. 1998)	11
Maddox v. State, 230 Miss 529, 533, 93 So. 2d 649, 650 (1957)	27
McClain v. State, 625 So. 2d 774, 778 (Miss. 1993)	7, 20
McQuarter v. State, 574 So. 2d 685, 687 (Miss. 1990)	10
Mohr v. State , 584 So. 2d 426, 430 (Miss. 1991)	11
Neal v. State, 451 So. 2d 743, 758 (Miss. 1984)	21
Nicolau v. State, 612 So. 2d 1080, 1086 (Miss. 1992)	10
Robinson v. State, 219 So.2d 916 (Miss.1969)	12
Shannon v. State, 321 So. 2d 1 (Miss. 1975)	26
Smith v. State, 490 So. 2d 860 (Miss. 1986)	11
Spikes v. State, 302 So. 2d 250, 251 (Miss. 1974)	21
State. Esparaza v. State, 595 So. 2d 418, 426 (Miss. 1992)	21
Stringer v. State, 454 So. 2d 468, 476-477 (Miss. 1984)	10
Van Buren v. State, 498 So.2d 1224, 1229 (Miss.1986)	12
Wetz v. State, 503 So. 2d 803, 807-08 (Miss. 1987)	21, 26
Wilson v. State, 305 So.2d 347 (Miss.1974)	12
Young v. State, 420 So. 2d 1055, 1057 (Miss. 1982)	26

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VS.

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BRIEF FOR THE APPELLEE

PROCEDURAL HISTORY:

On May 15, 2007, Nathaniel Thompson, "Thompson" was tried for burglary before Circuit Court of Claiborne County, the Honorable Lamar Pickard presiding. R. 1. Thompson was found guilty and given a six year sentence in the custody of the Mississippi Department of Corrections. R. 124. From that conviction, Thompson filed notice of appeal to the Mississippi Supreme Court. C.P. 51.

ISSUES ON APPEAL

I.

DID THOMPSON RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL?

II.

DID THE TRIAL COURT ERR IN DENYING PEREMPTORY INSTRUCTIONS?

III.

DID THE TRIAL COURT ERR IN DENYING A MOTION FOR A NEW TRIAL?

STATEMENT OF THE FACTS

On April 10, 2007, Thompson was indicted with Mr. Scottie Jo Craft for burglary of the Claiborne County Parks and Recreation building on or about January 7, 2007 by a Claiborne County Grand jury. C.P. 3-4.

On May 15, 2007, Thompson was tried for burglary before the Circuit Court of Claiborne County, the Honorable Lamar Pickard presiding. R. 1. Thompson was represented by Mr. W.B. Duggins, Jr. R. 1.

Ms. Michelle Burrell testified that she was director of parks and recreation for Claiborne County. R. 9- 11. The parks and recreation office building was at the Claiborne County fair grounds. She testified that on January 8, she discovered that a door to her office had been forced open. She found that a portable public address system, which had been purchased for some \$850.00, was missing. In addition, a digital camera costing \$300.00 along with \$80.00 in cash was missing. While the PA system was recovered by law enforcement before the time of trial, the camera had not been recovered. R. 11.

Mr. Carl Fleming with the Claiborne County Sheriff's Department, testified that he investigated a burglary at the fair grounds. The building housing the parks and recreation department had been allegedly broken into after business hours. Fleming testified that the door to the office had been "jimmied" with "a piece of metal." R. 14. While talking with Scotty Craft about another unrelated charge, Craft told him where the missing PA system was located. It was recovered from Thompson's mother's house. R. 15. The digital camera was not recovered. R. 15. Craft also told Fleming that Thompson had driven him to the fair grounds in his car when these items were taken. Thompson then drove him away once the items were placed in his car. R. 15.

Craft testified that he burglarized the goods because Thompson wanted them to use in exchange for "other goods." R. 24.

Mr. Scottie Jo Craft testified that he pled guilty to burglary. R. 20-25. He did so prior to trial and received a six year sentence. Craft testified that he broke into the Claiborne County Parks and Recreation building. Craft had previously worked there and knew where their equipment was stored. R. 29. He did so at Thompson's request. He forced the door open using "a little ole screw driver." R. 22. He "jimmied the door open." R. 22.

Thompson took Craft to the building in his car, a gray Buick. He picked him up after Craft had removed the PA system and a digital camera. After removing the PA system, a camera and a battery from the building, they took the items to Thompson's house. Craft testified that the camera was given to Chris Parker who was Thompson's girl friend. R. 23.

Craft testified that although Thompson's car was not running well, it was running. This was on January 7, 2007, the day of the burglary. R. 23. Craft testified that Thompson was driving a gray Buick and not a white Camero. Craft, a mechanic, had partially repaired the Buick's carburetor with a used one. He "used (it) as a core." R. 23. He did not buy a new carburetor for the car.

While Craft admitted to using cocaine, he testified that he had "a good memory of everything I done." R. 28.

Ms. Chris Parker, one of Thompson's girl friends, testified that while Thompson offered her a camera, she allegedly did not want it because he had no receipt. Parker testified that Thompson called her from jail. He allegedly told her that "he needed a camera." R. 38. She allegedly told him she "didn't know where it was." R. 38.

At the conclusion of the prosecution's case in chief, the trial court denied a motion for a directed verdict. R. 42.

Mr. Thompson testified in his own behalf. R. 65-73. He initially testified hat Craft brought a PA system to his house. He testified at first to buying it from Craft. Thompson then claimed to have "pawned it" for Craft for \$100.00. R. 67-82. Yet he admitted that he did not run a pawn shop. R. 82. In fact, he contradicted himself by testifying that he bought the PA system, then that he pawned it, and finally that he merely took it as part of an exchange for some work Craft could do for him. R. 67-82.

Thompson claimed he called his mother and Parker, his girl friend from the jail. R.68-76. He claimed he told his mother to bring the PA system that was claimed stolen. R. 68. He claimed that he told Parker "to go buy a camera so I could try to get off." R. 76.

Thompson initially denied knowing anything about the missing camera. "I don't know nothing about no camera." R. 80. He denied either giving or trying to sell the digital camera to his girl friend, Chris Parker. R. 81. Yet, he contradicted himself by claiming Craft "wanted to sell her the camera." R. 81. Thompson also denied having asked Chris Parker, his girl friend, to bring "the camera" to the police department. R. 76.

Sheriff Frank Davis testified in rebuttal. R. 107-109. Davis testified that he heard Thompson make two phone calls. This was when he was in custody. One was to his mother, the other was to Chris Parker. Davis testified to hearing Thompson ask his mother "to bring the stuff up there she had." R. 108. He testified to hearing him ask Chris "to bring the camera up there that she had." R. 108.

Ruby Thompson , Thompson's mother, testified that the PA system had been brought to her house. It was brought there by Thompson and Craft together. R. 97-98.

Thompson was found guilty and given a six year sentence in the custody of the Mississippi Department of Corrections. R. 124. A motion for a new trial was denied by the trial court. C.P. 38;

45. From that conviction, Thompson filed notice of appeal to the Mississippi Supreme Court, C.P. 51.

SUMMARY OF THE ARGUMENT

1. The record reflects that Thompson received effective assistance of counsel. There was neither evidence of deficient performance nor of any prejudice to Thompson's defense that undermined confidence in the fairness of his trial. There were no affidavits or statements of "good cause" for why they could not be obtained in support of any of Thompson's claims filed with his motion. Appellant's brief page 1-14. See M. C. A. §99-39-9(1)(e).

While no cautionary instruction was requested, or given sua sponte, this was a matter for the trial court's "discretion." The record reflects the trial court did not abuse its discretion. The record reflects corroboration by law enforcement and other witnesses of Craft, the accomplice's testimony. In addition, this is a case where the appellant incriminating himself, contradicted himself, as well as was contradicted by law enforcement, his mother and one of his girl friends. R. 65-84.

Jury instructions C-1 and S-5, along with other instructions, dealt with the responsibility of the jury for judging the credibility of all the witnesses appearing before them, which would have included both Craft and Thompson. C.P.17-19; 25. It is not error to avoid a cautionary instruction where an accomplice's testimony is partially corroborated. Particularly would this be true where a defendant testifies defiantly and recklessly in his own behalf, making his own credibility a central issue to his defense.

2. There was credible, substantial partially corroborated evidence in support of the trial court's denial of all peremptory instructions. R. 42. When the evidence presented by the prosecution was taken as true with reasonable inferences, there was more than sufficient evidence for denying a directed verdict. **McClain v. State**, 625 So. 2d 774, 778 (Miss. 1993).

While Craft had previously pled guilty for the burglary at issue, his testimony about Thompson's participation in the burglary was partially corroborated, and found not to be

inconsistent or unreasonable, given other testimony and evidence before the jury.

Thompson's testimony of buying , pawning, or exchanging goods rather than receiving the requested stolen property from Craft merely created a conflict in the evidence the jury was responsible for resolving. R. 79-83. Thompson's testimony about his car not being operable at the time of the burglary was contradicted on rebuttal by Craft, who was a mechanic. Thompson's testimony about his telephone call requests to his mother and his girl friend was contradicted by Sheriff Davis' testimony. R. 108. Thompson's claim that Craft tried to sell the camera they showed Chris Parker was contradicted not only by Parker but also by Officer Johnny Scott. R. 101.

Thompson testified to smoking marijuana, "weed", at his house with others the evening of the burglary. In fact, he admitted to smoking marijuana "every day." R. 70. He claimed to have no need to steal anything, but admitted that he was not employed at the time of trial and had no means of support. R. 65-73. Thompson's own mother contradicted him by testifying that both he and Craft brought the stolen PA system to her house. R. 97.

3. There was credible, substantial evidence in support of the trial court's denying a motion for a new trial. The record reflects that the trial court did not abuse its discretion in denying that motion. C.P. 45. There was no "unconscionable injustice" involved in denying that motion. **Jones v. State** , 635 So. 2d 884, 887 (Miss. 1994). On a motion for a new trial, all the evidence, not just that supporting the case for the prosecution, must be taken in the light most consistent with the verdict. **Jackson v. State** , 580 So. 2d 1217, 1219 (Miss. 1991).

This was not a case of a conviction based solely upon the corroborated testimony of an accomplice. Craft, the accomplice, was corroborated as to the what, when, where and how of the burglary by other witnesses. In addition, Thompson, who chose to testify in his own behalf, was contradicted by eye and ear witnesses including his own mother and girl friend. The weight of the

evidence is not based upon how many witnesses testify on behalf of an appellant but upon the jury's assessment of the credibility of all of the witnesses testifying to the essential factual elements substantiating the charges against a defendant. **Groseclose v. State**, 440 So. 2d 297, 301 (Miss. 1983).

ARGUMENT

PROPOSITION I

THOMPSON RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

Thompson argues that he received ineffective assistance of counsel. He believes that his counsel should have requested an accomplice instruction. Since the evidence against him came from Craft who had pled guilty to the burglary for which Thompson was being tried, he should have had the jury instructed to view his testimony with caution. Appellant's brief page 5-8.

For Thompson to be successful in his ineffective assistance claim, he must satisfy the two-pronged test set forth in **Strickland v. Washington**, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064-65, 80 L. Ed. 2d 674, 693-95 (1984) and adopted by this Court in **Stringer v. State**, 454 So. 2d 468, 476-477 (Miss. 1984). Thompson must prove: (1) that his counsel's performance was deficient, and (2) that this supposed deficient performance prejudiced his defense. The burden of proving both prongs rests with Thompson. **McQuarter v. State**, 574 So. 2d 685, 687 (Miss. 1990). Finally, Thompson must show that there is "a reasonable probability" that but for the alleged errors of his counsel, the result of his trial would have been different. **Nicolau v. State**, 612 So. 2d 1080, 1086 (Miss. 1992), **Ahmad v. State**, 603 So. 2d 843, 848 (Miss. 1992).

The second prong of the **Strickland v. Washington**, 466 U.S. 668, 685, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) is to determine whether there is "a reasonable probability" that but for the alleged errors of his counsel, the result of Thompson's trial would have been different. This is to be determined from "the totality of the circumstances" involved in his case.

The appellee would submit that based upon the record, there is a lack of evidence for holding that there is a reasonable probability that Mr. Duggin erred in representing Thompson.

Under the facts of this case, there was partial corroboration of Craft's testimony. Thompson chose to testify in his defense. R. 65-84. He was contradicted by both state witnesses and Craft. This made his credibility with the jury a central issue in his defense.

As stated in **Strickland**: and quoted in **Mohr v. State**, 584 So. 2d 426, 430 (Miss. 1991): Under the first prong, the movant 'must show that the counsel's performance was deficient and that the deficient performance prejudiced the defense. Here there is a strong presumption of competence. Under the second prong, the movant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' The defendant must prove both prongs of the test. *Id.* 698.

Thompson bears the burden of proving that both parts of the tests have been met.

Leatherwood v State, 473 So. 2d 964, 968 (Miss. 1985).

The burden of proving ineffective assistance of counsel is on the defendant to show that the counsel's performance was deficient and that the deficient performance prejudiced the defense.

When an appeal involves post conviction relief, the Mississippi Supreme Court has held, "that where a party offers only his affidavit, then his ineffective assistance of counsel claim is without merit." **Lindsay v. State**, 720 So. 2d 182, 184 (6 (Miss. 1998); **Smith v. State**, 490 So. 2d 860 (Miss. 1986). 2d 860 (Miss. 1986). There were no affidavits or proposed witnesses included with the charge against trial counsel. Nor is there any statement of "good cause" for why it could not be obtained. See M. C. A. §99-39-9(1)(e).

In **Green v. State** 456 So.2d 757, 758 (Miss. 1984), the Supreme Court found that the refusal to grant a requested cautionary instruction for an accomplice "does not constitute reversible error."

Assuming Williams was an accomplice to the crime as contended by the defendant, this Court has held on numerous occasions that the trial court has broad discretion in deciding whether to grant a cautionary instruction regarding the testimony of an accomplice; and, the refusal to give such an instruction does not constitute reversal

error. **Fleming v. State**, 319 So.2d 223 (Miss.1975); **Wilson v. State**, 305 So.2d 347 (Miss.1974); **Robinson v. State**, 219 So.2d 916 (Miss.1969). However, that discretion is subject to abuse when the State's evidence rests solely upon the testimony of an accomplice and there is some question as to the reasonableness and consistency of the testimony, or the defendant's guilt is not clearly proven as was the case in **Catchings v. State**, 394 So.2d 869 (Miss.1981). In that case we held that refusal of the requested instruction was prejudicial error and reversed the conviction

In **Derden v. State** 522 So. 2d 752, *754 -755 (Miss.1988), the Supreme Court stated that granting "a cautionary instruction" on testimony by an accomplice was "discretionary" with the trial court. One consideration in reviewing that discretion was whether there was "some corroboration" of the accomplice. As we shall show under proposition II, there was partial corroboration of Craft's testimony. The record also reflects that Thompson not only contradicted himself in his own testimony, but was also contradicted by other eye and ear witnesses including his own mother.

In **Van Buren v. State**, 498 So.2d 1224, 1229 (Miss.1986), this Court said, "the granting of a cautionary instruction regarding the testimony of an accomplice is discretionary with the trial judge." **Hussey v. State**, 473 So.2d 478 (Miss.1985); **Davis v. State**, 472 So.2d 428 (Miss.1985); **Jones v. State**, 381 So.2d 983 (Miss.1980); cert. denied, 449 U.S. 1003, 101 S.Ct. 543, 66 L.Ed.2d 300 (1980); **Fleming v. State**, 319 So.2d 223 (Miss.1975). However, that discretion is not absolute; it may be abused. **Hussey**, 473 So.2d at 480. **Holmes v. State**, 481 So.2d 319, 322 (Miss.1985). Two of the aspects in determining whether or not the discretion has been abused are (1) was the witness in fact an accomplice, and (2) was his testimony without corroboration. Here the three witnesses were in fact accomplices, and although there was some slight corroboration of *755 their testimony, corroboration was in fact minimal

In **Johnston v. State**, 730 So. 2d 534, 538 (Miss. 1997), the Court stated that the burden for "proving prejudice" could not be met by merely alleging it.

Additionally, there is a further requirement which Johnston must hurdle, prejudice. Claims alleging a deficiency in the attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. **Strickland**, 466 U. S. at 693., 104 S. Ct. at 2067. However, Johnston fails to make any allegations of prejudice. As in **Earley**, Johnson must affirmatively prove, not merely allege that prejudice resulted from counsel's deficient performance. **Earley**, 595 So. 2d at 433. Johnston has failed on the second prong of **Strickland**. Having failed to meet either

prong of the **Strickland** test, we find that there is no merit to the ineffective assistance of counsel claim raised by Johnston.

In **Ferguson v. State**, 507 So. 2d 94, 97 (Miss. 1987), quoting **Strickland**, 466 U S at 687, 104 S. Ct. 2052.

Although it need not be outcome determinative in the strict sense, it [deficient assistance of counsel] must be grave enough to 'undermine confidence' in the reliability of the whole proceeding.

The record reflects that jury instructions C-1 and S-5 were instructions on the jury's responsibility for assessing the sworn testimony of any and all of the witnesses who testified in the instant cause. This would included Craft as well as Thompson. C.P. 17-18; 25. This included their responsibility for evaluating discrepancies in any witnesses testimony on crucial or unimportant details. It was their responsibility to determine the credibility of each witness testifying under oath before them. C.P. 25.

The Appellee would submit there is a lack of evidence of deficient performance on the part of trial counsel. This would be for not requesting a cautionary instruction. Particularly is this true where the appellant chose to testify in his own behalf. He contradicted himself, and was contradicted by his accomplice, law enforcement investigators, his mother and his girl friend. R. 65-73.

And neither was there any showing of prejudice. Thompson made his testimony exculpating himself at Craft's expense a central issue in his defense. The jury, as the judge of credibility, did not find his testimony convincing. The Appellee would submit that this issue is lacking in merit.

PROPOSITION II

THERE WAS CREDIBLE, SUBSTANTIAL EVIDENCE IN SUPPORT OF DENYING ALL PEREMPTORY INSTRUCTIONS.

Thompson argues that there was insufficient evidence in support of his conviction for burglary of a building. Since there was no evidence that he personally broke into the building or that he intended to take and remove items stored in the building, he believes the trial court should not have allowed the jury to deliberate over his guilt or innocence. He believes he and his witnesses testimony that his car was not running and that he bought the PA system from Craft was sufficient for showing he was not guilty. For these reasons, he believes that he should have been granted a directed verdict. Appellant's brief page 8-13.

The Appellee would submit that there was credible, substantial partially corroborated evidence in support of the trial court's denial of all peremptory instructions as well as in support of the jury's verdict. R. 42. The trial court correctly found that the prosecution had made out a prima case of burglary against Thompson. It did so through its witnesses, which included Craft, his alleged accomplice, as well as other state witnesses.

The record reflects that Craft, the accomplice, was corroborated by other State witnesses about what was stolen, when it was stolen, and how it was stolen. He was also corroborated about what had happened to the digital camera after it was stolen.

The trial court denied Thompson's motion for a directed verdict. R. 42.

Court: All right. I'll overrule your motion, counsel. I think there's been a sufficient showing that a prima facie case has been made and there's a jury question. I'll overrule your motion. Do you intend to call witnesses? R. 42. (Emphasis by Appellee).

Ms. Michell Burrell testified that she was the office manager for the parks and recreation

department of Claiborne County. When she arrived at her office on January 8, 2007, she found that the door to her office had been forced open. A public address system, a digital camera and \$80 cash was found to have been removed. R. 8-10. The portable public address system was in good condition and had cost around \$850. R. 10. The digital camera cost around \$300.00. R. 11.

Officer Carl Ray Fleming testified that he investigated an alleged burglary. This was on January 8, 2007. This was at the Claiborne County parks and recreation building. Fleming found the front door had been forced open. Fleming testified that the door to her office had been "jimmied." It had been "forced open" by a "piece of metal." R. 14. A public address system, "a PA system," and a digital camera belonging to Claiborne County had been removed. It had been removed from Ms. Burrell's office. The PA system was recovered from Ms. Ruthy Thompson's house. She was Thomson's mother. R. 15-16.

Q. And you say the door was jimmied. Were you able to tell how it was jimmied?

A. It had been forced open just with a piece of metal or something of that nature. R. 14.

Fleming testified that he found that a PA system and a camera had been taken from Ms. Burrell's office.

Q. What did you find?

A. I found that the front door had been forced into, some items were missing out of Ms. Burrell's desk drawer, and she knew that she had a PA system over there, and it was gone and the camera that was purchased through the county. R. 17.

Mr. Scotty Jo Craft testified that he had previously pled guilty to the burglary at issue. He testified that he had been given a six year sentence. He also testified that while he had broken into the parks and recreation building, he had done so at Thompson's request. R. 22-24. Craft knew where their equipment was stored since he had worked there at one time. R. 29. Thompson wanted

to use the PA system and other items in exchange for "other goods." Thompson took him to the fair grounds where the building was located. Craft forced the door open with "a little ole screw driver." R. 22. After Craft had broken into the building, he took the PA system and a camera. He deposited the goods outside the building. They placed the goods in Thompson's car. The stolen items were taken back to Thompson's house. Craft testified that the camera was given to Chris Parker. R. 23.

Q. What did you do when you got to the fairgrounds?

A. I got out of the car and walked over to the building, went in the office and got the PA system and looked around in the office, got a camera and a battery and came back out, and went back and waiting a few minutes and he (Thompson) picked me back up and we went to his house. R. 22.

Q. How did you get in the office?

A. With just a little ole screwdriver.

Q. You jimmied the door?

A. Yes, sir.

Q. You took the PA system and camera?

A. Yes, sir.

Q. And took it back and put it in his vehicle?

A. Yes, sir.

Q. What kind of vehicle was he driving?

A. It's a gray Buick. R. 22

...

Q. Now, after you took the Peavey system and the camera back to his house, what was done with it?

A. I don't know where it went from there, you know. The camera was give to Chris Parker. R. 23.

...

Q. If Nate had not taken you there and had not told you he wanted a PA system, would you have broken in the place?

A. No, sir. R. 24. (Emphasis by Appellee).

Ms. Chris Parker, a friend of Thompson, testified that he called her. This was from the Sheriff's Office at the jail. She testified that he called her about "needing a camera." Parker testified that Thompson and Craft had brought a camera to her house. Thompson offered to give it to her but she refused. R. 39. She allegedly refused because Thompson had no receipt showing he had purchased it.

Q. But he didn't call you from the sheriff's office saying I need that camera back?

A. Yeah, he did.

Q. He did. Do you know why he would call you?

A. Maybe he thought that I could go down and find where Scotty had left it maybe. I don't know. R. 38.

Q. -had Nate ever given you that camera and you said you didn't want it?

A. No, Nate again, like I said, Nate and Scotty came to my house, and Scotty had the camera. Nate asked me did I want it. I pulled Nate to the side and I told him, no, I do not want it because there was no receipt and do not buy it. R. 39. (Emphasis by Appellee).

Mr. Thompson testified in his own behalf. R. 65-84. He testified that he bought the PA system from Craft. However, he had no receipt. R. 110. In addition, he admitted that the PA system was not at his house but at his mother's house. Thompson testified that "I" took it to her house. R. 71. He admitted to calling his mother from the jail and requesting that she bring the "stuff" thought stolen. R. 68. He admitted to calling his girl friend Chris Parker. He testified to having told her "to

go buy a camera..." R. 76. He denied having told her to bring the camera she had to the jail. R. 76.

Thompson was contradicted by Sheriff who was an ear witness listening to his calls. R. 108-109.

Q. Were other people there, too? (When Craft allegedly came to his house.)

A. Yes, sir, it was a load of them there. Me and my cousin, like I say, we like to play the game Play Station that night, and all of us was sitting around smoking. I smoke weed every day to tell you the truth. . . .I took it (the speaker system) to my mama's house to keep it from getting stolen, so if he come back and get it, he could take it with him. You know what I'm saying? So I took it to my mama's house. R. 70-71

...

Q. Didn't you call Chris?

A. Chris Parker?

Q. Yeah.

A. Yeah.

A. Yes, sir.

Q. What did you call her for?

A. I had wanted her to go buy a camera to bring it up there so I could try to get off because, like I say sir, I don't need to steal nothing.

Q. You didn't say, "I need that camera I gave you"?

A. No, sir. I said, "I need a camera." Like I say, if it would have took me getting off, then I would have brought the karaoke set and a camera to get off that...R. 76.

...

Q. Now, Chris testified that you and Scotty were together and earlier she said you offered to give her the camera and now she said Scotty offers to sell her a camera?

A. I didn't offer to sell nobody nothing. R. 81.

Q. It didn't happen? (He tried to give the camera to Chris at her house while with Scotty, as Parker had testified.)

A. She said it happened. I don't know. She called me off to the side. **Scotty wanted to sell her the camera.** I didn't know. She said, "Don't buy it, wasn't no receipt. " I didn't buy it... R. 81. (Emphasis by Appellee).

Ms. Ruthy Thompson, Thompson's mother, testified that the speaker system was brought to her house by her son, Thompson "and" Craft. They were together. This contradicted Thompson's testimony that he took the speaker system to his mother's house. R. 71.

Q. Ms. Thompson, you had the speaker, correct?

A. Yes.

Q. How did it get to your house?

A. Scotty and my son brought it.

Q. **Both of them together brought it to your house?**

A. **Right.** R. 97. (Emphasis by Appellee).

Johnny Scott, an investigator with the Copiah County district attorney's office, testified that he interviewed Ms. Chris Parker. This was on April 4, 2007. She told him that Thompson and Craft brought the camera to her house. Parker told him that Thompson "gave her the camera." However, she allegedly gave it back to him because he had no receipt. Parker did not mention Craft trying to sell the camera to her.

Q. And what did she (Chris Parker) tell you about the camera?

A. **She said that Nathaniel Thompson and Scotty Craft were together when they came to her and they had the camera. And that Nataniel gave her the camera, and that she asked do you have a receipt for the camera and he said no. And she gave him the camera back.** R. 101.

Q. **Did she ever say anything about Scotty trying to sell her the camera?**

A. **No, sir, she did not.** R. 101. (Emphasis by Appellee).

Sheriff Frank Davis testified that Thompson wanted to use the telephone. He wanted to call

his mother and his girl friend. He testified to hearing him tell both his mother and Chris Parker “to bring the stuff up there that they had.”

Q. And who was the first person he called?

A. His mother.

Q. And what did he tell his mother?

A. Bring the stuff up there she had.

Q. Bring the stuff up there she had?

A. That’s correct.

Q. Did he make any other calls?

A. He did.

Q. And who else did he call?

A. He called Chris.

Q. And what did he tell Chris?

A. He told her to bring the camera up there that she had.

Q. To bring the camera?

A. Yes, sir.

Q. What-did Chris comply with that?

A..She hung up right after that, and that was it. We never got the camera back.

Q. But it was no talk of go buy a camera or anything.

A. No, sir.

Q. It was just bring the camera that we took there. R. 108-109. (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 summarized above with cites to the record was taken as true together with reasonable inferences, there was sufficient, credible evidence in support of the denial of peremptory instructions and in favor of the jury's verdict. Craft testified to having broken into the recreation building at the Claiborne County fair grounds. R. 20-23. He used a screw driver "to jimmy" the door. R. 22. He did so to assist Thompson who wanted the portable public address system. Craft testified that he took the PA system and a digital camera from the building. The PA system was taken in Thompson's car to his house. The camera was given to Chris Parker, who was Thompson's girl friend. R. 23.

Craft repaired Thompson's Buick on January 6, the day before the burglary. He did not buy a new carburetor which it needed. Rather he used an "old carburetor" for a "core." R. 31. Craft

testified that while Thompson's car was not running well, it was running the day of the burglary, January 7, 2007.

Deputy Fleming corroborated Craft. He testified that the door to Ms. Burrell's office had been "jimmied open" with some type of "metal object." R. 14. A PA system and camera were taken from the office. This public address system was heavy, weighing some "sixty pounds," and difficult for one person to carry. R. 19. It would fit into the trunk of some one's car. R. 19. The PA system was recovered from Thompson's mother's house. R. 15.

Thompson's girl friend corroborated Craft. She testified that Thompson offered to give her a camera. This was a camera that he and Craft had brought to her house. R. 38. She also contradicted Thompson about his telephone call. She testified that he did not request that she "go buy" a camera for his use in jail. Rather he wanted her to bring the camera he thought she had to the jail. R. 38-41.

It is not necessary for a person acting in concert with another person to have actually broken and entered a burglarized building, as long as there was sufficient evidence, as existed in the instant cause, for inferring that he acted in furtherance of a commonly agreed upon plan or enterprise.

In **Howard v. State**, 755 So.2d 1188, *1190 (Miss. App.1999), the Court stated that where persons act together to accomplish a crime, "the act of one is the act of all."

Regardless of the dispute as to who fired the fatal shot, both men were acting in concert at the time Newson was killed. When "two or more persons act in concert to accomplish the commission of a crime, the act of one is the act of all; that is to say, one aiding and abetting in the commission of a crime is chargeable as a principal, and the acts of other principals are considered to be his acts" **Gilmer v. State**, 271 So.2d 738, 740 (Miss.1973). Even assuming that Slater fired the fatal shot, Howard was present and participating in the commission of the crime. An aider and abettor instruction was given, which was supported by evidence that Howard aided or encouraged Slater in addition to firing his own weapon. **Gleaton v. State**, 716 So.2d 1083, 1088 (Miss.1998).

While Thompson testified to having bought the PA system from Craft, and not having offered to give the camera to Chris Parker, his testimony merely created a conflict in the evidence the jury was responsible for resolving. R. 65-73.

In rebuttal, Sheriff Davis testified that Thompson had not asked his mother to bring the PA system thought stolen to the jail. He testified that he heard Thompson tell her to bring the PA system "that she had." R. 108. In addition, Thompson told Chris Parker to bring "the camera that she had." R. 108. He did not tell her to go "buy" a camera as Thompson had testified. R. 108-109.

Chris Parker corroborated Craft. She testified that Thompson offered "to give" her a camera which they had together. However, since Thompson had no receipt she allegedly gave it back to him and did not keep it.

Ruthy Thompson, the appellant's mother, corroborated Craft. She testified that Craft and Thompson brought the PA system to her house. She also testified that she returned it to law enforcement when she was questioned about its being stolen. R. 97-98.

In rebuttal investigator Deputy Johnny Scott testified that Ms. Chris Parker said nothing about Craft wanting to sell him the camera he and Thompson had. R. 101. This contradicted Thompson previous testimony that "Scotty wanted to sell her the camera." R. 81.

Therefore, the Appellee would submit that when the evidence summarized above with cites to the record was taken as true together with reasonable inferences, there was sufficient, credible evidence in support of the denial of peremptory instructions and a J.N.O.V. This issue is lacking in merit.

PROPOSITION III

THERE WAS CREDIBLE, SUBSTANTIAL PARTIALLY CORROBORATED EVIDENCE IN SUPPORT OF THE DENIAL OF A NEW TRIAL.

Thompson believes that he should have been granted a new trial. He believes that since Craft was admittedly an ex-convict and a cocaine user, his testimony was suspect. He believes that there was evidence that his car was not working which contradicted Craft. And he testified that he bought the PA system from Craft. Thompson believes he and his witnesses' testimony was enough to have enabled him to be granted a new trial. Appellant's brief page 9-13.

To the contrary, the record cited under proposition II, when taken together with reasonable inferences, was sufficient for supporting Thompson's conviction for burglary. While Craft was an ex-con and admitted to using cocaine, he also testified that "I have a good memory of everything I done." R. 28. As shown under Proposition II, the record reflects that he was corroborated as to the when, what, where and how the burglary was accomplished. R. 28.

Thompson chose to testify. R. 65- 84. He admitted to using marijuana along with his friends the evening the burglary occurred. He went so far as to state, "I smoke weed every day to tell you the truth." R. 70. He also claimed to have no need to steal although he admitted that he was unemployed and had no known means of support. R. 73. The record cited also indicates that he contradicted his own witnesses, by testifying first that he bought the PA system, then that he pawned it, and finally that he took it in exchange for possible services. R. 79- 82. While he claimed to have brought the PA system to his mother's house, he was contradicted by not only his own mother but also by Sheriff Frank Davis about what he did and said about the PA system and digital camera. R. 71 97; 108.

In addition, Thompson has yet to claim that he bought the stolen digital camera. R. 76-77. He stated, "I don't know nothing about no camera." R. 80. But he then contradicted himself by claiming that Craft "wanted to sell her (his girl friend) the camera.." R. 81. And Thompson was contradicted about what he said about the camera at the jail. If Thompson did not "give" the stolen camera to Chris Parker, then why was he heard asking her on the telephone "to bring the camera up there that she had." R. 108.

While Eddie Green testified on direct that he knew that Thompson's car was not working on the 7th of January, he could not explain how he knew this to be true. R. 84-90. On cross examination, Eddie Green was questioned about how he knew that that the motor to Thompson's car was out of his car on January 7, 2007.

Q. Well, what I'm saying is you testified that on the 7th, the engine wasn't in there, correct?

A. Yeah.

Q. How do you know that?

A. Because it was around the first day of the month. R. 90. (Emphasis by Appellee).

The record reflects that the trial court found sufficient credible evidence for denying a motion for a JNOV or a New Trial.

This cause having come on for a hearing on defendant's motion for Judgment Notwithstanding the Verdict or in the alternative a new trial, and the court having considered said motion, finds that the same should be denied. C.P. 45.

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

Our scope of review is well established regarding challenges to the weight of the evidence issue. Procedurally, such challenges contend that defendant's motion for new trial should have been granted. Miss. Unif. Crim. R. of Cir. Ct. Prac. 5.16. The decision to grant a new trial rests in the sound discretion of the trial court, and the motion should not be granted except to prevent "an unconscionable injustice." **Wetz v. State**, 503 So. 2d 803, 812 (Miss. 1987). We must consider all the evidence, not just that supporting the case for the prosecution, in the light most consistent with the verdict." **Jackson v. State**, 580 So. 2d 1217, 1219 (Miss. 1991), and then reverse only on the basis of abuse of discretion.

In **Groseclose v. State**, 440 So. 2d 297, 301 (Miss. 1983), the Court stated that any conflicts in the evidence created by testimony from defense witnesses was to be resolved by the jury. What the jury believes and who the jury believes as to what piece of evidence presented is solely for their determination. As stated:

Jurors are permitted, indeed have the duty, to resolve the 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 finding of fact sufficient to support the 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 or disbelieved in arriving at its verdict. It is enough that the conflicting evidence presented a factual dispute for jury resolution. **Shannon v. State**, 321 So. 2d 1 (Miss. 1975) 373 So. 2d at 1045.

In **Young v. State**, 420 So. 2d 1055, 1057 (Miss. 1982), this court found that Troy and Shirley Harrison, Young's accomplices' testimony was not unreasonable, self contradictory, or substantially impeached. If anything, discrepancies in testimony of multiple witnesses, particularly when offered about factual details as to what occurred, is an indication that the witnesses are trying to portray the situation "as they saw it," as best they can, given their own different observations and points of view.

We are of the opinion the accomplice's testimony was corroborated in that Mrs. Hoard identified Young as the man who robbed the bank, Cason identified Young as the purchaser of the shotguns found buried with the money, and the accomplice's

testimony of Young's disguise as well as the automobile he fled in was corroborated by Williams and the bank employees. In reviewing the accomplice's testimony we find minor discrepancies, not unusual for any witness, but do not think the testimony unreasonable, impeached, self-contradictory or substantially impeached as urged by appellant. We held in **Maddox v. State**, 230 Miss 529, 533, 93 So. 2d 649, 650 (1957), "Seldom do witnesses agree upon every detail. Indeed, their failure to do so is often strong evidence each is trying to accurately portray the situation as he saw it, and that it is to the credit, rather than discredit, of the witness."

Testimony from Thompson and his friends about how his Buick was allegedly not working on the day of the burglary, along with Thompson's denials of being involved in the burglary merely created a factual issue which the jury was responsible for resolving. The jury listened to all the witnesses testimony, observed their answers under oath, their demeanor and resolved this issue in the prosecution's favor.

We have summarized with cites to the record an abundance of evidence in support of their decision finding Thompson guilty of acting in concert with Craft the person who actually broke in, took and removed the Claiborne County PA system, and the camera. And as shown with cites to the record, this was not a case where an accomplice's testimony was lacking in corroboration or reasonableness.

To the contrary, not only was Craft's testimony corroborated as to the what, where, when and how of the actual burglary, he was also corroborated as to where the stolen digital camera was located. For if Thompson did not give the camera to Chris Parker, then why was he heard asking her "to bring the camera up there that she had.." R. 108.

Assuming for sake of argument, as argued by Thompson on appeal, that Thompson's car was not working and he was heard allegedly buying a PA system from Craft, then why would Thompson contradict himself, and his own witnesses by providing three different stories about this issue? He testified first to buying it, then to pawning it and finally that he was just taking the PA system to

assist Craft in exchange for other services. R. 79-83. "I was just trying to help him because he was going to help me." R. 82.

And even if his car wasn't running, his own mother still testified to seeing him along with Craft bring the stolen PA system to her house. R. 97. This contradicts Thompson testifying, "So I took it to my mama's house." R. 71. And if Thompson did not know anything about the camera, as he testified, then why was he heard asking Chris Parker to bring it to the jail. R. 108.

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

CONCLUSION

Thompson's conviction should be affirmed for the reasons cited in this brief.

Respectfully submitted,

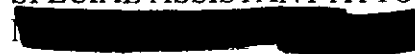
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CERTIFICATE OF SERVICE

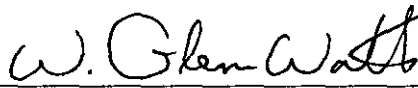
I, W. Glenn Watts, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 27th day of March, 2008.



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