NATHANIEL THOMPSON APPELLANT

V. NO. 2007-KA-1338-COA

STATE OF MISSISSIPPI APPELLEE

BRIEF OF THE APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
Benjamin A. Suber, M[redacted]
301 North Lamar Street, Suite 210
Jackson, Mississippi 39201
Telephone: 601-576-4200

Counsel for Nathaniel Thompson

NATHANIEL THOMPSON **APPELLANT**

V. **NO. 2007-KA-1338-COA**

STATE OF MISSISSIPPI **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Nathaniel Thompson, Appellant
3. Honorable Alexander C. Martin, District Attorney
4. Honorable Lamar Pickard, Circuit Court Judge

This the 15 day of February, 2008.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

Benjamin A. Suber
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39205
Telephone: 601-576-4200

CASES

STATUTES

NATHANIEL THOMPSON — APPELLANT

V. — NO. 2007-KA-1338-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

STATEMENT OF THE ISSUES

ISSUE NO. 1: TRIAL COUNSEL WAS INEFFECTIVE BY FAILING TO REQUEST AN ACCOMPLICE INSTRUCTION.

ISSUE NO. 2 THE TRIAL COURT ERRED IN DENYING NATHANIEL THOMPSON'S MOTION FOR A DIRECTED VERDICT AND MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT.

ISSUE NO 3. THE TRIAL COURT ERRED IN DENYING NATHANIEL THOMPSON'S MOTION FOR A NEW TRIAL BECAUSE THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

accomplice, not doing so was in error. The Mississippi Supreme Court had stated that such testimony should be viewed with great caution and suspicion and must be reasonable, not improbable, self-contradictory or substantially impeached. The evidence in this case was insufficient to convict Nathaniel Thompson of burglary. The verdict was also against the overwhelming weight of the evidence. Nate and numerous other witnesses stated that Craft came to Nate's house with the PA system trying to sell the system. Tr. 43-44, 46, 53-54, 61, 67, 92. Only Scotty Craft claimed that Nate was involved in the burglary. Evidence was presented to showed that Nate's car was being repaired and was not working on the night in question. Tr. 52, 54, 57, 61, 69, 85. The motor was hanging in the tree as the mechanic was transferring the motor in one car to another car. Tr. 69. The evidence was insufficient and the verdict was against the overwhelming weight of the evidence and this was reversible error .

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Claiborne County, Mississippi, and a judgment of conviction for the crime of Burglary against the appellant, Nathaniel Thompson. Tr. 122. The trial judge subsequently sentenced the Appellant to six (6) years in the custody of the Department of Corrections. Tr. 124, R.E. 14 The conviction and sentence followed a jury trial on May 15, 2007, Honorable Lamar Pickard, Circuit Judge, presiding. The Circuit Court of Claiborne County, Mississippi, set a bond for his release from custody pending the decision of his appeal. Nathaniel Thompson is presently out on bond awaiting the decision of his appeal.

Parks and Recreation building. Tr. 20. Craft broke into the building and stole a PA system, camera, and battery from an office. Tr. 22, 27. Craft, who had been previously convicted of burglary, pled guilty to breaking and entering to the parks building and is currently incarcerated. Tr. 20, 28, R.E. 16-22.

According to Craft's testimony, he and Nathaniel Thompson [hereinafter Nate] had a discussion concerning a PA system. Tr. 21. Craft stated that Nate wanted a PA system. *Id.* Craft continued to state that Nate drove him to the fairgrounds. Tr. 22. Craft got out of the car, walked over to the building, and broke into the office with a screwdriver. *Id.* He got the PA system and looked around the office and got a camera and a battery. *Id.* He then took the PA system and put it into the back of Nate's car. *Id.* Craft claims that the camera was given to Chris Parker and Nate took the PA system. Tr. 23.

Craft also contends that he was working on Nate's car on January 6, 2007, the day before he broke into the Claiborne County Parks and Recreation building, and claimed that Nate's car was running. Tr. 25. According to Craft he was working on Nate's car. *Id.* He had been working on the carburetor. Tr. 23. Craft also admitted to the court under oath that on the night he broke into the Claiborne County Parks and Recreation building he was under the influence of cocaine. Tr. 28.

Nate's version of the events that happened on the night of January 7, 2007, along the testimony of numerous other witnesses differ drastically from that of the previous convicted Craft. Nate testified that he had nothing to do with the breaking and entering of the Claiborne County Parks and Recreation building. Nate explained to the court that he along with friends were at his house playing video games, smoking, and sitting around the house. Tr. 65, 70.

Craft more than once whether the goods were stolen and Craft told him that they were not stolen. Tr. 67. Nate took the PA system to his mother's house. *Id.*

Nate told the court that the car Craft claimed they rode in to the Claiborne County Parks and Recreation building was not working because the motor was not in Nate's car. Tr. 69. Nate's mechanic took the motor out of one car to fix another car. *Id.* The motor was hanging in a tree for a couple of days, including the day that Craft broke into the Parks and Recreation building. *Id.* Nate stated that his mechanic put the motor in the car within a few days after removing the motor. Tr. 60. On January 17, 2007, Nate and his mechanic went and purchased items to finish fixing the car. *Id.* Nate declared that when Craft came to his house on January 7, 2007, that he was driving a white Camaro, and therefore, not in Nate's Buick car. Tr. 68.

Nate introduced several witnesses at trial that verify his version of the event that took place on January 7, 2007. Patricia Dotson testified that she had been over at Nate's house all day and that Craft brought over an item for Nate to purchase. Tr. 43-44, 46. She continued to state that Nate asked Craft if the property was stolen to which Craft responded no. Tr. 44. Nate purchased the item for about $50 or $100. *Id.* She also witnessed Craft driving up in a white Camaro. Tr. 45. Patricia Dotson stated that Nate's car was not running because the motor was hanging in the tree. Tr. 52.

Willie Parker was at Nate's house on the day that Craft broke into the Parks and Recreation building and stated that Craft came over and offered to sell some goods to Nate. Tr. 53-54. Craft told Nate that the goods were not stolen, to which Craft responded that they were not stolen. Tr. 54.

---

[1] Karaoke set and PA system are one in the same.

Ivan Terrell Truitt stated that when he got over to Nate's house on January 7, 2007, Nate had already bought the merchandise from Craft. Tr. 61. He did state that none of Nate's cars were running. *Id.* Ivan Terrell Truitt remembers seeing a white car outside of Nate's house but did not know whether it was a Camaro. Tr. 63.

Eddie Green was Nate's mechanic and he had changed out the motors in Nate's car. Tr. 84. He removed the motors around January 4 or 5, 2007, and stated that neither of his cars were running on January 7, 2007. Tr. 85. He put the motors back in around January 8-10, 2007. Tr. 87.

Aretha Wells was at Nate's house on January 7, 2007. Tr. 91. She stated that Craft came by that night to sell Nate some equipment. Tr. 92. Nate asked if it was stolen and Craft said no. *Id.* Nate proceeded to purchase the equipment. *Id.* She only saw a speaker box and did not see a camera. Tr. 93. She did not know of anybody in the house using drugs. Tr. 94.

ARGUMENT

ISSUE NO. 1: TRIAL COUNSEL WAS INEFFECTIVE BY FAILING TO REQUEST AN ACCOMPLICE INSTRUCTION.

The Appellant's position is that trial counsel should have requested a cautionary instruction regarding the testimony of an accomplice.

In ***Madison v. State*** , 932 So.2d 252, 255 (Miss. App. 2006) the court reiterated:

> [the Supreme] Court applies the two-part test *from* ***Strickland v. Washington***, 466 U.S. 668 (1984), to claims of ineffective assistance of counsel. ***McQuarter v. State***, 574 So.2d 685, 687 (Miss. 1990). Under ***Strickland***, the defendant bears the burden of proof to show that (1) counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense. *Id.* There is a strong but rebuttable presumption that counsel's performance fell within the wide range of reasonable professional assistance. *Id.* This presumption may be rebutted with a showing that, but for counsel's deficient performance, a different result would have occurred.

If the issue of ineffective assistance of counsel is raised, as is here, on direct appeal the court will look to whether:

> (a) . . . the record affirmatively shows ineffectiveness of constitutional dimensions, or (b) the parties stipulate that the record is adequate and the Court determines that findings of fact by a trial judge able to consider the demeanor of witnesses, etc. are not needed. *Id.*

The appellant hereby stipulates through present counsel that the record is adequate for this court to determine this issue and that a finding of fact by the trial judge is not needed.

"The supreme 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.'" ***Williams v. State***, 729 So.2d 1181, 1186 (Miss. 1998) (quoting ***Green v. State***, 456 So.2d 757, 758 (Miss. 1984)). "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. . ." *Id.* The only evidence that was presented to the court was the testimony of Craft. The Mississippi Supreme Court in ***Hussey v. State***, 473 So.2d 478 (Miss. 1985), reversed a conviction because the trial court failed to give a cautionary instruction concerning the alleged testimony of an accomplice. "[T]he prosecution in ***Hussey*** was based almost entirely on the testimony of the accomplice; 'the evidence (was) virtually irreconcilable with the verdict except for the testimony of the accomplice.'" ***Holmes v. State***, 481 So.2d 319, 323 (Miss. 1985) (quoting ***Hussey***, 473 So.2d at 480.) As in the cases of ***Hussey*** and ***Holmes***, in the case *sub judice* , except for the testimony of the accomplice, the evidence against Nathaniel Thompson was nonexistent. "When faced with such a situation, the trial judge must

However, in this case the trial judge never had the opportunity to grant or deny the cautionary instruction. Trial counsel should have asked for the instruction. "The uncorroborated testimony of an accomplice may be sufficient to sustain a guilty verdict." ***Catchings v. State***, 394 So.2d 869, 870 (Miss. 1981), ***Moore v. State***, 291 So.2d 187 (Miss. 1974.). "However, such testimony should be viewed with great caution and suspicion and must be reasonable, not improbable, self-contradictory or substantially impeached. ***Catchings***, 394 So.2d at 870, ***Moody v. State***, 371 So.2d 408 (Miss. 1979), ***Jones v. State***, 368 So.2d 1265 (Miss. 1979). In ***Feranda v. State***, 267 So.2d 305 (Miss. 1972), the Mississippi Supreme Court reversed the conviction of burglary and larceny as an accessory before the fact was reversed, the court found that the accomplice's testimony, upon which it was based, was inconsistent overly vague and almost completely uncorroborated.

Accomplice testimony should be viewed with great caution and suspicion; however, failure of trial counsel to ask for the cautionary instruction is in error. The Appellant, Nathaniel Thompson was entitled to have the instruction but it was never presented to the trial court. The evidence was present in this case.

In the case at hand, the only evidence presented by the prosecution was the testimony of Craft. Craft stated that he went into the Claiborne County Parks and Recreation building by himself. Tr. 22. He took a PA system, camera, and battery. *Id.* He claimed however, that Nate drove him over to the fairgrounds. *Id.* All other evidence that was present to the court was that Nate bought the goods from Scotty. Tr. 43-44, 46, 53-54, 61, 67, 92. Also that Nate's car was not running on the day in question. Tr. 52, 54, 57, 61, 69, 85. The testimony of Craft was uncorroborated. This Court

Scotty Craft with great suspicion and caution.

ISSUE NO. 2 THE TRIAL COURT ERRED IN DENYING NATHANIEL THOMPSON'S MOTION FOR A DIRECTED VERDICT AND MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT.

Denial of a directed verdict and J.N.O.V. challenges the legal sufficiency of the evidence supporting the guilty verdict. ***Randolph v. State***, 852 So.2d 547, 554 (Miss. 2002); ***Fair v. State***, 789 So.2d 818, 820 (Miss. 2001); ***McClain v. State***, 625 So.2d 774, 778 (Miss. 1993). With regard to the issue of the legal sufficiency of the evidence, the Mississippi Supreme Court has held "that reversal can only occur when evidence of one of more of the elements of the charged offense is such that 'reasonable and fair-minded jurors could only find the accused not guilty.'" ***Stewart v. State***, 909 So.2d 52, 56 (Miss. 2005); ***Randolph***, 852 So.2d at 555; ***Fair***, 789 So.2d at 820; ***Wetz v. State***, 503 So.2d 803, 808 (Miss. 1987). "To grant a JNOV the trial court must be convinced that the State has not presented competent evidence to establish each essential element of the offense beyond a reasonable doubt. ***McKee v. State***, 756 So.2d 793, 795 (Miss. App. 1999). See ***Franklin v. State***, 676 So.2d 287, 288 (Miss. 1996).

Nate was convicted of burglary of the Claiborne County Parks and Recreation building. "The two essential elements of burglary are (a) breaking and entering an establishment fitting the statutory definition of a business, and (b) proof that the breaking and entering was done with the formed intent to commit a crime once entry was obtained." ***McKee***, 756 So.2d at 795. Miss Code Ann. Section 97-17-33 (Supp. 1998). The state must prove each element of the indicted offensive beyond a reasonable doubt. ***Hobson v. State***, 730 So.2d 20, 28 (Miss. 1998); ***Heidel v. State***, 587 So.2d 835, 843 (Miss. 1991).

the building. Craft stated that he went into the building by himself. Tr. 22. He stated that he jimmied the door with a little ole screwdriver. *Id.* Craft got the PA system, camera, and battery and he left. *Id.* Craft satisfied the elements of burglary but the State did not prove the elements of burglary beyond a reasonable doubt concerning Nate.

No evidence was presented that connected Nate to help Craft plan and carry out the act. Craft could have named anybody and they very well could have been convicted of burglary also. Craft testified that Nate did not break into the building. No proof was presented that Nate had any intent to commit a crime once he obtained entry.

The Court in ***Turner*** did say that it is the jury's job to determine the weight and credibility of the evidence presented. ***Turner v. State***, 726 So.2d 117 (Miss. 1999). ***See also Fair***, 789 So.2d at 821. No reasonable jury could or should have convicted Nate of burglary looking at the weight and credibility of the evidence that was presented to the trial court. Craft presented the only evidence that connected Nate to the Burglary. Nate and numerous other witnesses stated that Craft came to Nate's house with the PA system trying to sell the system. Evidence was presented to showed that Nate's car was being repaired and was not working on the night in question. Tr. 52, 54, 57, 61, 69, 85. The motor was hanging in the tree. Taking the evidence that was presented to the Court, the elements of burglary were not proven beyond a reasonable doubt and this Court should reverse and render this case based on these facts.

ISSUE NO 3. THE TRIAL COURT ERRED IN DENYING NATHANIEL THOMPSON'S MOTION FOR A NEW TRIAL BECAUSE THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

the evidence that to allow it to stand would sanction an unconscionable injustice." ***Bush v. State***, 895 So.2d 836, 844 (Miss. 2005)(citing ***Herring v. State***, 691 So.2d 948, 957 (Miss.1997)). In reviewing such claims, the Court "sits as a thirteenth juror." ***Bush v. State***, 895 So.2d 836, 844 (Miss. 2005)(citing ***Amiker v. Drugs For Less, Inc.***, 796 So.2d 942, 947 (Miss.2000)(footnote omitted)).

"[T]he 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.'" ***Bush v. State***, 895 So.2d 836, 844 (Miss. 2005)(quoting ***McQueen v. State***, 423 So.2d 800, 803 (Miss.1982)). It means that "as the 'thirteenth juror,' the court simply disagrees with the jury's resolution of the conflicting testimony," and "the proper remedy is to grant a new trial." ***Bush v. State***, 895 So.2d 836, 844 (Miss. 2005)(quoting ***McQueen v. State***, 423 So.2d 800, 803 (Miss.1982)(footnote omitted)).

In the present case, even if the Court finds that the evidence was sufficient to support the verdict, and the Appellant is not entitled to an acquittal as a matter of law, he is at a minimum entitled to a new trial as the verdict was clearly against the overwhelming weight of the evidence.

In the case *sub judice*, there was absolutely no evidence that Nate had any reason or motive to break and enter the Claiborne County Parks and Recreation building. The only evidence that was presented to the Court was that of a person with prior burglaries, Scotty Craft. Craft admitted that he broke into the building and stole the PA system and camera. Tr. 22, 27. Craft then pled guilty to burglary of the building. Tr. 28. Craft had previously been convicted of burglary and served eight

everything. Tr. 28.

No corroborating witness was brought before the Court to verify the testimony of Craft. However, Nate presented numerous witnesses that testified to the Court that Craft just showed up at Nate's house wanting to sell some items. Tr. 43-44, 46, 53-54, 61, 67, 92. The witnesses also stated that Nate bought the PA system. *Id.*

Craft claimed to have ridden with Nate in Nate's car to the fairgrounds where Craft broke in and took the items from inside the building. Craft had claimed that he had been working on the carburetor the day before he burglarized the building and that the car was running. Tr. 25. Evidence was present from numerous witnesses that Nate's car was not working on the day of the incident. Tr. 52, 54, 57, 61, 69, 85. Nate's mechanic testified that he was working on the cars prior to the burglary and had removed the motor to switch into another car. Tr. 84. He stated that the motor was hanging in a tree for a few days and it was not till after the incident had occurred before he was able to place the motor back into the car. Tr. 84-85. Therefore, neither of Nate's car were working making it impossible for Nate and Craft to have used the car on the night of January 7, 2007. Tr. 85. Also, the defense presented a receipt into evidence from the local NAPA store showing where a carburetor was purchased among other items on January 17, 2007. Tr. 69-70, 84.

Furthermore, testimony was presented that Craft was driving a white Camaro on the day in question. Nate and Patricia Dotson both stated that they saw Craft driving a white Camaro. Tr. 45, 68. Ivan Terrell Truitt also saw a white car, but was not sure whether it was a Camaro. Tr. 63.

Even though some discrepancies are apparent from the witnesses that testified, the general stories are very similar. Patricia Dotson testified that Craft brought over some merchandise to

Willie Parker testified that Craft came by Nate's house to sell some goods and Nate bought them. Tr. 54. Nate asked if they were stolen to which Craft said that they were not. *Id.* Ivan Terrell Truitt stated that Nate had already bought the PA system by the time he had made it to Nate's house, but he was under the impression that Nate purchased the system. Tr. 60. Similar testimony was presented from Aretha Wells. She stated that Craft came by with some equipment to see Nate. Tr. 92. Craft asked Nate if he wanted to buy the PA system. *Id.* Nate asked him if it was stolen to which Craft reply no. *Id.*

Every individual remember events differently and it is no different in this case. The witnesses that were present remember Craft coming by the house asking Nate if he wants to purchase a PA system and a camera. However, some of the witnesses claim that Craft came by early in the evening, others state that he came by later in the night. The fact of the matter is that Craft came by the house at some point on January 7, 2007, and asked Nate to purchase some items, the time of day or night is irrelevant.

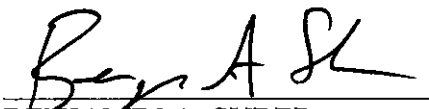
Craft also testified that when the investigator was questioning him about the night he broke into the Claiborne County Parks and Recreation building that he did not know what night he had broken into the building. Tr. 28-29. However, the previous questions Craft stated that he was on cocaine, which is rather powerful stuff, and that he knew what he was doing that night because he had a good memory of everything he had done. Tr. 28. He stated that he had a memory of everything. Tr. 28. If he had a memory of everything, how come he could not even remember the night that he broke into the building?

The verdict was against the overwhelming weight of the evidence. Nathaniel Thompson therefore respectfully asserts that the foregoing facts demonstrate that the verdict was against the overwhelming weight of the evidence, and the Court should reverse and remand for a new trial. To allow this verdict to stand would sanction an unconscionable injustice. *See* ***Hawthorne v. State***, 883 So.2d 86 (Miss. 2004).

accomplice, not doing so was in error. For the foregoing reasons, the Appellant contends that the evidence was insufficient to support the verdict. Therefore, the Appellant contends that the Court should reverse and render his conviction. However, should the Court not reverse and render, the Appellant contends that the verdict was against the overwhelming weight of the evidence, and therefore the Court should reverse and remand for a new trial.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Nathaniel Thompson, Appellant

BY: 

BENJAMIN A. SUBER
M[redacted]

MISSISSIPPI OFFICE OF INDIGENT APPEALS
Benjamin A. Suber, [redacted]
301 North Lamar Street, Suite 210
Jackson, Mississippi 39201
Telephone: 601-576-4200

Counsel for Nathaniel Thompson

day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

Honorable Lamar Pickard
Circuit Court Judge
1401 Adams Street
Hazlehurst, MS 39083

Honorable Alexander C. Martin
District Attorney, District 22
Post Office Drawer 767
Hazlehurst, MS 39083

Honorable Jim Hood
Attorney General
Post Office Box 220
Jackson, MS 39205-0220

This the 15 day of February, 2008.

BENJAMIN A. SUBER
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39201
Telephone: 601-576-4200