COPY

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

VIRTY LEE THAMES

APPELLANT

VS.

NO. 2007-KA-1573-COA

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 FACTS 2

STATEMENT OF THE ISSUES 6

SUMMARY OF THE ARGUMENT 7

ARGUMENT 8

Issue I.

THE DEFENDANT'S ATTORNEY DID NOT HAVE A CONFLICT OF INTEREST BECAUSE ANY CONFLICT WOULD BE HYPOTHETICAL OR POTENTIAL. 8

Issue II.

THE WEIGHT OF THE EVIDENCE SUFFICIENTLY SUPPORTS THE VERDICT. 10

Issue III.

MR. BARNETT EFFECTIVELY PERFORMED HIS DUTIES AS COUNSEL TO THE DEFENDANT BECAUSE ANY CHANGES IN PERFORMANCE WOULD NOT HAVE LED TO A DIFFERENT VERDICT. 13

Issue IV.

NO CUMULATIVE ERRORS EXIST BECAUSE NO ERRORS EXIST. 19

CONCLUSION 20

CERTIFICATE OF SERVICE 21

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

Strickland v. Washington, 466 U.S. 668, 687 (1984) 8, 13

STATE CASES

Anderson v. State, 904 So.2d 973, 980 (Miss. 2004) 13

Boyd v. State, 977 So.2d 329, 336 (Miss. 2008) 10

Brown v. State, 890 So.2d 901, 917 (Miss. 2004) 10

Bush v. State, 895 So.2d 836, 843 (Miss. 2005) 10

Byrom v. State, 863 So.2d 836, 847 (Miss. 2003) 19

Caldwell v. State, 953 So.2d 266, 271 (Miss. Ct. App. 2007) 15

Fulks v. State, 944 So.2d 79, 83 (Miss. Ct. App. 2006) 15

Harrell v. State, 974 So.2d 309, 325 (Miss. 2007) 14

Hulburt v. State, 803 So.2d 1277, 1279 (Miss. 2002) 8, 13

Jones v. State, 883 So.2d 578, 581 (Miss. 2003) 8

Jones v. State, 911 So.2d 556, 560 (Miss. Ct. App. 2005) 13

Jordan v. State 918 So.2d 636, 640 (Miss. 2005) 14

Little v. State, 593 So.2d 20, 26 (Miss. 1992) 8

Sanders v. State, 825 So.2d 53, 58 15

Strahan v. State, 955 So.2d 968, 974 (Miss. Ct. App. 2007) 10, 19

Walker v. State, 880 So.2d 1047, 1077 (Miss. Ct. App. 2004) 14

Wynn v. State, 964 So.2d 1196, 1200 (Miss. Ct. App. 2007) 13

STATE STATUTES

Miss. Code Ann. § 41-29-139(a)(1) 1

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

VIRTY LEE THAMES **APPELLANT**

VS. **NO. 2007-KA-1573- COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

COURSE OF PROCEEDINGS BELOW

The Grand Jury for Newton County, Mississippi indicted Virty Lee Thames, the defendant, for sale of cocaine on February 15, 2006 pursuant to Miss. Code Ann. § 41-29-139(a)(1) (1972). CP 3. The jury convicted the defendant of sale of cocaine. T. 115. The court sentenced the defendant to serve fifteen (15) years. T. 119. The defendant appeals his conviction and now appears before this honorable court. CP 30.

STATEMENT OF FACTS

On February 15, 2006, Mississippi Bureau of Narcotics agents arrived at Ms. Donna Keel's house. T. 37-38, 55, 73. Ms. Keel worked as a paid confidential informant. T. 37-38, 47, 54. Agents set up a hidden video and audio recorder on the counter. T. 36, 40, 54, 55. Agent Sidney Coleman and Agent Buchanan hid in a room in the trailer. T. 36, 55. Agent Stanley Walsh conducted surveillance from his vehicle. T. 38. Agent Gary Henry was also present. T. 39

The agents instructed Ms. Keel to call Otha Wheaton and request $100 of crack cocaine. T. 56. Agent Coleman gave Ms. Keel five (5) twenty (20) dollar bills. T. 48; EX D-1. Mr. Wheaton informed Ms. Keel Virt would bring the product. T. 56.

Agent Coleman observed an older model, red Blazer pull up. T. 40. Ms. Keel testified Virty Thames, the defendant, walked in and handed her crack cocaine in a paper towel. T. 57-58. She asked for a cigarette. T. 57. He handed her one. T. 57. She counted the money and handed the payment to him. T. 57. As the drug dealer turned to leave, he requested a hit. T. 57, 96-97. Ms. Keel said the crack cocaine belonged to someone else. T. 57.

Agent Coleman warned Agent Wash the drug dealer was departing in a Blazer. T. 41, 74. Agent Wash followed the Blazer. T 41, 74. Agent Wash copied down the license plate number and identified the driver as the defendant. T. 41, 74.

After the drug dealer departed, Ms. Keel handed the crack cocaine to Agent Coleman. T. 41, 58. Agent Coleman placed it in a plastic bag. T. 41, 58. EX S-2.

Grady Downy, a drug analyst with the Mississippi Crime Lab, determined the substance to be crack cocaine. T. 79-81. EX S-2.

Ms. Keel testified one of Mr. Wheaton's men threatened her and her family. T. 65. She signed a statement claiming her mental illness did not allow her to remember the sale at the defendant's attorney's office on April 10, 2006 . T. 65; EX D-2. In court, she explained she only signed the statement because she was frightened. T. 65.

Agents arrested the defendant in July. T. 51, 94. The defendant hired Ross Barnett, Jr. RE-50. Mr. Wheaton paid the bulk of the defendant's attorney fees. RE 50.

During the trial, Mr. Barnett actively participated in the voir dire. T. 17. He asked the jury numerous questions and struck unfit jury members. T. 17, 24-25. Mr. Barnett made a Batson challenge because the State used five out of six strikes to rid the jury of blacks. T. 25. Mr. Barnett successfully kept several of the black citizens on the jury. T. 25.

The State introduced the video of the drug deal into evidence. T. 60; EX S-1. Ms. Keel testified the video showed the defendant handing her the drugs and then her

handing him the money. T. 62.

Mr. Barnett cross-examined Ms. Keel. She admitted she is bipolar and takes lithium daily. T. 65. She also admitted she was a drug addict. T. 64.

After the State rested, Mr. Barnett motioned to dismiss the indictment. He claimed the state failed to prove essential allegations and the chain of custody. T. 89-90. The judge overruled his motion. T. 90.

The defendant testified. T. 91. He admitted he was an addict and used drugs with Ms. Keel. T. 92-93. The defendant did not deny he took the crack cocaine over to Ms. Keel's house. T. 94. The defendant did not deny he possessed the drugs. T. 95. The defendant did not deny Ms. Keel paid him $100. T. 99.

Discussing the jury instructions, Mr. Barnett adamantly insisted the court give instructions to allow the jury to find the defendant guilty of possession and not sale. T. 100-02. The jury received the following:

> D-8:
> 1. If you find the defendant guilty as charged in the indictment,...verdict should be as follows:
> "We, the jury, find the defendant...Guilty as charged."
> 2. If you find the defendant not guilty,...verdict should be as follows:
> "We, the jury, find the defendant...Not Guilty."
> 3. If you find the defendant guilty of possession of cocaine in the amount of 0.60 grams,...verdict should be as follows:
> "We, the jury, find the defendant...guilty of possession of 0.60 grams of cocaine."

D4:
[I]f the jury finds beyond a reasonable doubt that the Defendant did not sale cocaine but did, in fact, possess[ed] cocaine on February 15, 2006, then...the jury should find the Defendant guilty of possession of cocaine.

CP 9, 13.

In Mr. Barnett's closing argument, he urged the jurors to find that the defendant merely delivered and was only guilty of possession. T. 109.

The jury found him guilty as charged. T. 115.

During the sentencing phase, Mr. Barnett expressed,

> [The defendant] has been through rehabilitation, turned his life over to the lord, . . . been a regular attender at church, he's helped support his family, he's worked for the Newton Police Department as a mechanic trying to earn money to help his family . . . He's a first offender, forty-four years old, never been convicted of a felony before, never been charged with a felony . . . [W]e would pray for mercy.

T. 118. Despite this plea for mercy, the defendant received a fifteen (15) year sentence. T. 119.

After the conviction, Mr. Barnett made a motion for JNOV or in the alternative for a new trial. CP 18. The judge denied his motion. CP 21.

STATEMENT OF THE ISSUES

I.

The defendant's attorney did not have a conflict of interest because any conflict would be hypothetical or potential.

II.

The weight of the evidence sufficiently supported the verdict.

III.

Mr. Barnett effectively performed his duties as counsel for the defendant because any changes in performance would not have led to a different outcome.

IV.

No cumulative errors exist because no errors exist.

SUMMARY OF THE ARGUMENT

The defendant's attorney did not have a conflict of interest. Since the defendant's attorney had not yet represented the other party, any conflict was hypothetical or potential. The defendant must prove an actual conflict of interest. Since no actual conflict existed, the defendant's attorney did not have a conflict of interest.

The weight of the evidence sufficiently supported the verdict. The jury viewed a video that showed the crime occur. Witnesses testified the sale took place as the video showed. The defendant even testified that he received money in exchange for drugs. Plenty of evidence supported the jury's verdict.

The defendant's attorney effectively assisted the defendant. The defendant cannot prove both his attorney performed deficiently and the deficiency prejudiced the defendant. Therefore, the defendant's attorney effectively assisted the defendant.

No cumulative errors existed. To have cumulative errors, errors must exist. No errors existed. Therefore, no cumulative errors existed.

ARGUMENT

Issue I.
THE DEFENDANT'S ATTORNEY DID NOT HAVE A CONFLICT OF INTEREST BECAUSE ANY CONFLICT WOULD BE HYPOTHETICAL OR POTENTIAL.

When reviewing an attorney's performance, the Court must review using a two-part standard: the attorney's performance was deficient, and the deficient prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A strong, but rebuttable presumption exists that an attorney's behavior is within the "ambit of reasonable professional standards." *Hulburt v. State*, 803 So.2d 1277, 1279 (Miss. 2002) (quoting *McQuarter v. State*, 574 So.2d 685, 687 (Miss. 1990)).

When representing two parties, the "dual representation does not create a *per se* conflict of interest." *Hulburt*, 803 So.2d at 1279; *Littlejohn v. State*, 593 So.2d 20, 26 (Miss. 1992); *Jones v. State*, 883 So.2d 578, 581 (Miss. 2003). An actual conflict of interest must exist. *Hulburt*, 803 So.2d at 1279; *Jones*, 883 So.2d at 582. The Court cannot reverse for a hypothetical or potential conflict of interest. *Hulburt*, 803 So.2d at 1279; *Jones*, 883 So.2d at 582. Once the defendant establishes actual conflict of interest, prejudice is assumed. *Littlejohn*, 593 So.2d at 25.

In *Hulburt*, the trial court directed the co-defendant's attorney to represent both parties. *Hulburt*, 803 So.2d at 1280. The Court held the defendant failed to show an

actual conflict of interest. *Id.* at 1281. In *Littlejohn*, the defendant's attorney also represented another party involved in the case. *Littlejohn*, 593 So.2d at 21. This party testified against the defendant as part of his plea bargain. *Id.* at 22. The Court held actual conflict and prejudice. *Id.* at 24. In *Jones*, the attorney represented the defendant for all proceedings. *Jones*, 883 So.2d at 580. His attorney also represented his co-defendant for a preliminary hearing. *Id.* The Court stated the following:

> There is no question that such a situation, where counsel advises one of his clients to testify against another of his clients, would present counsel with a conflict of interest. That is not the situation here.

Id. The Court held no actual conflict of interest. *Id.* at 581.

Following precedent, no conflict of interest existed. The defendant alleged that a conflict of interest existed because Otha Wheaton hired his attorney to represent the defendant. RE 50. Otha Wheaton has yet to face trial.

Since no trial proceedings occurred against Otha Wheaton, any conflict of interest would be hypothetical or potential. When a trial proceeds against Mr. Wheaton, the conflict of interest would exist against Mr. Wheaton and not the defendant. The defendant must prove an actual conflict of interest for the case to be reversed. The defendant does not meet this burden.

The defendant did not prove an actual conflict of interest. Since the defendant did not prove this, the Court should affirm on the dual representation issue.

Issue II.
THE WEIGHT OF THE EVIDENCE SUFFICIENTLY SUPPORTED THE VERDICT.

The weight of evidence sufficiently supported the jury verdict. Therefore, it would be conscionable to affirm the verdict. Since it would be conscionable to uphold the verdict, the Court should not overturn the verdict.

The Court's standard of review for sufficiency of evidence is as follows:

> If a review of the evidence reveals that it is of such quality and weight that, "having in mind the beyond a reasonable doubt burden of proof standard, reasonable fair-minded men in the exercise of impartial judgment might reach different conclusion on every element of the offense," the evidence will be deemed sufficient.

Bush v. State, 895 So.2d 836, 843 (Miss. 2005) (citing *Edwards v. State*, 469 So.2d 68, 70 (Miss. 1985)).

When reviewing sufficiency of evidence, the Court considers evidence presented by both sides. *Brown v. State*, 890 So.2d 901, 917 (Miss. 2004); *Boyd v. State*, 977 So.2d 329, 336 (Miss. 2008). The Court regards the evidence in the light most favorable to the verdict. *Brown*, 890 So.2d at 917; *Boyd*, 977 So.2d at 336. The Court accepts all credible evidence as true. *Boyd*, 977 So.2d at 336. The jury holds the responsibility of assessing the credibility of witnesses. *Strahan v. State*, 955 So.2d 968, 974 (Miss. Ct. App. 2007).

> [T]he 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 witness, or may believe part of the evidence on behalf of the state and part of that for the accused.

Id. at 973 (quoting *Evans v. State*, 725 So.2d 613, 680 (Miss. 1997)). Since the jury determines the credibility of witnesses, the Court only overturns the jury's verdict "when it is so contrary to the overwhelming weight of evidence that allowing it to stand would sanction an unconscionable injustice." *Boyd*, 977 So.2d at 336.

In *Bush*, the State presented the jury testimony from a victim and a co-conspirator. *Bush*, 895 So.2d at 843. The Court considered the evidence in the most favorable light to the State and accepted all testimonies as true. Sufficient evidence supported the verdict. *Id.* Like *Bush*, the *Brown* court upheld the verdict. *Brown*, 890 So.2d at 917. The State presented three witnesses, and the Court held sufficient evidence existed. *Id.* The defendant in *Boyd* argued the State failed to establish he possessed the same caliber gun as the murder weapon. *Boyd*, 977 So.2d at 337. The Court held sufficient evidence existed for a jury to conclude the defendant caused the death even absent a murder weapon. *Id.* The defendant in *Strahan* argued insufficient evidence since there was no evidence connecting him to the scene and the witnesses were unreliable. *Strahan*, 955 So.2d at 972-73. The jury accepted the testimony. *Id.* at 973. The Court upheld the verdict. *Id.*

Keeping with precedent, sufficient evidence existed. The jury received sufficient information to convict the defendant as charged. The trial court instructed the jury to convict the defendant if he knowingly and intentionally sold cocaine and knew the product was cocaine. CP 14.

A video recorded the defendant giving the confidential informant the drugs and receiving money. T. 62; EX 1.The confidential informant testified the drug deal occurred. T. 57. The defendant testified he handed the informant the cocaine and received money. T. 99. This evidence is sufficient for a jury to believe the evidence satisfied the elements of the crime. Reasonable people could believe beyond a reasonable doubt the defendant committed this crime.

The overwhelming weight of the evidence favors the jury's verdict. Therefore, it would be conscionable for the Court to affirm the jury's verdict.

Reasonable people could have found beyond a reasonable doubt that the defendant sold cocaine. The weight of the evidence favors the jury's verdict. Since the weight of evidence favors the jury's verdict, the Court should affirm without fear of sanctioning an unconscionable injustice.

Issue III.

MR. BARNETT EFFECTIVELY PERFORMED HIS DUTIES AS COUNSEL TO THE DEFENDANT BECAUSE ANY CHANGES IN PERFORMANCE WOULD NOT HAVE LED TO A DIFFERENT OUTCOME.

Mr. Barnett effectively performed his duties as counsel for the defendant. The defendant cannot prove any change to Mr. Barnett's performance would have led to a different outcome. Therefore, the Court should affirm on this issue.

As decided by the United States Supreme Court, the standard of review for ineffective counsel is set out as a two-part test. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The defendant must prove the following: (1) the counsel performed deficiently and (2) the deficiency prejudiced the defendant. *Id.*

A rebuttable presumption exists that an attorney's behavior lies within the "ambit of reasonable professional standards." *Hulburt v. State*, 803 So.2d 1277, 1279 (Miss. 2002) (quoting *McQuarter v. State*, 574 So.2d 685, 687 (Miss. 1990)). To rebut the presumption, the defendant must prove the proceedings would have ended differently. *Wynn v. State*, 964 So.2d 1196, 1200 (Miss. Ct. App. 2007); *Jones v. State*, 911 So.2d 556, 560 (Miss. Ct. App. 2005). Many of the things an attorney does or does not do during a trial are considered part of his trial strategy. *Anderson v. State*, 904 So.2d 973, 980 (Miss. 2004). Trial strategies can include whether an

attorney asks certain questions, makes certain motions and objections, and examines the jury venire a certain way. *Id.*; *Harrell v. State*, 974 So.2d 309, 325 (Miss. 2007).

An abundance of authority exists on this issue. Very, very few decisions favor the defendant. The following are a few examples of decisions on the issue.

In *Harrell*, the Court mentioned voir dire is part of the defendant's strategy. *Harrell*, 947 So.2d at 315 (quoting *Burns v. State*, 813 So.2d 668, 675-76 (Miss. 2001)). The attorney questioned no potential jury member during voir dire. *Id.* The attorney participated in exercising peremptory challenges and striking jury. The Court held no obvious unfairness existed. *Id.*

In *Walker*, the Court stated "leading questions . . . will rarely create so distorted an evidentiary presentation as to deny the defendant a fair trial." *Walker v. State*, 880 So.2d 1047, 1077 (Miss. Ct. App. 2004). The Court then held although the attorney improperly failed to object to the prosecution's leading questions, the leading questions caused no prejudice. *Id.*

In *Anderson*, the Court held although the attorney improperly failed to object to hearsay, the hearsay added nothing prejudicial. *Anderson*, 904 So.2d at 980-81.

In *Jordan*, the defendant alleged failure to ask questions about an alleged feud during cross examination led to prejudice. *Jordan v. State*, 918 So.2d 636, 640 (Miss.

2005). The Court found the cross examination to be neither ineffective nor prejudicial. *Id.*

In *Sanders*, the attorney failed to voir dire the prosecution's expert witness. *Sanders v. State*, 825 So.2d 53, 58 (Miss. Ct. App. 2002). The defendant made no assertion that the expert only qualified because the attorney failed to voir dire. *Id.* Court found the defendant needed to prove the expert would not have qualified to be prejudicial. *Id.*

In *Fulks*, the defense attorney made no motion for a directed verdict. *Fulks v. State*, 944 So.2d 79, 83 (Miss. Ct. App. 2006). The Court held the attorney's performance was effective because he made a motion for JNOV or in the alternative a new trial after proceedings concluded. *Id.*

In *Caldwell*, the defendant's family desired to testify during his sentencing. *Caldwell v. State*, 953 So.2d 266, 271 (Miss. Ct. App. 2007). The attorney called no witnesses. *Id.* The Court did not find him ineffective. *Id.*

Following precedent, Mr. Barnett effectively assisted the defendant. The defendant alleged Mr. Barnett ineffectively performed the following: questioning the jury during voir dire, allowing the State to ask leading questions and extract hearsay, asking questions about evidence and experts, cross-examining, making motions, instructing the jury, and pleading for mercy during sentencing.

The defendant alleges Mr. Barnett weakly conducted the voir dire examination. Mr. Barnett effectively examined the jury venire. During the voir dire, Mr. Barnett asked numerous questions. T. 16-21. Mr. Barnett excused a number of potential jury members. T. 24-25. Mr. Barnett even made a Batson challenge when the State excused mainly black citizens. T. 26. Mr. Barnett effectively examined the jury venire and advocated against a prejudice.

The defendant alleges Mr. Barnett improperly failed to object to leading questions and hearsay. Even if the State asked leading questions or for hearsay, it did not result in prejudice. The video tape confirmed what all the witnesses said. EX 1. Objections would have led to the same jury verdict.

The defendant alleges Mr. Barnett improperly failed to object to the video (T. 60; EX 1) and expert testimony (T.79). The defendant asserted no claim that the judge would have refused the video or expert if Mr. Barnett made these objections. Therefore, he does not prove that a different outcome would have resulted.

The defendant alleges Mr. Barnett ineffectively performed when he asked Ms. Keel no questions about her deal with the state. Mr. Barnett asked Ms. Keel about recanting her story and her mental history. T. 65-66. Mr. Barnett gave the jury plenty of reasons not to believe Ms. Keel. If the jury decided Ms. Keel was a reliable

witness after this cross examination, questions about her deal would have made no difference in the trial's outcome.

The defendant alleges Mr. Barnett performed ineffectively by failing to request a directed verdict. Like in *Fulks*, Mr. Barnett made a motion for judgement notwithstanding the verdict or in the alternative for new trial. CP 18. Therefore, Mr. Barnett adequately defended his client.

The defendant alleges Mr. Barnett ineffectively instructed the jury. D-8 allowed the jury to find the defendant: guilty as charged, not guilty as charged, or guilty of possession. CP 9. D-4 instructed the jury could find the defendant guilty of possession. CP 13. The jury instructions clearly informed the jury that they could convict the defendant of the lesser-included crime of possession. An additional instruction on the lesser-included offense would have been repetitive.

The defendant alleged Mr. Barnett ineffectively pleaded for mitigating factors during the sentencing phase. During the sentencing phase, Mr. Barnett expressed,

> [The defendant] has been through rehabilitation, turned his life over to the lord, . . . been a regular attender at church, he's helped support his family, he's worked for the Newton Police Department as a mechanic trying to earn money to help his family . . . He's a first offender, forty-four years old, never been convicted of a felony before, never been charged with a felony . . . [W]e would pray for mercy.

T. 118. Mr. Barnett may not have called any witness to testify, but he made an honest attempt for mercy. Therefore, he performed neither ineffectively nor prejudicially.

Mr. Barnett effectively performed his duties. If any of the events happened differently, the trial still would have concluded as it did. Therefore, the Court should affirm on this issue.

Issue IV.
NO CUMULATIVE ERRORS EXIST BECAUSE NO ERRORS EXIST.

No harmless errors were made during the course of the trial. Since there were no harmless errors, a cumulation of errors cannot exist. Therefore, the Court should affirm on this issue.

The standard of review for cumulative errors is as follows:

> [U]pon appellate review of cases in which we find harmless error or any error which is not specifically found to be reversible in and of itself, we still have the discretion to determine, on a case by case basis, as to whether such error or errors, although not reversible when standing alone, may when considered cumulatively require reversal because of the resulting cumulative effect.

Strahan v. State, 955 So.2d 968, 975 (Miss.App.,2007) (quoting *Byrom v. State*, 863 So.2d 836, 847 (Miss. 2003)).

In *Strahan*, the Court found the issue without merit. *Id.* In *Byrom*, the Court found not cumulative error deserving reversal. *Byrom*, 863 So.2d at 847.

No error exists. Mr. Barnett properly defended the defendant without conflict of interest or ineffective performance. The weight of the evidence sufficiently supports the verdict. No error exists. Without an error, there can be no cumulation of errors. Therefore, the defendant received a fair and impartial trial. The Court should find this issue without merit.

CONCLUSION

The defendant's attorney properly assisted the defendant. The defendant only showed potential or hypothetical conflicts of interest. Since no actual conflict of interest existed, the Court should not reverse on this issue. The defendant's attorney also effectively assisted the defendant in the trial. The attorney did not prejudice the defendant in any way. Therefore, the Court should affirm the decision.

Additionally, the weight of evidence sufficiently supported the jury's verdict. In addition to testimony, the State presented a video recording of the actual sale. The jury received plenty of credible evidence to make their verdict. Therefore, the Court should affirm the decision.

Finally, no cumulative errors exist. No reversible or non-reversible errors exist. If no errors exist, no cumulation of errors can exist. Therefore, the Court should affirm the decision.

Finally, no cumulative errors exist. No reversible or non-reversible errors exist. If no errors exist, no cumulation or errors can exist. Therefore, the Court should affirm the decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jeffrey A. Klingfuss, 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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