

**J.D. GULLY**

**FILED**

**APPELLANT**

**AUG - 5 2008**

**VS.**

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

**NO. 2008-~~KA~~A-0216-SCT**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

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**J.D. GULLY**

**APPELLANT**

**VS.**

**NO. 2008-CA-0216-SCT**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**STATEMENT OF THE CASE**

On November 28, 2007, defendant J.D. Gully was found guilty in the Circuit Court of Lauderdale County, Honorable Lester F. Williamson presiding, of the sale of hydrocodone and acetaminophen within 1,500 feet of a church, in violation of *Mississippi Code Annotated* §§ 41-29-139 and 41-29-142. Feeling aggrieved Gully appeals.

East Mississippi Drug Task Force to become an informant. (TR 84). This agreement would exchange Parker's undercover services for exoneration of his pending charge. *Id.* With the assistance of East Mississippi Task Force agent Daniel Boyd, Parker helped organize several drug buys in hopes of putting an end to illegal drug distribution known to Parker. The first known distributor was J.D. Gully<sup>1</sup>. (TR 86).

The defendant was prescribed hydrocodone as a pain killer for aches and discomfort resulting from a previous surgery. He and informant Parker had a relationship as friends who visited with each other on a regular basis. This relationship privileged the Parker to information about the defendant as a drug dealer.

With knowledge of Gully's status as a distributor, the Task Force team set up a "buy/walk" operation. In a "buy/walk" operation, the informant makes a drug buy from a violator; the violator is not immediately arrested but allowed to walk away in order to conceal the informant's status as such. On September 26, 2006, this operation began with the informant, Parker, making a telephone call to the defendant, Gully, and requesting to buy \$200 worth of hydrocodone pills. (TR 88). As the video surveillance and findings in the lower court have revealed, Gully acquiesced and arrived at the designated location and completed the exchange of drugs for money.

On March 23, 2007, Defendant was indicted with the sale of forty (40) dosage units of hydrocodone and acetaminophen, a Schedule III controlled substance, within 1,500 feet of the First Church of Nazarene, in violation of §§ 41-29-139 & 41-29-142 of the Mississippi Code Annotated.

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<sup>1</sup>The subsequent operations are of no consequence in these proceedings. The State only makes mention of such to illustrate that the defendant was not singled out and was merely one of many drug dealers to be taken down throughout the course of this and other operations to come.

controlled substance with intent to sell.

Thereafter, On November 27, 2007, this case proceeded to trial where the jury found the defendant guilty of sale of a controlled substance within 1,500 feet of a church. Throughout the trial, the defendant made numerous objections and other motions in attempts to avoid paying his debt to society for his infractions. In the best interest of justice, the trial judge denied these attempts and ordered the defendant to seek a remedy upon appeal.

- Issue II. THE TRIAL COURT DID NOT ERR BY EXCLUDING THE TESTIMONY OF DEFENSE WITNESSES.**
- Issue III. THE WEIGHT AND SUFFICIENCY OF THE EVIDENCE PRESENTED AT TRIAL JUSTIFIED THE GUILTY VERDICT.**
- Issue IV. THERE WAS NO CUMULATIVE EFFECT OF ERRORS BY THE COURT THAT WARRANTED A NEW TRIAL.**

The defendant asserts a myriad of errors by the honorable Circuit Court of Lauderdale County. Upon thorough review of the facts of the case and applicable laws thereto, we find the defendant's contentions totally unmeritorious.

First, defense alleges an abuse of discretion by the court's denial of his motion for a mistrial. This motion was based on the violation of an order entered prior to trial prohibiting the State from eliciting information regarding or bringing up any allegations from the separate drug possession charge against the defendant. (TR 12-13). The trial judge noted that the alleged violation was unintentional and unsolicited. As a result, the motion for mistrial was denied and the trial was allowed to proceed. The trial judge gave a curative instruction to the jury to disregard what had been said in violation of the order. (TR 102-05). The defense contends that there was reversible error in the form of "substantial and irreparable prejudice" to the Defendant's case. (Appellant's Brief 13). There was no "miscarriage of justice" as the defense asserts and the court was correct in this ruling.

Defense made a second motion for a mistrial, which again, was properly denied. Defense based this motion on the fact that the court denied the defendant's wife from testifying to support his defense. The court correctly held that her potential testimony would be cumulative and therefore



defendant with the white bag with the name “Gloria Gordon” on it. Defendant contends the State never attempted to connect the name “Gloria Gordon” with defendant. (Appellate’s Brief 26). Defendant’s claim is totally without merit. The existence of the bag was never concealed from defendant; defendant was allowed to view the bag, and the bag was not exculpatory evidence. Defendant is procedurally barred from raising the issue on appeal for the first time.

Defendant also asserts that the sufficiency and weight of the evidence in this case were inadequate to support his conviction. We disagree. Defense’s argument that the eyewitness informants are not credible is merely a manifestation of their contempt for the incriminating testimony that was given against their client. The jury found the evidence to be sufficient and so did the lower court.

The assertion that the defendant’s conviction by the jury “is more likely the result of the prejudice he suffered,” is pure conjecture and has no factual basis. Defendant contends that if one of the errors by itself is not enough, then the cumulative effect of the many errors by the trial court in this case is enough to merit a new trial. (Appellate’s Brief 11). We disagree in that we fail to recognize any decision of the lower court as erroneous. Therefore the ruling of the lower court should stand as is.

Before trial, defense made a Motion in Limine to prevent the State from mentioning or asking a question that would elicit a response referring to other drug charges against the defendant. (TR 12). The motion was granted and the State was directed not to mention such unless it was first brought to the court's attention outside the presence of the jury. (TR 13).

During the direct examination of Agent Boyd, counsel for the State asked whether the informant in this case had been used to make any other cases. The witness replied "[y]es sir. He did make cases on [the defendant] once more, but we had a technical difficulty on that case." (TR 97). Upon hearing this answer, defense immediately objected and the jury was excused from the courtroom.

Defense then moved for a mistrial based on the alleged violation of the order excluding evidence of defendant's other drug charges. The State argued that the question was in no way intended to elicit any reference to any subsequent charges against defendant.

"I was simply asking him about the CI's [informant's] participation over a period of time because .... I was trying to explain why there was not a buy and bust made right then and that the reason was because they didn't want to burn him and they wanted to use him to make further cases so that he would be more useful. But the attempt was not to elicit any testimony about any other attempted buy with Mr. Gully which ... I was ignorant of until he opened his mouth and said that." (TR 100).

From this, it is clear that the prosecution's goal in asking the question was merely to lay a foundation and explain that the defendant was not apprehended at the time of sale to protect the informant's identity as an informant to assist in that capacity in future operations such as the one in question. This question also served to show that the informant, Parker, had no particular bias towards the defendant because he intended to help bring down other distributors in future operations. When

denied this motion, stating "...I think the mention of a possible other case that was not prosecuted is not – doesn't rise to the level that requires a mistrial."(TR102). The court then gave defense counsel the option of having the court instruct the jury to disregard any mention of some other incident or contact with law enforcement and a jury instruction at the end of the trial reinforcing that in writing or ignoring it altogether with instructions. Defense counsel requested the court to instruct the jury accordingly. (TR 102-3).

The trial court must declare a mistrial when there is an error in the proceedings resulting in substantial and irreparable prejudice to the defendant's case; however, the trial judge is permitted considerable discretion in determining whether a mistrial is warranted since the judge is best positioned for measuring the prejudicial effect. *Jones v. State*, 962 So.2d 1263 (Miss. 2007) (citing *Gossett v. State*, 660 So.2d 1285, 1290-91 (Miss. 1995)).

Given the nature of the alleged error or violation, the trial judge made his best judgment in regards to the issue. As *Jones* states, "the trial judge is in the best position to measure the prejudicial effect." *Id.* He used his discretion to rule accordingly and his sound decision should be given deference.

More specifically, in most cases, when an objection is made to improper questions by a district attorney and the court sustains the motion and admonishes the jury to disregard the improper questions and evidence, we have held that any prejudice created by the questions was cured and the trial court properly overruled the motion for a mistrial. *Reid v. State*, 266 So.2d 21 (Miss. 1972); *Thomas v. State*, 285 So.2d 148 (Miss. 1973). However, in the final analysis, each case must be decided on its own peculiar facts. *Henderson v. State*, 403 So.2d 139 (Miss. 1981). As prescribed

Mississippi Supreme Court held that "[w]hile error occurred, we find that the error was harmless, as it resulted in no prejudice to Jones, and it does not merit reversal." 962 So.2d 1263. Here, the trial judge used his valid discretion to make a reasonable ruling on the Motion for Mistrial based upon his reasonable perception of the situation.

Any assertion by the defendant that the jury was extremely prejudiced by the statement is pure conjecture and has no factual basis. Further, this statement alone was not strong enough to sway a jury to rule as they did against the defendant. There was sufficient testimony and evidence presented that played the major role in having the defendant found guilty.

Consequently, based upon the law, as summarized recently in *Jones*, there was no error in denying defendant's motion for mistrial. No relief should be granted based on this allegation of trial court error.

During the trial, the State objected to the defense calling Lorene Gully, wife of the defendant, as a witness. The State claimed Lorene Gully's testimony was irrelevant. (TR 199-200). This objection was based upon the defense's response to reciprocal discovery, "Lorene Gully, wife, who was present at the house at the time of the arrest and heard Loveen Bohnannon state that anything in the house belonged to him." Also, the response to discovery asserted that the witness would testify to the events at the time of defendant's arrest, and not to any events pertaining to the subject sale transaction. (TR 199-200; C.P. 23).

Defense counsel, claiming the discovery response was submitted in **both** the sale case and the possession case against the defendant, anticipated Mrs. Gully would testify to matters in the possession case. (TR 200). Defense counsel also argued that Mrs. Gully was to testify regarding the video footage of the sale transaction. Of course, she was to say that the man in the video was not her husband, just as the defendant himself testified. However, this testimony would have been cumulative, redundant and of no use.

Mrs. Gully was also to testify about events that occurred at the time of defendant's arrest, specifically, a statement she heard from the defendant's brother. This testimony would have been of no consequence considering it was related to the possession charge and not the sale charge.

The State succinctly argued in support of the objection that there was no basis for the defendant's wife to testify to an observation of the same thing that the jury is going to observe. (TR 202). The video was in evidence and the jury could view it themselves; Lorene Gully's testimony would be an opinion that is absolutely not helpful and baseless. *Id.* The trial judge agreed. Her testimony would have been cumulative because the defendant had already made the same testimony.

[Supreme] Court will not reverse this ruling. *Shaw v. State*, 915 So.2d 442, 445 (Miss. 2005) (citing *Jefferson v. State*, 818 So.2d 1099, 1104 (Miss. 2002) (quoting *Fisher v. State*, 690 So.2d 268, 274 (Miss. 1996))); M.R.E. 103(a).

The standard of review for the admission or suppression of evidence in Mississippi is abuse of discretion. *Poole v. Avara*, 908 So.2d 716, 721 (Miss. 2005); *Miss. Trans. Comm'n v. McLemore*, 863 So.2d 31, 34 (Miss. 2003). An abuse of discretion standard means the judge's decision will stand unless the discretion he used is found to be arbitrary and clearly erroneous. *Id.*

In the case at bar, the judge's actions and ruling were based on M.R.E. 403 when he ruled the potential testimony would be cumulative. Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." M.R.E. 403.

"[T]he standard of review regarding Rule 403 determinations is an 'abuse of discretion.' " *Fitch v. Valentine*, 959 So.2d 1012 (Miss. 2007) citing *Baldwin v. State*, 784 So.2d 148, 160 (Miss. 2001). As prescribed by case law, the judge enjoyed the discretion to rule within those parameters. Thus, his use of his discretion was not arbitrary nor erroneous. The "abuse of discretion standard" is passed whereas there was no abuse of discretion.

Next, having first viewed the video of the sales transaction two days prior to trial, the defense asserts error on behalf of the State in failing to timely produce the requested discovery. However, defense counsel acknowledges he received the State's discovery packet on or before April 17, 2007, and had knowledge of the video months prior to trial. (Appellant's Brief 16). The

State's discovery packet lists two CD's and a JVC digital ...

reference to a video of the sales transaction in the Task Force agent's case report ( ...

The defendant was also charged by separate indictment with possession of a controlled substance with intent to sell in violation of *Mississippi Code Annotated* § 41-29-139. (TR 11). On November 27, 2007, in the case *sub judice*, the State proceeded with the sale charge, being Circuit Court Cause No. 112-07, and not the possession with intent charge, being Circuit Court Cause No. 063-07. Defense contends it thought the possession charge was going to trial and that the severance of the two charges was in error. Defense claims he was not given enough time to prepare adequate defenses, or make changes to the reciprocal discovery in the sale case, being Cause No. 112-07. (Appellant's Brief 16). This argument is without merit. The record clearly reflects that on August 14, 2007, the Circuit Court entered an order setting Cause No. 112-7, the sale case, for trial on November 27, 2007. (C.P. 46).

Defense also moved for a mistrial based on the court allowing the State to amend the indictment. On the day of trial, the State was allowed to amend simple typographical errors to the indictment. (C.P. 50, 51).

Indictment[s] may be amended for matters of form, but not of substance and cannot be amended so as to change [a] charge made therein to another crime except by action of [the] grand jury that returned it. *Shive v. State*, 507 So.2d 898 (Miss. 1987); *Miss. Code Ann.* § 99-7-21. This case supports the State's position that amending an indictment in form is permitted by law. Had there been an attempt to change the substance of the indictment in regards to the content of the charges,

the defense would have been correct in their objection. This was not the scenario in the case at

prejudice the defendant's case. *Leonard v. State*, 972 So.2d 24 (Miss. Ct. App. 2008). In that case, the Court found that the prosecution would be allowed to amend the indictment, charging sexual battery, to correct the date of the offense. *Id.* The amendment did not materially alter any fact that was the essence of the offense on the face of the indictment as it originally stood, [and] the amendment did not materially alter defendant's defense, which was based on the premise that he never touched victim inappropriately. *Id.*

In the case *sub judice*, the State moved to amend the header of the indictment showing the term of the grand jury that issued the indictment and also the month the crime was committed. The requested amendments were changes to the form and not of substance. Therefore, the defendant should not have been afforded additional time to prepare for a defense of an issue he knew about prior to the trial date.



Defendant objects to the admission of the white bag which contained the hydrocodone introduced at trial as Exhibit 2. Defendant raises for the first time on appeal, that the Prosecution did not disclose to the defendant that the name of “Gloria Gordon” was on the white bag. Defense asserts that the name on the bag is exculpatory evidence that the State should have turned over. A white bag was referenced in the case agent’s report, the Task Force evidence submission form and the Mississippi Crime Laboratory analysis report, which were provided to defense in discovery months before trial. (Trial Exhibit 6). Agent Boyd testified he took custody of the controlled substance immediately after the sale so that the fact the name “Gloria Gordon” is on the white bag is not exculpatory evidence that the State failed to produce. Defense also asserts an alleged break in the chain of custody of the hydrocodone.

Defense counsel fails to mention to this court that “**Gloria Gordon**” is defendant’s sister, according to her letter of recommendation submitted to Judge Williamson prior to defendant’s sentencing. (Sentencing Exhibit 2). This evidence was not exculpatory, in fact it supports the State’s case. Therefore, had the defense objected at trial to the admission of the white bag, Gloria Gordon’s name could have been explained to the jury.

The case *sub judice* is in line with the holding in *Johnson v. State*, 904 So.2d 162 (Miss.,2005). In *Johnson*, the defendant failed to object to the chain of custody or to the admission of the cocaine into evidence. For the first time, on appeal Johnson asked the Mississippi Supreme Court to address the propriety of the judge's admission of the cocaine. The Court opined:

This Court normally reviews a judge's decision to admit or exclude evidence for an abuse of discretion. *Graves v. State*, 492 So.2d 562, 565 (Miss.1986). However, a defendant's failure to make a contemporaneous objection to the

(Miss.1994) (citing *Gray v. State*, 487 So.2d 1304, 1312 (Miss.1986)). An error is deemed “plain error” when the substantive rights of a defendant are affected. *Grubb v. State*, 584 So.2d 786, 789 (Miss.1991).

.... Moreover, the trial court specifically asked defense counsel if he had any objections to introduction of the cocaine either as an exhibit for identification purposes only or for admission into evidence and counsel did not object on either occasion. As the trial court properly admitted the cocaine into evidence without any objection from Johnson, it cannot be said that the trial court “abused its discretion” or committed “plain error.” We find that Johnson's claim of a break in the chain of custody is procedurally barred. Further, we find his claim is without merit. *Johnson* at 171.

The record reflects in the case before us that the State offered sufficient testimony from Agent Boyd and the crime lab analyst to satisfy the requirement of M.R.E. 901(a) for establishing a proper chain of custody for admission of the hydrocodone and white bag at trial.

Defendant makes numerous other claims against the weight and sufficiency of the evidence that led to his guilty verdict. He claims that based on the facts, there is no way a rational trier of fact could have found that the essential elements of the crime have been proven beyond a reasonable doubt.

The statutes that the defendant was charged with having violated read quite plainly:

(a) Except as authorized by this article, it is unlawful for any person knowingly or **intentionally**:

(1) To **sell**, barter, transfer, manufacture, distribute, dispense or possess with intent to sell, barter, transfer, manufacture, distribute or dispense, **a controlled substance**.  
*Miss. Code Ann.* 41-29-139.

....

(1) Except as provided ... any person who violates or conspires to violate Section 41-29-139(a)(1), *Mississippi Code of 1972*, by selling, bartering, transferring, manufacturing, distributing, dispensing or possessing with intent to sell, barter, transfer, manufacture, distribute or dispense, a controlled substance, in or on, or **within one thousand five hundred (1,500) feet of**, a building or outbuilding which is all or part of a public or private elementary, vocational or secondary school, or **any church**, ... shall, upon conviction thereof, be punished by the term of imprisonment

A thorough parsing of the aforementioned statutes reveal that the defendant met each element required to be charged and subsequently convicted of the said offenses. There were two eye witnesses who identified the defendant as the participant in the drug transaction. Task Force Agent Daniel Boyd, and the confidential informant, William "Bill" Parker, both gave sworn testimony that confirmed J.D. Gully intentionally sold a controlled substance. (TR 153; 183). Agent Boyd immediately took custody of the controlled substance in a white paper bag, secured it and subsequently submitted it to the Mississippi Crime Laboratory for testing. Forensic Scientist, Keith McMahan, testified that the pills were hydrocodone and acetaminophen, a Schedule III controlled substance. (TR 193; Trial Exhibit 6). Agent Boyd testified that 3104 52<sup>nd</sup> Street, the location of the sale, was 825.23 feet, being within 1,500 feet, of the First Church of the Nazarene and map in support of his testimony was admitted into evidence. (TR 88; 116-17; 127; Trial Exhibit 5).

Perhaps most importantly, the jury was given video footage of the transaction in which they were able to view repeatedly during their deliberation. (Trial Exhibit 3). All of this information was vital in helping prove the violation of the offense in question by the defendant.

Upon presentation of both sides' arguments, the jury was properly instructed and deliberated on a verdict. The jury correctly found the defendant guilty based on the evidence presented, and by law, the defendant is subject to a fine and or imprisonment; in this case 20 years imprisonments with 12 years suspended.

The Mississippi Supreme Court has repeatedly held that, the jury is charged with the responsibility of weighing and considering the conflicting evidence and credibility of the witnesses

(Miss. 1989). Defense repeatedly attacks the credibility of the prosecution's witnesses, and procedures performed during and related to the "buy/walk" operation. Defense is entitled to their own opinion, as are we, but the jury is the ultimate decider of fate in regards to the evidence and credibility of witnesses.

Where there is conflicting testimony, the jury is the judge of the credibility of the witness. *Duncan v. State*, 939 So.2d 772 (Miss. 2006). The jury is the final arbiter of a witness's credibility. *Id.* We believe, as our Supreme Court, that the jury is competent enough, when properly instructed, to make a sound decision based on the evidence. We remain steadfast in asserting that the evidence was clear to the jury and there was no error.

This Court reviews the sufficiency of the evidence in the light most favorable to the state. *McClain*, 625 So.2d at 778. "All credible evidence which is consistent with guilt must be accepted as true, and the State is given the benefit of all favorable inferences that may be reasonably drawn from the evidence." *Daniels v. State*, 742 So.2d 1140 (Miss. 1999) (citing *McClain*, 625 So.2d at 778). "[T]his Court will reverse only where, 'with respect to one or more elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty.' " *Id.*

In reviewing the evidence, one can reasonably find the defendant guilty from an objective standpoint. Certainly, upon appeal and in the light most favorable to the state, the defendant can reasonably be determined guilty. This issue is without merit.

In *Wilburn v. State*, 608 So.2d 702, 705 (Miss. 1992), the Mississippi Supreme Court held that "individual errors, not reversible in themselves, may combine with other errors to make up reversible error." The question that must be asked in these instances is whether the defendant was deprived of a "fundamentally fair and impartial trial" as a result of the cumulative effect of all errors at trial. *Id.*

If there is "no reversible error in any part, [then] there is no reversible error to the whole." *McFee v. State*, 511 So.2d 130, 136 (Miss. 1987). Whereas the defendant failed to establish ANY error on behalf of the trial court, there is nothing to constitute a cumulative effect that would require a new trial.

The Court in *Duncan v. State*, in regards to their issues, found that, "none of those issues previously raised by [defendant], rise to the level of reversible error either standing alone or when considered together. The verdict is supported by substantial evidence, and [defendant] fails to demonstrate any procedural or substantive errors that warrant reversal. Based on the finding of no error, we find that there is no cumulative effect of any alleged error that merits reversal." 939 So.2d 772 (Miss. 2006).

The ruling in the case sub judice should mirror the aforementioned holding in *Duncan*. While defendant attempted to demonstrate procedural and substantive errors to merit a reversal, those attempts fail to meet the standards to merit such reversal. Accordingly, no relief should be granted.

attempts to evade our legal system. Any arguments to the contrary should be countered with a reference to the transcript of the trial court's findings and the applicable case law cited herein.

The facts and proceedings of this case are simple and straightforward. The defense attempted to cloud the transparency of this case with extensive legal research that yielded numerous cases and a lengthy brief. These numerous allegations of error in conjunction with their fourth "catch-all" issue, serve as proof to the lack of merit to their contentions. It seems as if the defense is throwing out all possible defenses in hopes that one of them would merit a reversal and new trial. While the State acknowledges defense counsel's duty to his client in serving the defendant's best interest (which is to stay out of jail), we also recognize that the law is simply not in favor of the defendant.

Based upon the arguments presented herein as supported by the record on appeal, the State asks this reviewing court to affirm the trial court's verdict of guilty, and see that Mr. J. D. Gully serves his full sentence.

Respectfully submitted,

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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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