IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ANTHONY LEE TUCKER — APPELLANT

VS. — NO. 2008-KA-0762-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

The grand jury of Clay County indicted defendant, Anthony Tucker for Possession of Stolen Property in violation of *Miss. Code Ann.* § 97-17-20, and amended to add habitual offender status (6 previous convictions), c.p. 67-69. (Indictment, cp.12& order amending, c.p. 110-111.). After a trial by jury, Judge Lee J. Howard, presiding, the jury found defendant guilty. (C.p.70, cp.88). Defendant was sentenced to Ten Years in the custody of the Mississippi Department of Corrections without parole, probation or early release. Additionally defendant was ordered to pay a $10,000 fine upon release.

After denial of post-trial motions on March 24, 2008, the notice of appeal appears to have been dated on April 28th, 2008 (C.p. 176); and filed with the Clay County Circuit Court on May 1, 2008. (C.p. 176). It is the position of the State such late filing of the notice of appeal divested this reviewing court of jurisdiction.

STATEMENT OF FACTS

Counsel for defendant has provided a comprehensive statement of facts that were presented to the jury and upon which they convicted defendant.

ARGUMENT

Jurisdiction

It is the position of the State this court was divested of jurisdiction by the late filing of the notice of appeal. It is apparent from the face of the filed "Notice of Appeal" (c.p. 176-177) that counsel was aware of the date of the denial of the post-trial motion (March 24, 2008). Further, there is no explanation offered for the apparent late filing of the notice. (Dated April 28, 2008, stamped filed on May 1, 2008).

> ¶ 3. Mississippi law requires that a "notice of appeal ... shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment." M.R.A.P. 4(a). Any appeal which violates the thirty-day requirement of Mississippi Rule of Appellate Procedure 4 "shall be dismissed." M.R.A.P. 2(a)(1).
>
> . . .
>
> ¶ 5. While it is true that "this Court may suspend Rule 4, for good cause shown, and allow out-of-time appeals in criminal cases ... **[t]he party seeking an out[-]of[-]time appeal carries the burden of persuasion regarding the lack of a timely notice.**" *Andrews v. State*, 932 So.2d 61, 62(¶ 5) (Miss.Ct.App.2006) (citing M.R.A.P. 4).

Prather v. State, 2008 WL 4559743 (Miss.App. 2008)(emphasis added).

Without waiving any jurisdictional bar to review the State will respond to each of the issues raised on appeal.

Issue No. 1

There Was Ample, Legally Sufficient Evidence of Such Weight and Credibility to Support the Jury Verdict of Guilty.

In this initial allegation of error defendant raised two specific challenges.

First the sufficiency of the evidence. Defendant makes much of the fact that the stolen items, (and lots of them by the way) were just laying around and they belonged to others; there was no proof he knew they were stolen, etc., etc.

Well, the short answer is that from the evidence it can be argued defendant was in actual possession, and had dominion and control over some of the many, many stolen items. And, or, such was constructive possession based upon the facts. Further possession can be in many forms, – all of which are legally sufficient to support a conviction involving 'possession' of property (be it contraband, illegal substance or chattels).

> ¶ 9. Possession of a controlled substance may be actual or constructive, individual or joint. Berry v. State, 652 So.2d 745 (citing Wolf v. State, 260 So.2d 425, 432 (Miss.1972)).

Dixon v. State, 953 So.2d 1108, 1112 (Miss. 2007).

While appellate counsel suggests this court discount the testimony that he received the stolen property from guys in a van and ignore the proximity in which defendant was found to the copious amounts of stolen property – such is legally sufficient evidence to raise a presumption of guilt.

> ¶ 20. Our case law has held that "the presumption of guilt [of larceny], which arises from the possession of goods recently stolen, may be rebutted by an explanation or an account given by the accused as to how he acquired possession. The explanation, however, must be both reasonable and credible." Pearson v. State, 248 Miss. 353, 362, 158 So.2d 710, 714 (1963). If the explanation is not reasonable and credible, the evidence is sufficient for larceny. Wilson v. State, 237 Miss. 294, 301, 114 So.2d 677, 680 (1959).
>
> *Presley v. State*, 994 So.2d 191, 195 (Miss.App. 2008).

There was legally sufficient evidence of actual possession, constructive possession individually and jointly.

Consequently, there is not merit to this portion of this claim of error.

Second, as to the weight of the evidence. There was evidence that defendant lived in the shed where stolen items were found by the score, and where there was testimony that defendant 'lived' or slept.... Tr. 174, 189.

> The Mississippi Supreme Court observed in Keys that "[p]roof of felonious intent will always be by circumstantial evidence except where the accused has confessed."
>
> *Vince v. State,* 844 So.2d 510, 515 (¶14) (Miss.App. 2003).

Defendant bemoans the fact that evidence of guilty knowledge was attempted to be proved by mere circumstantial evidence. Unfortunately for defendant circumstantial evidence alone is enough to support a conviction.

> ¶11. Lack of direct evidence is not fatal to the validity of a conviction. ***"A conviction may be had on circumstantial evidence alone."*** Tolbert v. State, 407 So.2d 815, 820 (Miss.1981). However, if the prosecution

bases its case entirely upon circumstantial evidence, it "must prove the defendant guilty beyond a reasonable doubt and to the exclusion of every reasonable hypothesis consistent with innocence." Rhodes v. State, 676 So.2d 275, 281 (Miss.1996). In this case, the primary circumstantial evidence was Jones's possession of the stolen items. "[T]he possession of stolen articles, standing alone, may be sufficient to satisfy the beyond a reasonable doubt standard given sufficiently probative circumstances of possession." Shields v. State, 702 So.2d 380, 381 (Miss.1997). Nevertheless, we must view the "circumstances of possession and the presence or absence of evidence of participation in the crime other than mere possession" based on certain factors. Id. at 382. These factors are:

1. The temporal proximity of the possession to the crime to be inferred;
2. The number or percentage of the fruits of the crime possessed;
3. The nature of the possession in terms of whether there is an attempt at concealment or any other evidence of guilty knowledge;
4. Whether an explanation is given and whether that explanation is plausible or demonstrably false.

Jones v. State, 995 So.2d 146, 150 (Miss.App. 2008).

There was an abundance of evidence, circumstantial and direct to support the elements of the offense and reasonable inferences of guilty therefrom.

No relief should be granted on the first claim of error.

Issue No.2

Defendant Was Properly Charged and Convicted for Possession of Stolen Property.

Next, defendant seeks to garner relief by claiming the State really was proving he stole the property in his possession and as a consequence defendant must be freed.

Such is just not the case. The State, as it is permitted to do, may tell a complete story during a prosecution – even if it involves other crimes and bad acts.

> ¶ 21. . . . "Evidence of other crimes or bad acts also is admissible to tell the complete story so as not to confuse the jury." Williams v. State, 991 So.2d 593, 607 (¶ 49) (Miss.2008). In cases "where another crime or act is 'so interrelated to the charged crime as to constitute a single transaction or occurrence or a closely related series of transactions or occurrences,' proof of the other crime or act is admissible." Bell v. State, 963 So.2d 1124, 1131 (¶ 16) (Miss.2007) (quoting Duplantis v. State, 644 So.2d 1235, 1246 (Miss.1994)).
>
> *Bennett v. State*, 2009 WL 678713 (Miss.App. 2009).

Further, as oft quoted in the brief of defendant – "he got the items from some guys in a white van." Tr. 253, 275 (quote paraphrased). Such is evidence going, specifically, to obtaining, receiving and possessing (actual possession) of stolen goods.

Based upon the law and evidence presented of the whole story no relief should be granted based on this allegation of trial court error.

Issue No. 3

Defendant's Indictment Was Legally Sufficient to Charge the Crime for Which He Is Now Convicted.

> ¶ 19. The issue of whether an indictment is fatally defective is a question of law and warrants a broad standard of review by this Court. Nguyen v. State, 761 So.2d 873, 874(¶ 3) (Miss.2000). Since this issue is a question of law, the standard of review is de novo. Peterson v. State, 671 So.2d 647, 652 (Miss.1996) (superceded by statute). The purpose of an indictment is "to inform the defendant with some measure of certainty as to the nature of the charges brought against him so that he may have a reasonable opportunity to prepare an effective defense." Moses v. State, 795 So.2d 569, 571(¶ 13) (Miss.Ct.App.2001). The indictment shall contain "the essential facts constituting the offenses charged and shall fully notify the defendant of the nature and cause of the accusation." URCCC 7.06.
>
> *Jones v. State*, 993 So.2d 386 (Miss.App. 2008).

Specifically defendant claims the description of the stolen property as being "athletic apparel" is legally insufficient to put him on notice of what he had stolen.

> ¶11 . . . A description of "110 pounds of dairy feed," along with the value of the feed has been found sufficient. *Barnes v. State*, 230 Miss 299, 92 So.2d 863 (Miss.1957). [. . .] A description of "six sacks of ammonium nitrate" has also been found sufficient. *Jones v. State*, 215 Miss. 355, 60 So.2d 805 (1952).
>
> *Nguyen v. State*, 761 So.2d 873, 876 (Miss. 2000).

In Nguyen the court listed many cases showing indictments that were legally sufficient. Once of those cited cases, *Barnes, supra*, cited so approvingly specifically noted that the description of the property 110 pound bags of dairy feed were also linked by the owner of the property and value making such description, in total

legally sufficient. The indictment sub judice also lists the owner and value of the 'athletic apparel' which the state had to prove. And prove it did. Where it came from, hot it came to be in defendant's possession and the value in excess of the statutory amount to be a felony.

The same can be said of the rationale in the *Jones* case, *supra*. Essentially, it would appear that where the stolen property that is possessed is fungible in nature a legally sufficient description would include the owner, the class or item, (bags of dairy feed, sacks of fertilizer, "athletic apparel") along with the combined value to qualify within the statute – such is legally sufficient to put defendant on notice of the property possessed.

Accordingly, the State would argue the indictment put defendant on notice to prepare his defense to the crime charged.

No relief should be granted based on this allegation of error.

Issue No. 4

The Jury Was Properly Instructed by the Instructions Given and There Was No Error in the Instruction Refused.

Continuing the challenge to his conviction defendant challenges the giving of several instructions and the denial of several others.

The State will respond to each in turn.

Instruction S-2 - Defendant claims there was no proof it came from Foot Gear or the value. The testimony was that the items of athletic apparel found in the possession of defendant came from Foot Gear Tr. 126-27. The transcript is rife with evidence of the value. This was a proper instruction.

Instruction S-3 - As noted in defendant's own brief there was evidence to support the giving of the instruction. It was proper to give the instruction.

Instruction D-2A - Denied for being repetitious.
¶ 17. Jury instructions are reviewed by reading them as a whole. Rushing v. State, 911 So.2d 526, 537(¶ 24) (Miss.2005). McCain was entitled to jury instructions on his theory of the case. Despite this entitlement, the trial judge can refuse to give instructions which state the law incorrectly, repetitiously state a theory already covered, or have no evidentiary foundation. *McCain v. State,* 971 So.2d 608 (Miss.App. 2007).
The judge was correct in denying the instruction.

Instruction D-3 - See the response to Instruction D-2A above. The proffered instruction was an incomplete statement of law as applied to the facts. *Id.* The trial judge was correct in denying this instruction.

Instruction S-4 - Constructive possession may be proved by showing a suspect had dominion and ***control over the location in which the contraband*** is found. *McKee v. State,* 878 So.2d 232, 237 (Miss.App. 2004)(emphasis added). It was proper to give a joint or constructive

joint possession instruction to inform the jury.

It is the succinct position of the State that read together the instructions were not confusing but fully and adequately instructed the jury on the element of the offense and any claim as to a defense of defendant.

No relief should be granted on this allegation of error.

Issue No.5

There Was No Prosecutorial Misconduct in the Closing Arguments of the State.

The States response to this allegation of error will be very succinct. Trial counsel for defendant objected to the use of the term ex-con the very second time it was used. Tr. 455. The trial court sustained the objection specifically as to that term. Such is not error. *Travis v. State*, 972 So.2d 674, 683 (¶ 39)(Miss.App. 2007).

As to the reference to the burglary it was in part to tell the whole story of how the multitude of items from that one store burglary got in defendant's possession. It is an inference that anyone would know if they get dozens of items for some guys in a van that they are stolen. Perhaps defendant even helped plan and steal the stuff, supposedly he claims he came by them from the guys in the van. Such an argument is permissive and draws upon reasonable inferences from the evidence and is not unfairly prejudicial.

It is the position of the State the argument was not unfairly prejudicial and permissive within the wide latitude allowed during closing.

> ¶ 17. Attorneys are granted wide latitude in making their closing arguments. Holly v. State, 716 So.2d 979, 988(¶ 33) (Miss.1998). Prosecutors may include anything that has been presented as evidence, but they must refrain from appealing to the fears of jurors. Stubbs v. State, 878 So.2d 130, 138(¶ 22) (Miss.Ct.App.2004). Allegations that a prosecutor's comment was improper must be evaluated by taking into account the complete context in which the statement was made, including that which was said by the prosecution and defense. Spicer v.

State, 921 So.2d 292, 318(¶ 53) (Miss.2006). "The inquiry regarding attorney misconduct during closing arguments is 'whether the natural and probable effect of the improper argument is to create unjust prejudice against the accused so as to result in a decision influenced by the prejudice so created.' " Jefferson v. State, 964 So.2d 615, 619(¶ 14) (Miss.Ct.App.2007) (quoting Sheppard v. State, 777 So.2d 659, 661(¶ 7) (Miss.2000)).

Mosely v. State, 4 So.3d 1069 (Miss.App. 2009).

No relief should be granted on this allegation of error.

Issue No. 6
Counsel Had Constitutionally Effective Assistance of Counsel.

It is the succinct position of the State that defendant was afforded constitutionally effective assistance of counsel.

Appellate counsel argues extensively about prejudicial hearsay and failure to object. However, the reviewing courts of this State have oft held: "...deciding whether to object to hearsay "falls within the broad discretion given to counsel in formulating and carrying out his trial strategy." *Loi Quoc Tran v. State*, 999 So.2d 415, 418 (Miss.App. 2008).

Now, on appeal, new counsel claims that the failure to get a limiting instruction regarding some evidence is ineffective assistance of counsel. The Mississippi Supreme Court has held otherwise.

> ¶ 32. We are also mindful that counsel's decision whether to request a limiting instruction regarding a part of the evidence against the accused may also be a part of trial strategy. Our supreme court has pointed out that a limiting instruction "can actually focus the jury's attention on sensitive information" Sipp v. State, 936 So.2d 326, 331(¶ 9) (Miss.2006) (citing Brown, 890 So.2d at 913(¶ 35)). We have held that **a lawyer's failure to request such a limiting instruction as a tactical decision does not amount to ineffective assistance**.

Moss v. State, 977 So.2d 1201 (Miss.App. 2007)(emphasis added).

There is an additional claim regarding the handling of the cross-examination of a witness. Such claims have been heard before and found not to be ineffective

assistance but within the gambit of trial strategy.

> ¶ 30. Thames argues that he received inadequate assistance of counsel when trial counsel failed to cross-examine Keel regarding her criminal history and compensation from the State for her cooperation. The Mississippi Supreme Court has stated that:
>
> > [D]ecisions made at trial during cross-examination are tactical decisions, and this Court will not analyze these decisions in hindsight to find that certain questions should or should not have been asked of a witness. The general rule is that "an attorney's decision to call certain witnesses and ask certain questions falls within the ambit of trial strategy and cannot give rise to an ineffective assistance of counsel claim."
>
> *Thames v. State*, 5 So.3d 1178 (Miss.App. 2009).

Further strategic defense strategies are "The decision whether to request certain jury instructions is a matter of trial strategy." *Myhand v. State,* 981 So.2d 988, 992 (Miss.App. 2007).

And, "...counsel's failure to object during closing arguments is presumed to be strategic." *Clayton v. State,* 946 So.2d 796, 804 (Miss.App. 2006), citing *Wiley v. State*, 517 So.2d 1373, 1380 (Miss.1987).

The State would ask this court to decline the invitation to extend this case to further post-conviction proceedings and specifically hold that this defendant had constitutionally effective assistance of trial counsel.

No relief should be granted on this allegation of error.

Issue No. 7

Defendant Is Not Entitled to Relief Based upon a Claim of Cumulative Error.

Lastly, it is asserted the cumulative effect of multiple error or near errors, mandates a new trial.

> ¶ 31. At the outset, we note that "the Constitution does not guarantee a perfect trial, but it does entitle a defendant in a criminal case to a fair trial." Hammons v. State, 918 So.2d 62, 65(¶ 10) (Miss.2005) (citing Clark v. State, 891 So.2d 136, 140-41(¶ 19) (Miss.2004)). Therefore, Carlisle's trial did not have to be perfect in order to be valid. However, the Mississippi Supreme Court has held that "individual errors, not reversible in themselves, may combine with other errors to make up reversible error." Caston v. State, 823 So.2d 473, 509 (¶ 134) (Miss.2002). The Court further noted that:
>
> > [t]he 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. If there is 'no reversible error in any part, so there is no reversible error to the whole.'
> >
> > Id. (citations omitted).
>
> *Carlisle v. State,* 936 So.2d 415 (Miss.App. 2006).

While numerous allegations of error are presented it is the position of the State that singly or collectively they do not rise to a level that defendant was deprived of a fundamentally fair trial.

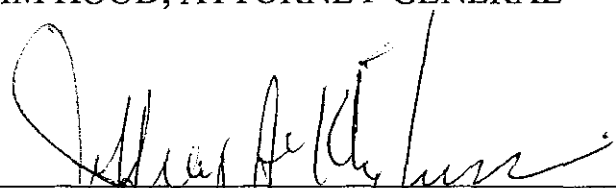
No relief should be granted on this allegation of cumulative error.

CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal the State would ask this reviewing court to dismiss the attempted appeal for want of jurisdiction or, alternatively affirm the verdict of the jury and sentence of the trial court.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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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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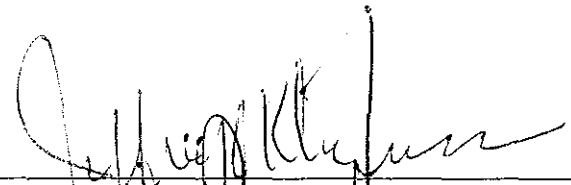
This the 29th day of May, 2009.



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