IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ANTHONY LEE TUCKER — APPELLANT

V. — NO. 2008-KA-00762-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. Anthony Lee Tucker
4 Forrest Allgood, and the Clay County District Attorney's Office
5. Honorable Lee J. Howard

THIS 23rd day of February, 2009.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Anthony Lee Tucker, Appellant

By: _____
Leslie S. Lee, Counsel for Appellant

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STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Clay County, Mississippi, and a judgment of conviction for the crime of possession of stolen property against the appellant, Anthony Lee Tucker. Tr. 460, C.P. 88, R.E. 22. Tucker was subsequently sentenced to ten years without the possibility of parole in the custody of the Mississippi Department of

Corrections as an habitual offender under §99-18-81. Tr. 479, C.P. 112, R.E. 25. This sentence followed a jury trial on October 3-5, 2007, with a sentencing hearing on November 20, 2007, Honorable Lee J. Howard, Circuit Judge, presiding. Tucker is presently incarcerated with the Mississippi Department of Corrections.

FACTS

According to the testimony presented at trial, On October 10, 2005, Jason Cole, the manager of the Foot Gear store in West Point, Mississippi, called the police to report a burglary at the store. Tr. 133. When the police arrived, they found the store's telephone and surveillance wires cut, the door pried open and the items in the store and the storage room taken. Tr. 169-70. For the next eight days, the police had no leads regarding the burglary. Tr. 220.

The investigation into the robbery did not progress until October 18, 2005, when an anonymous female called in a tip to the police department saying that Anthony Tucker had broken into the Foot Gear store on October 8th. She told the police that they could find the merchandise in the house and the yellow shed located at 1893 Matthews Gin Road. Tr. 171. Detective Zate McGee of the West Point Police Department searched for and found the appellant's name in the Mississippi Department of Correction's (MDOC) active offenders list and through some investigation, found out that Johnny Hancock was Tucker's parole officer. Tr. 172-73.

After meeting at the West Point Police Department to discuss the anonymous tip, McGee, Hancock, and MDOC agent Ryan Boykin went to 1893 Matthews Gin Road, the

home of the appellant's brother-in-law, James Gibbs, to investigate. Tr. 173-74, 237, 260. Upon arriving at the house, Hancock took the appellant into custody and the officers walked to the shed. Tr. 174-75. Hancock opened the door and saw several pairs of new tennis shoes lined up under the bed. Tr. 175-76. Upon seeing the shoes, Detective McGee called her supervisor to come to the scene while she went to obtain a search warrant for the house. Tr. 177.

The shed contained a bed that appeared to have been slept at some point but it was covered with clothes when Hancock entered. The shed also contained a couch, coffee table and an ashtray. Tr. 264, Exhibits 13-17. The shed did not have any windows, ventilation, running water, sinks or any toiletry items. Tr. 264-65. Hancock described the shed as being a place where somebody had slept but said that the shed appeared to have been used for storage. Tr. 264-65

While waiting on her supervisor, Detective McGee saw a burned pile of hangers in the backyard, about 10 or 15 yards from the shed. Tr. 178. In the same area where the burned pile of hangers was found, Detective McGee also found fragments of tags that came off of clothing in the pile that were for various brand name pieces of clothing. Tr. 199-200. When Detective McGee returned with the search warrant after being gone about an hour and a half, the house was searched. Tr. 181. Officers found tennis shoes, sportswear, blue jeans and caps were found in every bedroom of the house, stored in garbage bags, in closets and on beds. Tr. 182.

Following their search of the house, the officers went to the yellow shed behind the house to conduct a search. Tr. 189. During this search, the officers found football jerseys, baseball caps, blue jeans and tennis shoes on the bed and floor. Tr. 190.

Eight or nine days after the search and seizure, Cole came to the West Point police department where the officers had generated a list of the seized items and had them spread out on a table for identification. Tr. 197. Cole was shown the merchandise and upon his recognition of the merchandise as being from his store, it was returned to him. Tr. 197-98. He had no inventory list, but picked out what he believed belonged to Foot Gear by sight. Tr. 145-46.

Following the recovery of the items from the house, Anthony Tucker was taken into custody. Tr. 200. Before being taken to jail, Hancock alleged that Tucker told him that he got the stuff from "two guys in a white van." Tr. 253. Along with the appellant, James Gibbs, Christann Gibbs, Erica Witherspoon, and Kevin Pointer were also taken into custody at that time. Tr. 200. Christann Gibbs, the sister of the appellant, testified that the shed was "unlivable" and that the appellant slept in the living room of the house, while the shed was a storage place for furniture that had been brought to the house during her recent move there. Tr. 336, 349.

SUMMARY OF THE ARGUMENT

Anthony Tucker was truly in the wrong place at the wrong time. Having just been released from a Wisconsin prison, he went to live with is sister and her five children in West Point. Unable to afford the apartment they all lived in – although going through a divorce

– she moved back in with her husband, James Gibbs. Tucker had no choice but to go with her. Several days after they moved in with Gibbs, he brought home several items of new clothes and shoes. Tucker, who had very little, was given some of these clothes and shoes. Because of this, Tucker has been charged with possessing stolen property. The sole evidence that Tucker possessed property he knew to be stolen came from hearsay. An anonymous tip to police alleged that Tucker burglarized the Foot Gear store and currently possessed the items in a yellow shed on his brother-in-law's property. Tr. 171. The evidence was insufficient and/or the verdict against the weight of the evidence to show Tucker had the required guilty knowledge that the goods were stolen or that he constructively possessed stolen property worth over $500.00.

In the alternative, the State attempted to prove that Tucker was the actual burglar in this case. It was therefore improper to charge him with possessing goods that the State alleged he actually stole. This was apparently done to give Tucker three more years on a potential sentence.

Furthermore, the indictment is this case was clearly insufficient and constituted plain error. The goods the State alleged Tucker stole were simply described as "athletic apparel." This gave the State the option to show that he constructively possessed goods found in his brother-in-law's shed, where the State alleged Tucker lived, or the goods found in his brother-in-law's house. He was entitled to a list of the items the State alleged he possessed, not just a blanket description of "athletic apparel."

The trial judge also erred in granting conflicting and confusing instructions to the jury, while denying Tucker's instructions outlining his theory of the case. The jury was instructed on constructive possession, aiding and abetting, and joint possession. This was clearly more than Tucker was indicted for, and failed to provide him sufficient notice to properly prepare his defense.

The trial judge also erred in failing to stop the State from engaging in inflammatory comments during closing argument which irreparably prejudiced Tucker. The prosecutor argued that the burglary was committed by a professional ex-convict who brought his trade to Mississippi. Counsel's objection was only partially sustained regarding the State's use of "ex-convict," but overruled as to the argument Tucker committed the burglary. Tucker was clearly prejudiced by this argument, as he was not charged with burglary and was not prepared to defend that charge.

In the alternative, Tucker was clearly deprived of effective assistance of counsel. The ineffectiveness was so apparent from the record, the trial judge had an obligation to declare a mistrial to protect Tucker's rights. Counsel made no effort to prevent the jury from hearing about the anonymous tip accusing Tucker of burglary, and failed to attempt to limit testimony about Tucker's parolee status.

Finally, even if each error above, in isolation, does not constitute reversible error by itself, the cumulative effect of the these errors mandate reversal.

ARGUMENT

ISSUE NO. 1: WHETHER THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE VERDICT OF GUILTY, OR IN THE ALTERNATIVE, WHETHER THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE

A. Sufficiency of the Evidence.

Trial counsel requested a directed verdict at the close of the State's case, arguing the prosecution failed to create a jury question that Tucker was connected to the stolen items or that he actually lived in the shed where police alleged some of the stolen items were located. Tr. 288. The trial judge denied the motion without comment. Tr. 289. The motion was renewed and again denied after the State finally rested after rebuttal[1]. Tr. 436-37. Therefore, this Court must consider the sufficiently of all the evidence presented during the entire trial. *Gibson v. State*, 731 So.2d 1087 (¶12) (Miss. 1998). The trial judge erred in not granting this motion.

The standard of review regarding the sufficiency of the evidence is well-established. Review of a motion for a directed verdict tests the sufficiency of the evidence. *Bush v. State*, 895 So. 2d 836, 843 (¶15) (Miss. 2005). The court must determine whether the evidence shows "beyond a reasonable doubt that the accused committed the act charged and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction." *Id.* at ¶16 (quoting *Carr v. State*, 208 So. 2d 886, 889 (Miss. 1968)). Taking the evidence in the light most

[1] Although counsel filed both a Motion and an Amended Motion for Judgment Notwithstanding the Verdict, In The Alternative, Motion for a New Trial, neither motion alleged the evidence was insufficient. C.P. 91, 115, R.E. 26, 28.

favorable to the verdict, the question is not whether the court believes the evidence established guilt beyond a reasonable doubt but whether a rational trier of fact could have found all the elements beyond a reasonable doubt. *Bush*, 895 So. 2d at 844 (¶16) (quoting *Jackson v. Virginia*, 443 U.S. 307, 315 (1979)).

This case should have never gone to the jury. There was clearly insufficient evidence that Tucker constructively possessed any of the items alleged to be stolen by the prosecution, or that he knew or should have known that the items were stolen. The State alleged in Tucker's indictment that on or about October 18, 2005, Tucker did unlawfully receive or possess stolen athletic apparel, at a time he knew or should have known the property was stolen. C.P. 12, R.E. 14. The jury was later instructed to find Tucker guilty if they found beyond a reasonable doubt that he alone, or with others, simply possessed athletic apparel in Instruction S-2. C.P. 81, R.E. 15.

The state did not meet its burden of proving that Anthony Tucker constructively possessed stolen items because the state was never able to prove that he exerted any sort of dominion or control over the property, or over the place where the property was held. Mississippi courts have long held that receipt of property also encompasses elements of dominion and control. *Davis v. State,* 586 So.2d 817, 820 (Miss. 1991), *See also Daniel v. State,* 54 So.2d 272, 274 (Miss. 1951). To exercise dominion and control, it is required that the goods be in his possession and that the goods are deposited in a place that is subject to the defendant's control, or placed somewhere on his premises by his knowledge or consent.

Church v. State, 317 So.2d 386, 387 (Miss. 1975), *citing* 76 C.J.S. Receiving Stolen Goods § 6b, at 9 (1952).

The evidence clearly established that Tucker did own the house or the shed where the stolen property was recovered. Tr. 260. To prove constructive possession "[w]here the premises upon which contraband is found is not in the exclusive possession of the accused, the accused is entitled to acquittal, absent some competent evidence connecting him with the contraband." *Powell v. State*, 355 So.2d 1378, 1379 (Miss.1978).

If the store was burglarized on or about October 8, 2005, and the police recovered the items on October 18, 2005, Tucker was around the property for no more than 10 days. Looking at Exhibits 13-17, it is absolutely clear there were all kinds of items in that shed that did not come from Foot Gear. Is Tucker responsible for all those items if they turn out to be stolen simply because he was a temporary resident there?

Tucker had packed his belongings in anticipation of traveling to Memphis, TN for medical treatment. Tr. 261. He packed his belongings in his green duffle bag. Tr. 279, 409. It is significant to note that he did not pack any of the items he was accused of possessing. The green duffle bag contained no stolen items. Tr. 230. Simply living in one's brother-in-law's shed or living room for a short period does not sufficiently establish dominion and control over all the property in those areas. This is especially true when that same brother-in-law pled guilty to receiving stolen property. Tr. 229. There was absolutely no evidence presenting connecting Tucker to Gibbs's crime. The evidence was insufficient to create a jury question and the court should have granted the direct verdict.

B. Weight of the Evidence.

If this Court finds the evidence supporting the charge of possession of stolen property was sufficient to submit to the jury, in the alternative, Tucker would assert that the verdict of guilty was clearly against the overwhelming weight of the evidence. This issue was raised in counsel's post-trial motions. C.P. 91, 115, R.E. 26, 28. "In determining whether a jury verdict is against the overwhelming weight of the evidence, this Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial." *Herring v. State*, 691 So.2d 948, 957 (Miss. 1997). "Only in those cases where the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal." *Id. See also Benson v. State*, 551 So.2d 188, 193 (Miss. 1989); *McFee v. State*, 511 So.2d 130, 133-34 (Miss. 1987).

To convict on a charge of receiving stolen goods, the State must prove that the defendant intentionally possesses, receives, retains or disposes of stolen property, knowing or having reasonable grounds to believe that the property has been stolen unless the possession is with the intent to return the property to its rightful owner. Miss. Code Ann. § 97-17-70(1) (Supp. 2005). In the present case, the evidence presented at trial failed to meet these elements. It is required that the state prove each of the elements of the offense beyond a reasonable doubt before the jury can reach a guilty verdict. *Victor v. Nebraska*, 511 U.S. 1, 5 (1994), citing *In re Winship*, 397 U.S. 358, 361-62 (1970). However, in this case there was no proof offered by the state that the appellant was exercising domain over the shed

where a small amount of the property was found, or that he had any knowledge that the property was stolen.

Anthony Tucker's conviction was against the weight of the evidence as there were no facts to warrant a finding that Tucker exercised dominion or control over the property. The property was located in a storage shed with dozens of other assorted items. Exhibits 13-17. Christann Gibbs testified that she gave Tucker the property as a gift from her husband. Tr. 344-45. The only evidence to the contrary came from Johnny Hancock, who testified Tucker told him he received the property from two guys in a van. Tr. 253. This crucial fact was not even contained in Hancock's written report, but was added as an afterthought later. Tr. 275-76. The State was required to show that a reasonable person would be convinced by the facts and circumstances that the property was stolen. *Davis v. State,* 586 So.2d 817, 819 (Miss. 1991). In *Davis*, the defendant was found guilty on a charge of receiving stolen guns after it was shown that he told another individual that the guns were "hot" and said that he "figured they was...stolen." *Id.* at 820.

However, in the current case, we have no such evidence on which to base a receiving stolen goods charge. First, Tucker's sister, Christann Gibbs, testified that she received the clothes from her husband, James Gibbs. Gibbs took the took the clothes from his closet and gave them to Christann for Tucker. Tr. 344. If Tucker's brother-in-law had obtained the clothes by theft or knew they were stolen, there is no clear evidence that Tucker knew that

the clothes were stolen. It is Tucker's state of mind that matters, not his sister's or his brother-in-law's.

The State presented the testimony of probation officer Johnny Hancock, who claimed Tucker told him he received the items from "two guys in a white van." Tr. 275. Which items did he receive from the men in the van? Only the items found in the shed or all of the items found in Gibbs's house? Apparently Hancock never thought to ask. There is nothing in record that Tucker told anyone that the merchandise was stolen. There was no police investigation or surveillance to show Tucker's access to the house and/or shed.

The state cannot prove a charge of receiving stolen goods because it has failed to foreclose all other reasonable theories of how the appellant could have received the goods. It is the duty of the state, when seeking to prove a charge of receiving stolen goods based on circumstantial evidence, as they sought to do here, to not only prove the appellant's guilt beyond all reasonable doubts, but also to exclude any other reasonable hypothesis of innocence. *Washington v. State*, 726 So. 2d 209, 213 (Miss. 1998). *See also Lewis v. State*, 573 So.2d 713, 715 (Miss. 1990), and *Whatley v. State*, 490 So.2d 1220, 1222-23 (Miss. 1986). In *Lewis*, the State attempted to prove the defendant's guilty knowledge by circumstantial evidence. However, the Mississippi Supreme Court reversed and rendered the conviction.

> The evidence showed that Lewis was in possession of the skidder and that he intended to sell parts from it, but did not show how Lewis came by the skidder. Since Lewis did not testify we have no other evidence at which to look. While we have no doubt that Lewis either stole the skidder or received it, we find that

> the evidence fails to prove beyond a reasonable doubt of which offense Lewis was guilty.

Lewis, 573 So.2d at 715 (Miss.1990).

Similarly, in Tucker's case, there is only circumstantial evidence against him. Even with Hancock's testimony, the State failed to show that the items were given to him with his knowledge that they had been stolen. The defense theory was that Tucker's sister received the clothes from her husband and then gave them to Tucker as a gift. The State attempted to prove guilty knowledge simply because Hancock claimed Tucker said he received "the items" from some men in a white van. Neither theories showed guilty knowledge beyond a reasonable doubt. Mere possession without any indication of guilty knowledge is not enough to uphold a conviction of receiving stolen goods. *Thompson v. State,* 457 So.2d 953, 956 (Miss. 1984), *Johnson v. State,* 247 So.2d 697, 699 (Miss. 1971).

As illustrated above, no reasonable juror could have found that Tucker received or possessed stolen property unless they treated the hearsay comments for the anonymous caller as substantive evidence. Without this improper evidence, as well as the jury's knowledge of Tucker's criminal background, no jury could have convicted Tucker of receiving stolen property based on the evidence presented. Allowing this verdict to stand would constitute a manifest injustice.

ISSUE NO. 2: IN THE ALTERNATIVE, WHETHER TUCKER WAS IMPROPERLY CHARGED WITH RECEIVING STOLEN PROPERTY WHEN THE STATE'S THEORY OF THE CASE WAS THAT TUCKER ACTUALLY STOLE THE PROPERTY.

It is a well-settled principal of law that a person cannot feloniously receive what he, himself, has stolen. "It is elementary law that one who steals property cannot be convicted of receiving, concealing or aiding in concealing the property stolen." *Hentz v. State*, 489 So.2d 1386, 1389 (Miss.1986). As this Court stated in *Young v. State*, 908 So.2d 819, 829 -830 (Miss. App. 2005), this principal exists because the statute punishing persons in receipt of stolen property is not intended as a double penalty for theft crimes, but to punish those who "make theft easy or profitable." *Id.* citing *Hentz* at 489 So.2d at 1389.

In *Hentz*, the Mississippi Supreme Court reversed the appellant's conviction of receiving stolen property because the evidence demonstrated that the appellant had been present when a combine was stolen. "Inferences" from the evidence suggested Hentz and two others then cut up the combine in order to get it off of Hentz's father's property. *Id.* Hentz was therefore guilty of grand larceny, not receiving stolen property . *Id.*

In the case at bar, the State clearly inferred throughout the entire trial that Tucker was guilty of the burglary of the Foot Gear store. During its opening statement, the State told the jury that an anonymous female called police to say that Tucker committed the burglary at Foot Gear, and the property could be found at a house on 1893 Matthew Gin Road and in a shed behind the house where Tucker was living. Tr. 110. The prosecutor stated, "The other thing is, ladies and gentlemen, when they went in there and robbed the store or burglarized the store, they took the clothes, hangers and all out. Behind the house there in the pile were a lot of freshly burned hangers." Tr. 112-13.

During the testimony of Jason Cole, trial counsel tried to keep the State from getting too much information about the burglary allegation into evidence.

> BY [DEFENSE COUNSEL]: Your Honor, we would stipulate that the store was burglarized. I would object to any lengthy testimony about any allegations that Mr. Tucker was involved in that. He has not been charged with that crime, and to my knowledge there's been no evidence presented to use in discovery that would indicate that he was in anyway involved.
>
> BY THE COURT: The indictment says that he must be in possession of property that was feloniously taken, does it not?
>
> BY [PROSECUTOR]: Yes, sir.
>
> BY THE COURT: Then there must be some proof of a felonious taking to do that. Objection is overruled. You may proceed.

Tr. 116-17.

During the testimony of Zate McGee, the State again went through extensive testimony about the burglary scene. Tr. 168-69. McGee testified that on October 18, 2005:

> I received – that evening I received a call from the shift sergeant that was on duty at that time advising that the police department had received a call from an anonymous female saying that Anthony Tucker had broken into Foot Gear on October the 8th and that he had hid the merchandise that was stolen in a yellow shed and in a house located at 1893 Matthew Gin Road.

Tr. 171.

McGee went on to testify about all the items found in Gibbs's house. Tr. 182-89, Exhibit 12A-12J. She also testified to the burned hangers from the store located in the yard. Tr. 178-79, Exhibit 9 and 10. This testimony was clearly meant to infer the persons who burglarized the store still had the items with them. Although this evidence would have been crucial to prove burglary, it was not relevant to prove Tucker's constructive possession of

stolen property. The court even pointed this out to the State during the hearing on the admission of Tucker's prior convictions into evidence.

> And the centrality of the credibility issue. Well, the credibility issue is central in this case for this fact. The defendant was in possession of items alleged to have been taken from a burglary that occurred in the recent past, within a month. Possession of property recently stolen might give rise to an inference. You are not entitled to an instruction on that point on the receiving case. You might have been entitled to an instruction had he actually been charged with burglary or the burglary of the store.
>
> Then you could have been entitled to the instruction that possession of property recently stolen as an inference from which the jury can infer guilt that he stole it. You can't get that instruction in a receiving case. And that's what he's charged with, receiving or possessing stolen property, knowing it or should have know that it was stolen. So the credibility issue is going to be central in this case.

Tr. 323-24.

Indeed, the unexplained possession of recently stolen property is a circumstance from which guilt of the larceny may be inferred, "but no inference can be drawn therefrom alone that the one in possession of the property received it from another knowing that it had been stolen." *Sanford v. State*, 155 Miss. 295, 124 So. 353 (1929). See also *McClain v. State*, 625 So.2d 774, 779 (Miss. 1993) (unexplained possession of recently stolen property, standing alone, is insufficient to satisfy the guilty knowledge required as an element for the crime of receiving stolen property).

Finally, during the State's closing argument, the prosecution came right out and accused Tucker, an ex-convict, of coming down to Mississippi to professionally burglarize the store. The prosecution argued to the jury that the Foot Gear store was burglarized by

more than one individual, using the term "they" several times. The prosecution argued that that Tucker was not worried about the property being stolen.

> [BY PROSECUTOR:] ... And probably the one good reason that I can give to you for that is going to be this, okay. Let me show you something. This is the back of the store where they cut the wires to the security system. Okay. They burglarized the store. Okay. This is the interior security camera where they yanked the wires down. Okay. Now, this is where they forced the door open. And the cage, you can see it back over here (indicating). It swung out of the way. Even the wire cage stuff they forced it open.
>
> Then, ladies and gentlemen, they go through a store and they take – clean the whole wall –
>
> [BY DEFENSE COUNSEL]: Your Honor, I'm going to object. I don't know who counsel is referring to as "they".
>
> BY THE COURT: Overrule. This is argument.
>
> [BY PROSECUTOR]: Ladies and gentleman, what you see here is a job by somebody who has some insight of how to do these jobs, what we call an ex-con job. An ex-convict whose picked up that kind of knowledge, those kind of skills. And when he gets here, he uses them, okay.
>
> And you know what? Stop and think about this. That was the front door. They loaded it out of the front door. Somebody had to drive the vehicle. They didn't leave it parked there the whole time pulled away. And several people had to be going inside the store to load it out. So these people, an ex-con who has the ability and knowledge to do this, broke in this store, he and his friends, who ever they were –
>
> [BY DEFENSE COUNSEL]: Your Honor, I'm going to object to this. I think counsel is intentionally trying to persuade the jury that my client had something to do with this burglary. Keeps talking about ex-cons, he, his friends. There's been no evidence as to what gender or anything about who may have burglarized this story. [sic] I think that is improper argument.

BY THE COURT: *The jury is allowed to draw reasonable inferences from the evidence. The defendant is not on trial for burglary. The objection as to the burglary or any evidence of burglary is overrruled in that regard.*

The reference to ex-con is sustained.

[BY PROSECUTOR]: Ladies and gentlemen, does this look like a professional person's job or like a bunch of 20 year olds going and smashing the window and just grabbing some stuff and running? You know what it looks like. You can tell what it looks like. And, ladies and gentleman, if you believe anything that Ms. Gibbs said, that stuff appeared at her house the very next morning. So you tell me who you think knew stuff was stolen at that house?

Tr. 454-56 [emphasis added].

The State was not trying Tucker on receiving stolen property based on the evidence they presented. They were attempting to prove he committed the burglary. It is significant to note that business burglary under Miss. Code Ann. §97-17-33(1) (Supp. 1997) carries a 7 year sentence, whereas receiving over $500 in stolen property under Miss. Code Ann. §97-17-70(4) (Supp. 2005) carries a possible 10 year sentence. It was clearly improper for Tucker to be charged with receiving stolen property based on the evidence presented. "The fact that one has stolen the property at issue is generally adequate to require a directed verdict of acquittal should that person be charged with receipt of stolen property." *Williams v. State*, 595 So.2d 1299, 1303 (Miss. 1993).

This Court did limit this legal principal recently in the case of *Ezell v. State*, 956 So.2d 315, 319 -320 (Miss.App. 2006). In *Ezell*, this Court found that there was direct evidence that the defendant obtained the property from a third person. However, in the case *sub*

judice, based on the State's own evidence, no reasonable juror could conclude only the stolen items found in the shed were obtained from two guys in a van. Mississippi Supreme Court precedent should be followed and Tucker's conviction for possession of stolen property should be reversed and rendered.

ISSUE NO. 3: IN THE ALTERNATIVE, WHETHER TUCKER'S INDICTMENT WAS INSUFFICIENT TO ALLEGE WHAT STOLEN ITEMS HE WAS ACCUSED OF CONSTRUCTIVELY POSSESSING.

Tucker was indicted under Miss. Code Ann. §97-17-70 (Supp. 2005), for possessing *or* receiving stolen property[2]. The State's initial theory of the case was that Tucker possessed the stolen items found in the shed where they alleged Tucker was living on Gibbs's property. They had Jason Cole go over the value of the items recovered from the shed to show the value of those items exceeded $500.00. Tr. 129-30, 164-65. However, when it became clear this was a constructive possession case, and the defense was given a constructive possession instruction, the State then requested an aiding and abetting instruction to allege Tucker also possessed the items recovered from the house itself. Tr. 426-27, C.P.82, R.E. 16. However, there was absolutely no evidence that Tucker had dominion and control over any of the stolen items, those found in the shed or the house, much less guilty knowledge. As the exhibits

[2] Tucker's indictment read: ....on or about the 18th day of October, 2005, ...did unlawfully, wilfully, and feloniously, receive or possess the personal property of Haresh Khiantani d.b.a. Foot Gear, to wit: athletic apparel, said property having a total value in excess of $500.00, and having been feloniously taken away from the said Haresh Khiantani d.b.a. Foot Gear, and further that the said ANTHONY TUCKER knew or should have known at the time of the receiving or possessing of said property that said property had been so feloniously taken, in violation of MCA §97-17-70....

showed, the shed had all kinds of property in it. Even if the State was correct in proving Tucker lived there for about two weeks, it is clear he only had dominion and control over limited items.

Tucker packed a duffle bag with his belonging to go to Memphis. Tr. 261. That bag was in the shed. Tr. 352, 409. Nothing in that bag was identified as being stolen property. Tr. 230. If Christann's testimony was believed, Tucker only lived in the living room of the house. Tr. 336, 365-66, 350. Exhibit 8 indicates only four items of stolen property were located in the living room. There was no prove that these four items were valued at more than $500.00. The State failed to allege exactly what items Tucker possessed that it claimed was stolen.

For well over a century, it has been the law of this State that in an indictment for receiving stolen property, it is essential to describe the property with the same particularity as is required in an indictment for larceny. *Wells v. State*, 43 So. 610, 611 (Miss. 1907). Tucker was accused of possessing simply "athletic apparel." With all of the property recovered in all different areas of James Gibbs's property, this was insufficient. As shown above, the State was allowed to change the charge in the middle of the trial by seeking to tie Tucker to the all the items recovered from a house he did not own and the State believed he did not live in. The State made no effort to prove Tucker had dominion and control over the property inside Tucker's house. The State simply relied on Christann's testimony that Tucker stayed in the living room.

Nguyen v. State, 761 So.2d 873 (Miss. 2000), is instructive. Similar to the case at bar, Nguyen was indicted along with four others for receiving 114 stolen items, "...including televisions, C.D. players, VCR's, cameras, tools and microwaves, of the value of Two Hundred and Fifty Dollars ($250.00) or more, the personal property of multiple owners, knowing the said property to have been stolen feloniously..." *Id.* at 874. The Mississippi Supreme Court found the indictment did not adequately inform the appellants of what they was charged with receiving. The language of the indictment was insufficient to allow them to adequately prepare their defenses. *Id.* at 877. The Court went on to explain that the opportunity for discovery did not substitute for a more detailed indictment.

> ¶ 13. The State further argues that URCCC 9.04 allows each of the appellants as a matter of right the opportunity to examine, inspect, test and photograph all of the physical evidence in the possession of the State, thereby eliminating the need for exhaustive descriptions in the indictment. Discovery is not a substitute for the requirements of URCCC 7.06 that the indictment "shall be a plain, concise and definite written statement of the essential facts constituting the offense charged and shall fully notify the defendant of the nature and cause of the accusation." Though it is beyond dispute that we are now in the age of notice-pleading, the appellants should not be forced to engage in discovery in order to find out the essential facts constituting the offense charged and to be fully notified of the nature and cause of the accusation against them.

Id.

If the State believed Tucker merely possessed stolen property and did not burglarize the store, what property exactly was he accused of constructively possessing? The property found in the yellow shed? The property found all over Gibbs's house? The items found only in the living room? Or was he accused of aiding and abetting the possession of stolen property everywhere on Gibbs's property?

The indictment is this case clearly had a substantive defect in failing to sufficiently identify the stolen property Tucker was alleged to constructively possess.

> ¶ 7. It is well-settled that in order for an indictment to be sufficient, it must contain the essential elements of the crime charged. *Peterson v. State*, 671 So.2d 647, 652-53 (Miss. 1996). The Mississippi Supreme Court has held that where a deficiency appearing in an indictment is non-jurisdictional, it may not be raised for the first time on direct appeal absent a showing of cause and actual prejudice; however, the State's failure to include the essential elements of the crime in the indictment is a jurisdictional defect that is **not** waivable by the defendant. See *Banana v. State*, 635 So.2d 851, 853 (Miss. 1994). Furthermore, the State's failure to include an essential element of the crime cannot be cured by notice outside of the indictment. *White v. State*, 851 So.2d 400, 403(¶ 5) (Miss.Ct.App. 2003).

Pollard v. State, 932 So.2d 82, 85-86 (Miss.App. 2006) [emphasis supplied].

This was crucial, as the State was later able to throw in an aiding and abetting instruction and a joint possession instruction, allowing the jury to find Tucker guilty if he constructively possessed ANY of the stolen property found anywhere on Gibbs's property. As a matter of due process, a defendant is entitled to reasonable advance notice of the charges against him and a reasonable opportunity to prepare and present his defense to those charges. *Jones v. State*, 461 So.2d 686, 693 (Miss. 1984). Tucker's indictment was defective and he is entitled to have his conviction and sentence vacated.

If this Court concludes that trial counsel somehow waived Tucker's right to raise this issue on appeal for failing to demur to the indictment at trial, , such conduct would clearly be ineffective assistance of counsel as set forth in Issue 6, *infra*.

ISSUE NO. 4: WHETHER THE TRIAL JUDGE ERRED IN DENYING JURY INSTRUCTION D-2A AND D-3, AND GRANTING S-3 AND S-4.

The final instructions the jury received in this case were hopelessly confusing and conflicting. In addition, Tucker was also denied an instruction on his theory of the case. During the jury instruction conference, the State presented an elements instruction which again did not specify which items it alleged Tucker possessed. The instruction read:

INSTRUCTION S-2

> The Court instructs the Jury that if you find from the evidence in this case beyond a reasonable [sic] that the Defendant, Anthony Tucker, alone or with another or others, did on or about October 18, 2005, unlawfully, willfully, and feloniously, possess athletic apparel which had been stolen from Footgear, having a total value in excess of $500.00, and the Defendant knew or should have known at the time of possessing said property that it was stolen, then you shall find the Defendant guilty as charged of Possession of Stolen Property. If the State has failed to prove any of these elements beyond a reasonable doubt, then you shall find the Defendant not guilty.

C.P. 81.

The defense objected to the language of this instruction, arguing not only did the State fail to sufficiently prove the items found actually came from Foot Gear, but that there was no evidence to show the items within Tucker's control exceeded $500.00. The Court overruled the objection. Tr. 426. The State then submitted an instruction on aiding and abetting.

INSTRUCTION S-3

> The Court instructs the Jury that under the laws of the State of Mississippi anyone who aids, assists, or encourages in the commission of a crime is deemed a principal in that crime and is just as responsible as if he had committed the whole act with his own hand. Therefore, if you find from the evidence in this case beyond a reasonable doubt that the Defendant, Anthony

Tucker, did aid, assist, or encourage another or others in the commission of the crime of possession of stolen property, then the Defendant was a principal to the possession of stolen property and is criminally responsible for that crime.

C.P. 82.

Trial counsel immediately objected to this instruction.

[BY DEFENSE COUNSEL]: Your Honor, I would object to this. There has been no testimony as to Mr. Tucker's involvement and let alone his aiding or assisting anyone else being involved in this crime of possession of stolen property. There's been no mention of any other defendants that he may have had contact with or that he was in collusion with, so I would object to S-3.

BY THE COURT: Response by the State?

[BY PROSECUTOR]: Your Honor, from the testimony here, their testimony is that he lived in the house. And in the house there were things found throughout the house even in the room that he, quote, was living in, the living room, that things were stolen. *So they could all be working together.*

BY THE COURT: I agree then. I had forgotten about where the testimony was from the witness of the defendant that he was actually residing. If the testimony was not that and he was wholly and completely living in the shed, then I think maybe the – might have been some question as to that.

[BY PROSECUTOR]: There's a question as to that.

BY THE COURT: But the other evidence is in the record by virtue of the witness Gibbs. It's overruled. It's given.

Tr. 426-27 [emphasis added].

Although the Christann Gibbs did testify that Tucker was staying inside the house in the living room, there was testimony from the State that Tucker was locked inside a police

car for about two hours while officers retrieved a search warrant for the house. Tr. 181, 189, 216. Christann Gibbs testified her house was not normally in the disorderly fashion police found it. Tr. 355. Tucker had absolutely no control over what happened in that house for the two hours police had to wait to enter it. Additionally, when police did inventory the property, they listed only four items they believed had been stolen that were found in the living room. Tr. 163, Exhibit 8. The trial judge erred in granting this instruction, as there was absolutely no evidence to show Tucker aided and abetted the possession of stolen property found in the house.

The Mississippi Supreme Court has held that "[a]ny person who is present at the commission of a criminal offense and aids, counsels, or encourages another in the commission of that offense is an 'aider and abettor' and is equally guilty with the principal offender." *Spann v. State*, 970 So.2d 135 (¶9) (Miss. 2007), citing *Hoops v. State*, 681 So.2d 521, 533 (Miss.1996) (quoting *Sayles v. State*, 552 So.2d 1383, 1389 (Miss.1989)). There was absolutely no evidence that Tucker aided, counseled, or encouraged James Gibbs in the commission of the crime of possession of stolen property.

Not only was there insufficient evidence to grant the State this instruction, the instruction was an incomplete statement of the law. It failed to correctly define the crime as set forth by the Mississippi Supreme Court in *Milano v. State*, 790 So.2d 179, 185 (Miss. 2001). Instruction S-3 is missing several key provisions of the 5th Circuit pattern instruction, including:

....Before any defendant may be held criminally responsible for the acts of others it is necessary that the accused deliberately associate himself in some way with the crime and participate in it with the intent to bring about the crime.

Of course, mere presence at the scene of a crime and knowledge that a crime is being committed are not sufficient to establish that a defendant either directed or aided and abetted the crime unless you find beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator.

In other words, you may not find any defendant guilty unless you find beyond a reasonable doubt that every element of the offense as defined in these instructions was committed by some person or persons, and that the defendant voluntarily participated in its commission with the intent to violate the law.

Milano at ¶ 21. Instruction S-3 should never have granted.

The trial judge then went on to grant Instruction D-1, which attempted to define constructive possession[3]. Tr. 428.

JURY INSTRUCTION D-1

The Court instructs the jury that to constitute possession, there must be sufficient facts to warrant a finding that Anthony Tucker exercised custody or control of the particular property and was intentionally and consciously in possession of it.

C.P. 84, R.E. 18.

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[3] Tucker would note the proper instruction should have also used language that the defendant was aware of the presence and character of the property and was intentionally and consciously in possession of it. Counsel should have also included language explaining that proximity is usually an essential element, but by itself is not adequate in the absence of other incriminating circumstances. *Curry v. State*, 249 So.2d 414, 416 (Miss. 1971).

After some discussion on the wording of Instruction D-2, trial counsel agreed to re-word the instruction and submit a new one. Tr. 429-30. Trial counsel then submitted Instruction D-3, which explained the defense theory of the case. The court held off on ruling on the instruction until he could see a revised Instruction D-2A. Tr. 431. The following morning, trial counsel submitted D-2A.

JURY INSTRUCTION D-2A

> The Court instructs the jury that if the State fails to prove beyond a reasonable doubt that the property in question was not given to Anthony Tucker as a gift and that he knew or had reasonable grounds to believe it was stolen then you should find the Defendant not guilty.

C.P. 86, R.E. 19.

The trial judge denied the instruction as repetitious. Tr. 434. The court then went on to discuss Instruction D-3.

JURY INSTRUCTION D-3

> The Court instructs that if the accused, Anthony Tucker, was at the time of the offense ignorant to the fact the property in question was stolen then Anthony Tucker can not be found guilty of the offense of Receiving or Possession of Stolen Property.

C.P. 87, R.E. 20.

The prosecution objected to this instruction, not one the principal of law involved, but as to the way it was drafted.

> BY THE COURT: Let me ask you this. If he had received the property and he didn't know it was stolen but thereafter found out that it was stolen or had

reasonable grounds to believe it was stolen, would he not then come in possession of it?

[BY PROSECUTOR]: Yes, sir, because the statute says you receive or possess.

BY THE COURT: So it says "at the time of the offense he was ignorant." I agree. It's refused. I think the point of law is the State has failed to prove its case beyond a reasonable doubt is the issue that the defendant is attempting to get before the jury.

Tr. 434.

A defendant is entitled to jury instructions on his theory of the case whenever there is evidence that would support a jury's finding on that theory. *Jackson v. State*, 645 So.2d 921, 924 (Miss. 1994). Even the 'flimsiest of evidence' is sufficient to mandate a trial court's giving an instruction on the [defendant's] proposed theory, but there must be some 'probative value' to that evidence. *Miller v. State*, 733 So.2d 846 (¶7) (Miss.App. 1998)." *Goff v. State*, 778 So.2d 779 (¶5) (Miss.App. 2000). Christann Gibbs testified that her husband gave some clothes to Tucker as a gift. Tr. 344-45. This was sufficient evidence to grant the instruction. It was reversible error to deny D-2A and D-3.

Finally, the prosecution submitted a final instruction that morning on joint possession. Tr. 434-35.

INSTRUCTION S-4

The Court instructs the Jury that possession as used in these instructions does not mean exclusive possession, or exclusive dominion and control. Two or more people maybe in possession of the same property at the same time if that property is subject to their dominion and control, no

matter has fleeting the possession, or how slight the dominion and control.

C.P. 83, R.E. 17.

This Court has held that, "In determining whether error lies in the granting or refusal of various instructions, the instructions actually given must be read as a whole. When so read, if the instructions fairly announce the law of the case and create no injustice, no reversible error will be found." *Kea v. State,* 986 So.2d 358 (¶8) (Miss.App. 2008), citing *Johnson v. State*, 823 So.2d 582, 584(¶ 4) (Miss.App. 2002), and *Collins v. State*, 691 So.2d 918, 922 (Miss.1997).

When read as a whole, these instructions were hopefully confusing to the jury. Did the joint possession instruction mean the jury could convict based on the athletic apparel found in the house or in the shed or both? S-1 did not define which apparel he was accused of possessing. If Tucker slept in the shed with a pair of stolen shoes next the bed, was that sufficient to show "fleeting" or "slight" dominion or control as set forth in S-4? Such an instruction is hopelessly in conflict with D-1, which told the jury Tucker exercised control over "particular property and was intentionally and consciously in possession of it."

The Mississippi Supreme just recently held in *Dixon v. State*, 953 So.2d 1108 (Miss. 2007), that mere association with the person who physically possessed contraband is insufficient. *Id.* at ¶9, citing *Vickery v. State*, 535 So.2d 1371, 1379 (Miss.1988). Dixon also reiterates the long-standing principal that possession may be may be actual or constructive, individual or joint. *Dixon*, 953 So.2d at ¶9. *Berry v. State*, 652 So.2d 745, 748 (Miss. 1995),

citing *Wolf v. State*, 260 So.2d 425, 432 (Miss.1972). The State provided no testimony or evidence that Tucker lived in Gibbs's house, but simply relied on Christann's testimony that Tucker slept in the living room. Besides the obvious fact that Tucker had no control over what was moved during the two hours he waited in the police car, the only stolen items found in the living room were four items, two of which were children's shoes. See Exhibit 8. There was no testimony these items were worth over $500.00.

The jury had no meaningful way from the instructions given to determine just what Tucker was accused of possessing and when. The joint possession instruction conflicts with the constructive possession instruction. The aiding and abetting instruction was incomplete and would have confused the jury after the joint possession instruction was granted. Tucker is entitled to a new trial with the jury properly instructed.

If this Court concludes that trial counsel waived Tucker's right to pursue this issue on appeal for failing state the appropriate grounds for objection to these instructions, such conduct would clearly be ineffective assistance of counsel as set forth in Issue 6, *infra*.

ISSUE NO. 5: WHETHER THE TRIAL JUDGE ERRED IN FAILING TO SUSTAIN A DEFENSE OBJECTION DURING CLOSING ARGUMENTS WHEN THE STATE IMPLIED TUCKER WAS GUILTY OF BURGLARY, AND WHETHER HE WAS IRREPARABLY HARMED BY THE STATE REFERRING TO HIM AS AN EX-CONVICT.

As mentioned in Issue No. 1, *supra*, during closing arguments, the prosecution argued to the jury that the Foot Gear store was burglarized by more than one individual, using the term "they" several times. The prosecution argued that that Tucker was not worried about

the property being stolen, because "they" burglarized the store. An objection was overruled. Tr. 453-54.

Emboldened by the ruling, the prosecution went even further, alleging the burglary was a profession job, "what we call an ex-con job." And when he got "here," he used those skills. The prosecutor alleged the ex-con broke into the store. After objection, the trial court sustained the comments about an ex-con, but allowed the jury to draw a "reasonable inference" to commission of the burglary. Tr. 454-55. Since the court overruled counsel's objection to claiming Tucker was also guilty of the burglary, the prosecutor went on.

> [BY PROSECUTOR]: Ladies and gentlemen, does this look like a professional person's job or like a bunch of 20 year olds going and smashing the window and just grabbing some stuff and running? You know what it looks like. You can tell what it looks like. And, ladies and gentleman, if you believe anything that Ms. Gibbs said, that stuff appeared at her house the very next morning. So you tell me who you think knew stuff was stolen at that house?

Tr. 455-56.

As argued in Issue No. 1, the evidence of guilty knowledge in this case far from strong, as Tucker was guest on Gibbs's property for only a few days before the items appeared. Tr. 337. It can not be said with any confidence that this argument did influence the jury. These comments also inferred Tucker was a professional burglar. As the record indicates, the prosecutor knew better, as Tucker's priors were all drug cases. Tr. 319-21. The trial judge clearly committed reversible error by failing to sustain this objection and rein in the prosecutor. Someone without a criminal record may have been given the benefit of the

doubt by the jury under these circumstances. But the prosecution was telling the jury this man is an ex-convict, a professional thief, so he had to be guilty.

There is no doubt that attorneys are allowed wide latitude in arguing their cases to the jury, but prosecutors should not use tactics which are inflammatory, highly prejudicial, or reasonably calculated to unduly influence the jury. *Sheppard v. State*, 777 So.2d 659 (¶7) (Miss. 2000), citing *Hiter v. State*, 660 So.2d 961, 966 (Miss. 1995).

> In *Davis v. State*, 530 So.2d 694, 701 (Miss.1988), the Court, citing *Craft v. State*, 226 Miss. 426, 84 So.2d 531 (1956), set forth the test to be used when determining if an improper argument by a prosecutor to the jury requires reversal: the test "is whether the natural and probable effect of the improper argument of the prosecuting attorney is to create an unjust prejudice against the accused as to result in a decision influenced by the prejudice so created."

Ormond v. State, 599 So.2d 951, 961 (Miss. 1992).

Based on the facts of this case, no reasonable juror would have found a visitor on the property of his brother-in-law for less than two weeks, guilty of possession of stolen property. The only way the jury could have convicted based on these facts, was consideration of Tucker's past and the evidence suggested by the prosecution that he in fact committed the burglary. This argument can not be considered harmless, as this Court can not say, beyond a reasonable doubt, that the jury was not influenced by these prejudicial comments. The jury verdict was certainly attributable to the prosecution's improper argument. *Sullivan v. Louisiana*, 508 U.S. 275, 279-280 (1993); *Smith v. State*, 986 So.2d 290 (¶31) (Miss. 2008).

The prosecution's comments deprived Tucker of his right to a fair trial under the Fourteenth Amendment to the United States Constitution. *Hickson v. State*, 472 So.2d 379, 384 (Miss. 1985). This case should be reversed and remanded for a new trial.

If this Court concludes that trial counsel waived Tucker's right to raise this claim by failing to request a mistrial, such conduct would clearly be ineffective assistance of counsel as set forth in Issue 6, *infra*.

ISSUE NO. 6: IN THE ALTERNATIVE, WHETHER THE APPELLANT WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL, DEPRIVING APPELLANT OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

The benchmark for judging any claim ineffectiveness of trial counsel is whether counsel's conduct undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). In *Madison v. State*, 923 So. 2d 252 (¶10) (Miss. App. 2006), this Court reiterated that *Strickland* is the standard, as the Mississippi 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. *Leatherwood v. State*, 473 So. 2d 964, 968 (Miss. 1985). This Court must examine the totality of the circumstances in determining whether counsel was effective. *Id.*

If the issue of ineffective assistance of counsel is raised 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." *Madison*, 923 So.2d at ¶11, citing *Read v. State*, 430 So.2d 832, 841 (Miss. 1983).

Tucker asserts that the record clearly demonstrates ineffective assistance of counsel. Alternatively, appellant 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. "When a defendant raises an ineffective assistance claim on direct appeal, the question before this Court is whether the judge, as a matter of law, had a duty to declare a mistrial or order a new trial *sua sponte*, on the basis of trial counsel's performance." *Roach v. State*, 938 So.2d 863, 870 (Miss.App. 2006)(citing *Colenburg v. State*, 735 So. 2d 1099, 1102 (Miss. App. 1999).

Here, trial counsel allowed the State to submit highly prejudicial hearsay evidence regarding Tucker's alleged involvement in the separate crime of business burglary. Tr. 171. No attempt was made by counsel simply to stipulate that the police received a tip to investigate Tucker for having stolen property. It is illogical to believe that the failure to object to this or to offer to stipulate that police were given a tip was trial strategy. This "evidence" was absolutely devastating to Tucker's defense. The jury heard evidence that he was the actual thief. Obviously, the caller could not be cross-examined. Counsel could have alleged a Confrontation Clause violation under *Crawford v. Washington*, 541 U.S. 36 (2004).

Instead, counsel stood silent, allowing the evidence to come in unchallenged. The State used this hearsay in its closing arguments to imply Tucker was the burglar. Tr. 454-56.

The prejudice to Tucker under the *Strickland* test was that the jury considered this as competent evidence of guilt when they should not have. "Prejudicial evidence that has no probative value is always inadmissible." *Roberson v. State*, 595 So. 2d 1310, 1315 (Miss. 1992). See also *Smith v. State*, 530 So. 2d 155, 160-61 (Miss. 1988). The sole purpose of this evidence to was show why the police took the actions that they did in going to Tucker's residence. This could have easily been accomplished by simply telling the jury the police received a tip to investigate Tucker for being in possession of stolen items. No mention of Tucker's connection to the burglary needed to be made. It was clearly not probative to the possession charge. Even without counsel taking action, the trial court had a duty to do so to ensure Tucker was given a fair trial. *Acevedo v. State*, 467 So.2d 220, 226 (Miss. 1985).

Furthermore, Counsel failed to even ask for a limiting instruction on the use of this evidence. It is clear from the verdict the jury used it as substantive evidence and Tucker was undoubtedly prejudiced by counsel's deficiency.

Also equally prejudicial to Tucker's defense was counsel's failure to prevent the State for eliciting testimony that Tucker was on parole. In fact, Zate McGee testified Tucker was on "MDOC's active offender's list." Tr. 172, 202[4]. Again, the necessity of showing Tucker

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[4]It should be noted that Tucker's status as a parolee was first mentioned during the State's voir dire. Tr. 45. Trial counsel did not object to this.

was a parolee was simply to show the police could search his residence without a warrant. Counsel failed to offer any stipulation to this fact. The jury could have been instructed by the court that police did not need a search warrant to look into the shed. This would have accomplished the State's purpose in admitting this evidence. Instead, it was used again Tucker to imply his guilt during closing arguments. Tr. 454-55. The prejudice is apparent.

Unlike the defense counsel in *Moss v. State*, 977 So.2d 1201 (¶29-32) (Miss. App. 2007), it can not be reasonable trial strategy to fail to object and/or ask for a limiting instruction. In *Moss*, the defendant took the stand and his prior convictions came out through impeachment. Here, Tucker did not take the stand. Therefore, the decision not to object can not be reasonably considered tactical.

Counsel also elicited testimony about other bad acts concerning Tucker during her cross-examination of Hancock. When asked if Hancock had any other problems with Tucker, Hancock related that Tucker's ex-wife had signed affidavits against him for threats and telephone harassment. Tr. 257. This opened the door to the State questioning Hancock about the details of complaints alleged by Tucker's ex-wife. Besides the telephone harassment, Hancock testified Tucker was accused of failing to bring his child back to his ex-wife after visitation. Tr. 281-82. If trial counsel's reasoning for bringing all this up was some attempt to show Tucker's ex-wife set him up on all this, counsel failed to follow through with any evidence. Instead, this evidence further prejudiced Tucker in the eyes of the jury.

Tucker would also assert, as argued in Issue No. 3, *supra*, that Tucker's indictment failed to sufficiently allege which stolen items Tucker constructively possessed. If said defect is found by the Court to be waivable because counsel failed to object, this deficiency clearly prejudiced Tucker. As argued above, Tucker could not be sure which items he was accused of constructively possessing, those in the shed or in the house or both. Since the trial judge allowed an aiding and abetting instruction as well as a joint possession instruction, the prejudice in not knowing exactly what he was charged with was obvious.

As argued in Issue No. 4, *supra*, the jury instructions were hopelessly contradictory and confusing. Counsel submitted an incomplete instruction on constructive possession. C.P. 84, R.E. 18. A complete instruction would have helped the jury understand the proximity alone is insufficient to show constructive possession. *Curry v. State*, 249 So.2d 414, 416 (Miss. 1971). Although counsel objected to the lack of evidence to support the aiding and abetting instruction, counsel never objected as to the form of the instruction. The instruction submitted left out key provisions of the recommended instruction in *Milano v. State*, 790 So.2d 179, 185 (Miss. 2001). Counsel's lack of objection and failure to properly object the State's instructions clearly prejudiced Tucker, as the jury was allowed to convict him of possessing any of the stolen property found anywhere on Gibbs's property.

As argued in Issue No. 5 , *supra*, counsel did object when the State argued to the jury that Tucker should be convicted because he was a professional criminal who actually burglarized the Foot Gear store. However, counsel failed to ask that the jury be admonished and failed to request a mistrial. "Where a trial court sustains an objection, the failure to both

request a cautionary instruction and move for a mistrial generally waives the issue. *Forrest v. State*, 863 So.2d 1056 (¶25) (Miss. App. 2006), citing *Lockridge v. State*, 768 So.2d 331 (¶23) (Miss. App. 2001).

As set forth in detail in Issue No. 5, *supra*, the State was allowed to argue that Tucker was a professional convict who came down from Wisconsin to bring his crime skills to Mississippi. Trial counsel had a duty to not only object and request a mistrial, but to ask that the jury be instructed to disregard such inflammatory argument. Again, counsel's deficiency prejudiced Tucker's trial.

The combination of all these deficiencies leaves no doubt that Tucker was denied his Sixth Amendment Constitutional right to effective assistance of counsel, as well his rights under Article 3 Section 26 of the Mississippi Constitution. The ineffectiveness of Tucker's counsel was apparent from the record and the trial judge should have taken some action to protect Tucker's constitutional rights. Tucker has more than sufficient shown that without counsel's deficiencies, there is a reasonable probability that, but for his attorney's errors, the trial would have had a different outcome. *Hall v. State*, 735 So.2d 1124, 1127(¶ 6-7) (Miss. App.1999). Tucker is entitled to a new trial.

If this Court finds, however, that the record does not affirmatively show ineffective assistance of counsel, Tucker respectfully requests the issue be dismissed without prejudice to allow appellant to supplement the record with additional evidence on post-conviction. See *Walton v. State*, No. 2006-KA-01065-COA (¶15) (Miss. App. November 13, 2007), *aff'd*, *Walton v. State*, No. 2006-CT-1065-SCT (Miss. November 13, 2008).

ISSUE NO. 7 CUMULATIVE ERROR DEMANDS TUCKER BE PROVIDED A NEW TRIAL.

The Mississippi Supreme Court has recognized that several errors not individually sufficient to warrant a new trial can require reversal when taken together. *Stringer v. State*, 500 So.2d 928, 946 (Miss.1986). Although perhaps these errors would be harmless in isolation, when combined with the issues argued above, the appellant asserts their cumulative effect mandates a new trial.

Even if this Court were to find no reversible error in the all of the issues presented above, when the errors are viewed collectively, Tucker is clearly entitled to a new trial based on cumulative error.

> The cumulative error doctrine stems from the doctrine of harmless error, codified under Mississippi Rule of Civil Procedure 61. It holds that individual errors, which are not reversible in themselves, may combine with other errors to make up reversible error, where the cumulative effect of all errors deprives the defendant of a fundamentally fair trial. *Byrom v. State*, 863 So.2d 836, 847 (Miss. 2003). As an extension of the harmless error doctrine, prejudicial rulings or events that do not even rise to the level of harmless error will not be aggregated to find reversible error. As when considering whether individual errors are harmless or prejudicial, relevant factors to consider in evaluating a claim of cumulative error include whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged. See, e.g., *Leonard v. State*, 114 Nev. 1196, 1216, 969 P.2d 288, 301 (Nev.1998) (citing *Homick v. State*, 112 Nev. 304, 316, 913 P.2d 1280, 1289 (1996)). That is, where there is not overwhelming evidence against a defendant, we are more inclined to view cumulative errors as prejudicial. In death penalty cases, all genuine doubts about the harmlessness of error must be resolved in favor of the accused because of the severity of the punishment. See *Walker v. State*, 913 So.2d 198, 216 (Miss.2005).

Ross v. State, 954 So.2d 968, 1018 (Miss. 2007).

The shear number of serious errors in this case as outlined above, combined with the ineffective assistance of Tucker's counsel, mandate a new trial.

CONCLUSION

Given the evidence presented in the trial below, and based on the above argument, together with any plain error noticed by the Court which has not been specifically raised, Anthony Lee Tucker is entitled to have his conviction for possession of stolen property reversed and remanded for a new trial.

Respectfully submitted,
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CERTIFICATE

I, Leslie S. Lee, do hereby certify that I have this the 23rd day of February, 2009, mailed a true and correct copy of the above and foregoing Brief of Appellant, by United States mail, postage paid, to the following:

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