IN THE COURT OF APPEALS OF MISSISSIPPI

RUBIN RENFROW — APPELLANT

VERSUS — NO. 2008-KA-0786-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR APPELLEE

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STATEMENT OF THE CASE

Procedural History

Rubin Renfrow was convicted in the Circuit Court of Simpson County on a charge of possession of child pornography and was sentenced to a term of 15 years in the custody of the Mississippi Department of Corrections. Aggrieved by the judgment rendered against him, Renfrow has perfected an appeal to this Court.

Substantive Facts

THE STATE'S CASE IN CHIEF

Deputy Bernard Gunter of the Simpson County Sheriff's Department testified that on March 21, 2006, he served a search warrant at 184 Lemming Road in Braxton, the residence of Rubin Renfrow. Pursuant to this warrant, Deputy Gunter seized Renfrow's computer. Deputy Gunter then took the computer to the sheriff's office and placed it in the evidence vault. On March 28, 2006. he took the computer to the Attorney General's Office for a forensic analysis. The following January 24, 2007, the computer, with the exception of the hard drive, was returned to the sheriff's office. The hard drive was retained as evidence in this prosecution for possession of child pornography. (T.289- 302)

Sherita Sullivan, an employee of the Attorney General's Office, was accepted by the court as an expert in the field of computer forensics examination. Ms. Sullivan testified that she "made a forensically sound copy" of the hard drive in question. (T.327-31) She found "[i]mages of child pornography" on that hard drive. Specifically, she discovered the image of "female child" with "an adult male penis in her mouth ... " According to Ms. Sullivan, "The images were in a folder, and hte name of the folder was P-E-D-O ... " (T.339-40)

When asked whether she had found "any other indicators on the hard drive that would tie Mr. Renfrow to the computer," Ms. Sullivan answered, "There were e-mails signed with his name, Rubin." She also discovered an electronic message which contained attachments, including "one of the pictures of the little girl."

Furthermore, "there were other e-mails from that [address] to another e-mail address that had those attachments of the pictures with the little girl." (T.341-42)

When the prosecutor asked Ms. Sullivan to "[t]ell ... about the ICQ file," she responded, "ICG is a chat program. And under the file directory of that program, that's where the folder P-E-D-O, pedo folder was located that contained the images." Investigation of the "Google HELLO files" revealed "thumbnail images of the same little girl ... " The attachments from the e-mails in the "pedo file," however, were not thumbnails but "larger images." (T.342-43)

Keith Leavitt, also an employee of the Attorney General's Office, was accepted as an expert in the field of forensic computer examination. Mr. Leavitt testified that on March 28, 2006, he "received a computer related to this investigation from Investigator Gunter," who "stated that he was looking for evidence of child exploitation." (T.403) Using Ms. Sullivan's "image that she had created," Mr. Leavitt "examined the data on this computer system."[1]

Dr. Larry Gibson, accepted as an expert in the field of family medicine, testified that the child depicted in one of the images in question appeared to be "around eight years old." Another image showed the same child, obviously under the age of 18, with her "left hand grasping" a penis and her tongue ... placed on" it. Still another image was "a picture of a well-developed adult with a young girl who

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[1]Mr. Leavitt testified that he had "examined her report" and found that "everything appeared normal." Thus, to his knowledge, it was a forensically sound image." (T.406)

[was] actually performing oral sex on this adult." Dr. Gibson had examined several other images which, in his medical opinion, depicted girls between the ages of nine and 12 posing nude in sexually explicit postures. (T.590-600)

Robin Renfrow Matthews, the defendant's daughter, testified that she was living with her father at 184 Lemming Road on March 21, 2006, when law enforcement officers seized his computer. Mrs. Matthews and her father were the only occupants of this house at this time. She used her father's computer "a few times," but she had not seen any images of naked children on it and she had not read his e-mail messages. Mrs. Matthews went on to testify that her father, a retired teacher and principal, had visited Russia on two occasions before the search warrant was executed. (T.602-05, 612)

Subsequently, the state recalled Deputy Gunter, who testified that Renfrow had voluntarily presented himself at the sheriff's department and "requested to talk" to him. In the presence of Deputy Gunter and Sheriff Lewis, Renfrow freely and voluntarily signed a waiver of his *Miranda* rights and gave an oral statement. After the interview was concluded, Deputy Gunter realized that he had forgotten to activate the audio portion of the videotaping device; thus, only the video was preserved. At that point, Deputy Gunter summarized Renfrow's statement in writing. (T.623-26) When he was asked to read that written account to the jury, Deputy Gunter testified as follows, in pertinent part:

> Mr. Renfrow did state during the interview that he was aware and did know that there was child pornography on his computer that was recovered from his home on a search warrant and then sent to the Attorney General's Cyber Crime Unit. Mr. Renfrow

> states that, while he was on the Internet with friends from Russia, these pictures would come up and he would delete them. When asked why there was over 170 pictures on his hard drive and over 500 deleted from the hard drive ... He states he did not know. When asked why he did not contact law enforcement about these phots, he did not have answer. Mr. Renfrow was asked about the he-she videos he had. He stated that his son gave them to him, and then later admitted he bought them at a store in Jackson, Mississippi. Mr. Renfrow was then asked if he would give a videotaped statement; he agreed. After the taping, it was realized that the audio part of the tape was malfunctioning.
>
> (T.627-28)

Sheriff Lewis verified that this account accurately reflected what Renfrow had told him and Deputy Gunter on that date. (T.650)

THE DEFENDANT'S CASE

Renfrow testified that he was not well-versed in the use of the computer and that he routinely "tried to get rid of" pornographic images which randomly popped up when he received e-mails from acquaintances in Russia. (T.678-89)

The defense presented three witnesses, including the defendant's son, who testified that they were well-acquainted with Renfrow; that they had never seen any evidence of child pornography in his residence; and that his reputation in the community for truth and veracity was good. (T.708-18)

Finally, the defense called Nannette Pate, who admitted that she had had no training in forensic computer examination. She was allowed to testify as an expert in computer repair and maintenance, but not as an expert in the former "narrow field" of forensic computer examination. (T.718-26) Ms. Pate testified that in her opinion Renfrow's computer had been compromised by viruses and other problems.

(T.738-39) On cross-examination, Ms. Pate acknowledged that she had seen images of naked children on Renfrow's computer and that she could not say "how they got there." (T.764)

Additional facts will be set out as necessary in the following argument.

SUMMARY OF THE ARGUMENT

First, the state contends that the verdict is supported by legally sufficient proof and is not contrary to the overwhelming weight of the evidence. The prosecution substantial proof that the defendant was guilty of possession of child pornography.

Next, the state submits no error has been shown in the denial of the motion to suppress the physical evidence seized pursuant to the search warrant.

Renfrow has not shown error in the court's admission of his statement into evidence.

Additionally, the state contends the court did not err in overruling Renfrow's challenge to the constitutionality of the statute under which he was indicted and convicted.

Moreover, Renfrow has shown neither an abuse of discretion nor prejudice with respect to the court's denial of his motions for continuance.

Finally, the court did not err in overruling the objection to the introduction of the physical evidence over a chain-of-custody objection.

PROPOSITION ONE:

THE VERDICT IS BASED ON LEGALLY SUFFICIENT PROOF AND IS NOT CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE

First, Renfrow challenges the sufficiency and weight of the evidence undergirding his conviction. To prevail, he must satisfy the following formidable standards of review:

> "If there is sufficient evidence to support a verdict of guilty, this Court will not reverse." *Meshell v. State*, 506 So.2d 989, 990 (Miss.1987). [other citations omitted] This Court should 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." *Alexander v. State*, 759 So.2d 411, 421(¶ 23) (Miss.2000) (quoting *Gossett v. State*, 660 So.2d 1285, 1293 (Miss.1995)).
>
> The standard of review in determining whether a jury verdict is against the overwhelming weight of the evidence is also well settled. "[T]his 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." *Collins v. State*, 757 So.2d 335, 337(¶ 5) (Miss.Ct.App.2000) (quoting *Dudley v. State*, 719 So.2d 180, 182(¶ 9) (Miss.1998)). On review, the State is given "the benefit of all favorable inferences that may reasonably be drawn from the evidence." *Collins*, 757 So.2d at 337(¶ 5) (citing *Griffin v. State*, 607 So.2d 1197, 1201 (Miss.1992)). "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." *Collins*, 757 So.2d at 337(¶ 5) (quoting *Dudley*, 719 So.2d at 182).
>
> *Carle v. State*, 864 So.2d 993, 998 (Miss.App.2004).

Moreover, "[t]his Court does not have the task of re-weighing the facts in each case to, in effect, go behind the jury to detect whether the testimony and evidence they chose to believe was or was not the most credible." *Langston v. State*, 791 So.2d 273, 280 (¶ 14) (Miss.Ct.App.2001).

Furthermore,

> The jury is charged with the responsibility of weighing and considering conflicting evidence, evaluating the credibility of witnesses, and determining whose testimony should be believed. [citation omitted] The jury has the duty to determine the impeachment value of inconsistencies or contradictions as well as testimonial defects of perception, memory, and sincerity. *Noe v. State*, 616 So.2d 298, 302 (Miss.1993) (citations omitted). **"It is not for this Court to pass upon the credibility of witnesses and where evidence justifies the verdict it must be accepted as having been found worthy of belief."** *Williams v. State*, 427 So.2d 100, 104 (Miss.1983).
>
> (emphasis added) *Ford v. State*, 737 So.2d 424, 425 (Miss.App.1999).

It has been "held in numerous cases that the jury is the sole judge of the credibility of the witnesses and the weight to be attached to their testimony." *Kohlberg v. State*, 704 So.2d 1307, 1311 (Miss.1997). As the Mississippi Supreme Court reitereated in *Hales v. State*, 933 So.2d 962, 968 (Miss.2006), criminal cases will not be reversed "where there is a straight issue of fact, or a conflict in the facts..." [citations omitted] Rather, "juries are impaneled for the very purpose of passing upon such questions of disputed fact, and [the Court does] not intend to invade the province and prerogative of the jury. " [citations omitted]

We incorporate by reference the proof set out in our Statement of

Substantive Facts to support our position that the prosecution presented substantial, indeed, overwhelming evidence of Renfrow's guilt of possession of child pornography as defined by MISS.CODE ANN. § 97-5-33(5) (1972) (as amended),[2] Count II of the indictment, and Instruction S-3-A. (C.P.4, 61) As the prosecutor argued during initial closing, without objection, this case boiled down to "a very simple" one. (T.802) The prosecutor went on to argue, again, without objection,

> [i]t's not important how the images got there, but it's important what he did with them. He knew they were on his computer. ... He told you he had it. He knew he had it. He saw trhem. He said he didn't look at them very well. ... I guess you wondered how he managed to know to put them in another folder without looking at them, but he knew he had it. He moved it. He manipulated it on the computer. He overtly tried to saw it. He saved it in a folder called pedo. Now, you've heard testimony too that pedo is not something that comes with your computer. It's something that is created by a user. It was created by Mr. Renfrow.
>
> * * * * *
>
> [T]he photographs were on the computer. It doesn't matter how long they had been there, how many times they looked at them, what he did with them. It matters

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[2]That subsection reads as follows:

> No person shall, by any means including computer, possess any photograph, drawing, sketch, film, video tape or other visual depiction of an actual child engaging in sexually explicit conduct.

Although the statute did not require such a finding, the state charged Renfrow with willful possession of the pornography, and the defining instruction required the jury to find this element in order to return a verdict of guilty.

> that they were on his computer. He knew that they were on his computer. He told you he possessed the pictures. Sheriff Lewis told you that he heard the defendant tell that he knew there was child pornography on his computer. ...
>
> (T.803-04)

The state submits this cogent argument, presented without objection and supported by the evidence, summarizes the prosecution's case against Renfrow and demonstrates that he is not entitled to a judgment or acquittal or a new trial. The testimony to the contrary simply created an issue of fact which was properly resolved by the jury.

The proof amply undergirds the trial court's submission of this case to the jury and refusal to disturb its verdict. Renfrow's first proposition should be denied.

PROPOSITION TWO:

NO ERROR HAS BEEN SHOWN IN THE COURT'S DENIAL OF THE MOTION TO SUPPRESS THE FRUITS OF THE SEARCH

Prior to trial, the defense filed a motion to suppress, inter alia, the physical evidence seized from the defendant's residence pursuant to a search warrant. (C.P.40) The court overruled that motion in a written order finding in pertinent part "[t]hat the physical evidence in this case was legally seized, properly secured and properly protected and should not be suppressed." (C.P.84)

During the hearing on the pretrial motions, Deputy Gunter testified that on March 26, 2006, he filed an affidavit for a warrant to seize the computer from Renfrow's house. When asked to recount the underlying facts and circumstances, Deputy Gunter testified, "I had testimony of a Shawn Matthews, six years old, and

a Seth Matthews, four years old, in a child molestation case." The children had given videotaped interviews to one Brian Erwin of the Rankin Child Advocacy Center. In that interview, "[t]he two children discussed that their granddaddy had touched their genital areas and buttocks and also, while this was happening, that he showed them computer images of naked adults, women and men and also children." Deputy Gunter presented these facts in the affidavit, and a search warrant was issued. (T.36-39)

In making the rulings on the record at the conclusion of this multi-motion hearing, the court stated the following, in pertinent part:

> With respect to paragraph four, the Court hereby incorporates the testimony given at the motion to suppress. The fruits of the search warrant, **we held that hearing in Raleigh, I believe, last fall.** It might have had a different case number, I don't remember, but **it was the same search warrant. And the Court incorporates and adopts the findings from that hearing into the one today.**
>
> **Further, the testimony and evidence elicited today convinces me that the evidence seized pursuant to the search warrant was lawfully seized.**
>
> (emphasis added) (T.160-61)

The motion to suppress was re-argued at a subsequent pre-trial motion hearing on March 20, 2008. (T.175) During that hearing, Deputy Gunter testified that he took the complaint from Randall Matthews, the father of the defendant's grandchildren, on March 16, 2006. Mr. Matthews reported that the incidents in question occurred in April and May, 2005. Thereafter, the children were interviewed on videotape at the Child Advocacy Center in Rankin County. After viewing the

videotape, Deputy Gunter used information obtained thereby to obtain a search warrant for Renfrow's house. The warrant was executed on March 21, 2006, the same day that it was signed by the issuing judge. (T.180-82, 196)

The trial court finally issued this ruling:

> All right. Information was received on the 16th of March 2006, presented to a Justice Court Judge on the 21st, at which time a warrant was issued and served on the same day. **Again, as I see the motion, the narrow issue is whether or not dismissing Count One** [charging fondling] **affected the search warrant. I find that it does not.** As always, Mr. Stubbs, I'll keep it before me. So the motion is denied.
>
> (emphasis added) (T.1996)

The pertinent standard of review of the trial court's ruling was reiterated recently as follows:

> The United States Supreme Court has established a "totality of the circumstances" standard for the determination of the existence of probable cause for the issuance of a warrant. *Illinois v. Gates*, 462 U.S. 213, 233, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); see *Lee v. State*, 435 So.2d 674, 676 (Miss.1983) (adopting "totality of the circumstances" standard in Mississippi). This simply requires a magistrate to "make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Gates*, 462 U.S. at 238, 103 S.Ct. 2317. **"[R]eviewing a magistrate's issuance of a search warrant on appeal does not require that we make a de novo determination of probable cause; therefore, our standard of review is to determine whether there was a substantial basis for the magistrate finding probable cause."** *Pittman v. State*, 904 So.2d 1185, 1189(¶4) (Miss.Ct.App.2004) (citing *Smith v. State*, 504 So.2d 1194, 1196 (Miss.1987)).

(emphasis added) *Savell v. State*, 928 So.2d 961, 971 (Miss.App.2006).

To prevail on his claim that the trial court erred in overruling his motion to suppress, Renfrow must demonstrate an abuse of discretion. *Flake v. State*, 948 So.2d 493, 496 (Miss.App.2007). The state submits Renfrow has failed to show that the trial court committed such error. While staleness of information "may be a defect in probable cause for search warrants," it is "but one factor in the totality of the circumstances ... " *Id.* Under the circumstances presented here, Renfrow has not shown that the alleged staleness defeated the magistrate's "common sense" interpretation of the affidavit. *Id.* It does not defy "common sense" to infer that evidence such as that in issue here would remain on a computer a year after it was discovered initially. For these reasons, the state submits Renfrow's second proposition should be denied.

PROPOSITION THREE:

NO ERROR HAS BEEN SHOWN IN THE ADMISSION OF THE DEFENDANT'S STATEMENT INTO EVIDENCE

Prior to trial, the defense moved to suppress Renfrow's statement on the ground that it given involuntarily and without a valid waiver of rights. (C.P.31, 40) During the hearing on that motion, Deputy Gunter testified that he served an arrest warrant on Renfrow at his residence on March 21, 2006. At that time, he gave Renfrow the *Miranda* warnings. (T.43) After booking the defendant at the Simpson County Sheriff's Department, Deputy Gunter again read him his rights. The defendant signed a written acknowledgment of his rights, but did not waive them at

that time. (T.54-55)

On March 16, 2007, Renfrow appeared at Deputy Gunter's office and asked to speak with him. Once more, Deputy Gunter informed him of his rights. This time, Renfrow waived his rights and gave a statement. According to Deputy Gunter, he did not appear to be under the influence of alcohol or drugs. The statement was not induced by any promises, threats or any type of coercion. (T.57-60)

Renfrow did not testify during the suppression hearing.

At the conclusion of the hearing, the court made a ruling set out in pertinent part below:

> [T]e defendant came to the sheriff's office. The how and why he did is of no immediate concern for this motion. At the sheriff's office he was duly advised of his Miranda rights. **He freely, knowingly and voluntarily waived those rights. Then he freely voluntarily and knowingly gave a statement to Officer Gunter in the presence of Sheriff Lewis.** Therefore, with those findings in mind, the assertion of paragraphs two and three of the defendant's motion are not well taken.
>
> (emphasis added) (T.160)

In its written order disposing of several pre-trial motions, the court ruled in relevant part, "the statement of the defendant was given freely and voluntarily after having been read his constitutional rights and after waiving same, and should not be suppressed." (C.P.84)

At the outset, the state points out that the appellate court

> will reverse the denial of a motion to suppress only if the trial court's ruling is manifest error or contrary to the overwhelming weight of the evidence. *Palm v. State*, 748 So.2d 135, 142 (Miss.1999) (citing *McGowan v.*

> *State*, 706 So.2d 231, 235 (Miss.1997)). This Court will not reverse the lower court's finding that the confession was voluntary and admissible so long as the court applied the correct principles of law and the finding is factually supported by the evidence. *Palm*, 748 So.2d at 142 (citing *Greenlee v. State*, 725 So.2d 816, 826 (Miss.1998)). Once a trial judge determines admissibility, the defendant/appellant faces a heavy burden in trying to reverse on appeal. *Greenlee*, 725 So.2d 816, 826 (Miss.1998) (quoting *Hunt v. State*, 687 So.2d 1154, 1160 (Miss.1996)).
>
> *Ruffin v. State*, 992 So.2d 1165, 1169 (Miss.2008).

The defendant in this case has not met this "heavy burden." The trial court's findings were amply supported by the testimony, which was not refuted by the defendant himself. The evidence taken at the hearing undergirds the conclusion that Renfrow initiated the interview and that he gave a statement freely, knowingly and voluntarily.

Finally, the state submits that both the accuracy of the confession and the absence of Renfrow's signature were matters affecting weight rather than admissibility. The jury was the proper arbiter of the credibility of Deputy Gunter's summary of the statement. *Craft v. State*, 380 So.2d 251, 254 (Miss.1980). For these reasons, Renfrow's third proposition should be denied.

PROPOSITION FOUR:

THE TRIAL COURT DID NOT ERR IN OVERRULING THE MOTION TO DISMISS

Prior to trial, Renfrow moved the court to dismiss the indictment returned against him, contending that it was unconstitutionally vague for failing to include the element of *mens rea*. (T.156-58) The court overruled the motion with this finding

and conclusion:

> All right. I agree subsection (5) of 97-5-33 does not contain the word "knowingly" or "willfully" or anything like that. In a sense, the indictment which does contain the word "willfully" and which has been equated numerous times, dozens, if not hundreds, or times with knowingly in all kind of different cases by our supreme court. The indictment in effect puts more burden on the State than the statute does. The State has nailed themselves down to proving that the defendant willfully, i.e., knowingly, possessed this alleged child pornography. The statute doesn't say they have to do it, but the indictment does. So that's what you're stuck with. So, for this case, that motion is denied.
>
> (T.159)

At the outset, the state submits that "[s]tatutes under constitutional attack have a presumption of validity attached to them, overcome only with a showing of unconstitutionality beyond a reasonable doubt." *Richmond v. State*, 751 So.2d 1038, 1048 (Miss.1999). Moreover, "the test concerning statutory construction is whether a person of reasonable intelligence would, by reading the statute, receive fair notice of that which is required or forbidden." *Id.*

Moreover, "[t]he Legislature may define a crime which depends on no mental element and consists only of forbidden acts or omissions." *Wright v. State*, 236 So.2d 408, 413 (Miss.1970), cited in *Richmond.* "In that instance, the intent to do the forbidden act is the only intent necessary to complete the offense." *Roberson v. State*, 501 So.2d 398, 401 (Miss.1987. Such statutes "which do not require 'guilty knowledge' have been generally held to be constitutional [citation omitted] unless such laws invade some specific

constitutional right." *Wright*, 236 So.2d at 413-14. See also *Windham v. State*, 602 So.2d 798, 807 (Miss.1992) (Robertson, J., concurring) ("I trust we . . . now accept that the legislature may define a crime which depends on no mental elements and consists only of forbidden acts or omissions").

In light of these authorities, the challenge to the constitutionality of § 97-5-33(5) lacks merit. The statute defines the crime as a forbidden act; it is not constitutionally infirm for failing to set out a mens rea.[3] Accordingly, Renfrow's fourth proposition should be denied.

PROPOSITION FIVE:

THE TRIAL COURT DID NOT ERR IN DENYING RENFROW'S MOTIONS FOR CONTINUANCE

On February 28, 2008, Renfrow filed a motion to for continuance, asserting that trial in this case was set for March 19, 2008; that the defense had filed a motion for discovery on November 14, 2007; that the state had delivered its response to discovery on February 8, 2008; and that the state had informed defense counsel that it had inadvertently provided an incorrect serial number for the defendant's computer. For these reasons, the defendant asserted the case should be continued. (C.P.33)

On March 5, 2008, the state filed a response asserting that it had complied with discovery in a timely manner, at least 30 days prior to the trial setting. The

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[3]We reiterate that the state obligated itself to prove that the defendant willfully possessed the child pornography, and that the jury was instructed accordingly.

response went on to state that the a report provided to the defense on January 23, 2008, had contained a scrivener's error which the was corrected by a supplemental report provided on February 8, 2008. (C.P.45)

The court originally denied the defendant's motion on March 7, 2008, during the first hearing on pretrial motions. At that time the court ruled that most of the discoverable material had been delivered "in the earlier cause number" and that the state was not delinquent in providing discovery. (T.164)

During the hearing on post-trial motions, the defense counsel contended that under these circumstances, he had had inadequate time to prepare a defense. (T.836) The prosecutor countered that the state had provided "ample opportunity" for the defendant to view the hard drive and that it had provided "two clones for the defendant." Furthermore, the prosecutor stated,

> **If you recall, there was a prior indictment and Mr. Stubbs had ample notice that there was a hard drive in this computer.** And it was not until two weeks prior to trial that he decided that he needed an expert, and that was certainly not within the rules of the Court.
>
> (emphasis added) (T.839)

We now submit that in light of the foregoing facts, Renfrow cannot show that the trial court abused is discretion in denying the motions for continuance or in denying the motion for new trial on this ground; nor can he show prejudice to his case. It is well settled that

> "[t]he decision to grant or deny a continuance is left to the sound discretion of the trial court." *Stack*, 860 So.2d at (¶ 7). "Unless manifest injustice appears to have resulted from the denial of the continuance, this Court

> should not reverse." *Lambert v. State*, 654 So.2d 17, 22 (Miss.1995). "The burden of showing manifest injustice is not satisfied by conclusory arguments alone, rather the defendant is required to show concrete facts that demonstrate the particular prejudice to the defense." *Stack*, 860 So.2d at (¶ 7) (internal quotations omitted).
>
> *Beckum v. State*, 917 So.2d 808, 814 (Miss.App.2005)

"The defendant bears the burden of presenting concrete facts that show how the denial of a continuance caused particular prejudice to his case." *Stack v. State*, 860 So.2d 687, 691-92 (Miss.2003).

In this case, Renfrow presented no proof as to how he could have been better prepared if he had had additional time to prepare for trial. Accordingly, he has not shown prejudice with respect to the court's rulings. Nor has he shown an abuse of judicial discretion. His fifth proposition should be denied.

PROPOSITION SIX:

THE COURT DID NOT ERR IN ADMITTING A COPY OF THE COMPUTER HARD DRIVE OVER THE DEFENDANT'S CHAIN-OF-CUSTODY OBJECTION

In paragraph V. of his amended motion to suppress, Renfrow contended that the state had "wholly failed to protect and secure the alleged evidence in this case, and it has been contaminated and subjected to potential viruses." (C.P.41) After a hearing on this issue, the court made a finding and conclusion set out below in pertinent part:

> Paragraph five of the defendant's amended motion, speaks to the chain of custody and the possible contamination. For purposes of this hearing, I find that the erroneous serial numbers reflected on documents S-4 and S-5 are the result of clerical error which do not render the evidence inadmissible. I'll leave it to the jury to make the final decision concerning the weight and worth of the evidence in light of the aforesaid variance in serial numbers. Therefore, the assertions of paragraph ... five are not well taken...
>
> Further, the defendant alleges that the computer involved herein may have been contaminated and subjected to potential virus infection. The State's computer witness testified with respect to the chain of custody of the computer from the time it was delivered to the Attorney General's office and received by Leavitt, or whatever his name was, Kevin (sic), the custodian. And the logs reflect when it was placed into the vault, when the expert Sullivan removed it from the vault and when it was returned to the sheriff's office.
>
> Furthermore, there was testimony that the write block hardware was affixed. And to me, at least, that creates a presumption that the computer was not contaminated nor subjected to potential viral infection while in the State's possession. The defendant has put on no testimony to rebut that presumption, therefore,

that ground is not well taken.

(T.161-62)

The defendant bears the burden of establishing a broken chain of custody, i.e., tampering, alteration, or substitution. *Brooks v.* State, 761 So.2d 944, 948 (Miss.App.,2000); *Hemphill v. State*, 566 So.2d 207, 208 (Miss.1990), cited in *White v. State*, 722 So.2d 1242, 1244-45 (Miss.1998). "In addition, the significance of issues regarding the chain of custody are largely left to the discretion of the trial judge. Unless this discretion has been abused, this Court will not reverse." *Brooks*, 761 So.2d at 948, citing *Doby v. State*, 532 So.2d 584, 588 (Miss.1988). No such abuse has been shown here. (T.92-107) The court's factual finding is supported by the testimony taken at the hearing. Renfrow has failed to sustain his burden of showing otherwise. At best, he speculates that the evidence *might* have been contaminated. This is not sufficient. As the court pointed out in its findings and conclusion, the reasonable inference was that the computer was not subject to such infection.

Renfrow has failed to demonstrate an abuse of judicial discretion with respect to this issue, and his final proposition should be denied accordingly.

CONCLUSION

The state respectfully submits the arguments presented by Renfrow are without merit. Accordingly, the judgment entered below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Deirdre McCrory, 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 2nd day of March, 2009.

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