IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DOUGLAS E. JAY, JR. — APPELLANT

VS. — NO. 2008-KA-1264

STATE OF MISSISSIPPI — APPELLEE

# BRIEF FOR THE APPELLEE

## APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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## STATEMENT OF THE ISSUES

I. THE TRIAL COURT PROPERLY DENIED ALL POST-TRIAL MOTIONS FILED BY THE APPELLANT.

II. THE TRIAL COURT DID NOT ERR IN REFUSING TO ORDER A COMPETENCY HEARING.

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VIII. THE APPELLANT IS PROCEDURALLY BARRED FROM ARGUING CUMULATIVE ERROR AS THE ISSUE WAS NOT BROUGHT BEFORE THE TRIAL COURT.

## STATEMENT OF THE FACTS

After receiving a tip from a confidential informant, Deputy Mark Spence of the Newton County Sheriff's Department obtained a search warrant to search the house of the Appellant, Douglas Jay, Jr. (Transcript p. 31 - 32). Deputy Spence along with several other law enforcement officers went to Jay's house to execute the warrant. Upon arrival they found three juveniles, Jay, and Theresa Chapman present in the house. (Transcript p. 59). Jay was read his *Miranda* rights and searched. (Transcript p. 60 - 61). Deputies found two bags containing an off white substance (later determined to be 27.85 grams of methamphetamine) and a black film canister in Jay's front right pocket. (Transcript p. 62 and 80). The canister contained a leafy green substance (later determined to be 1.3 grams of marijuana) and a small bag with pills (later determined to be 16 tablets of Alprazolam). (Transcript p. 63 and 81). A small bag was also recovered from Jay's watch pocket on his pants which contained an off white crystal-like substance (later determined to be .96 grams of methamphetamine). (Transcript p. 64 and 83). Deputies also found a plastic bag with a leafy green substance (later determined to be 9.3 grams of marijuana) in the night stand beside the bed in the master bedroom. (Transcript p. 65 and 84). Deputies also found a metal tube under a pillow on the bed in the master bedroom. (Transcript p. 72). The tube contained four bags with a leafy green substance (later determined to be 106.1 grams of marijuana). (Transcript p. 73 and 85). After the search, both Jay and Ms. Chapman were placed under arrest. (Transcript p. 67). When Jay noticed that Ms. Chapman was also being placed under arrest, he questioned deputies as to why she was being arrested. (Transcript p. 67). When he was told, he responded by saying that everything the deputies found was his. (Transcript p. 68).

Jay was represented by P. Shawn Harris at trial. Mr. Harris explained what happened on the day of trial just prior to the start of trial as follows:

> We had a - - I got here about 8:30 and met Douglas Jay upstairs, and then we walked around back to the jury room, which was empty, and we sat and discussed some matters in his case, and he had some questions, and I had some answers, and about ten minutes later, I satisfied all his questions and I told him to go have a seat in the courtroom and I came around back and - - uh - - in a few minutes came out here and right before Your Honor came on the bench, I knew it was time. I looked around and I saw Mr. Jay, Sr, and - - and Douglas Jay, Jr.'s son seated in the back of the courtroom. I called his son up and asked him where Douglas was. He said he was downstairs smoking. I said go get him right now cause court's fixing to start, he's got to be in the courtroom. He went downstairs to go get him and came back up after a minute. He said he couldn't find him. And so that's when we started searching for through the courthouse and couldn't find him.

(Transcript p. 105 - 106). Jay was never found and his trial commenced without him. At the conclusion of trial, Jay was convicted of: Count I - Possession of Methamphetamine in an amount more than 10 grams and less than 30 grams in violation of Mississippi Code Annotated §41-29-139(c)(1)(D); Count II - Possession of Marijuana in an amount more than 30 grams and less than 250 grams in violation of Mississippi Code Annotated §41-29-139(c)(2)(C); and Possession of Alprazolam in an amount less than 100 dosage units in violation of Mississippi Code Annotated §41-29-139(c)(3)(A). He was sentenced on April 15, 2005 as a subsequent offender under Mississippi Code Annotated §41-29-147. (Record p. 43 - 44). As to Count I, Jay was sentenced to serve twenty-five years in the custody of the Mississippi Department of Corrections. As to Count II, Jay was sentenced to serve six years in the custody of the Mississippi Department of Corrections with said sentence to run consecutively to the sentence imposed in Count I. As to Count III, Jay was sentenced to serve two years in the custody of the Mississippi Department of Corrections with said sentence to run concurrently with the sentences imposed in Counts I and II. On April 26, 2005, Mr. Harris filed a motion for new trial on Jay's behalf. (Record p. 48 - 49). This motion was never ruled upon.

On October 13, 2005, Ross Barnett, Jr. filed an entry of appearance on behalf of Jay and shortly thereafter filed a motion to set aside judgment of conviction and sentence. (Record p. 50 -

51). This motion was denied by the trial court on May 24, 2006. (Record p. 65). Mr. Barnett then filed a motion for permission to appeal conviction and sentence of the court out of time on June 9, 2006. (Record p. 67 - 68). The State of Mississippi responded (Record p. 70 - 71) and the motion was denied on August 4, 2006. (Record p. 72). Nonetheless a notice of appeal was filed on September 5, 2006. (Record p. 75).

Henry Palmer then filed an entry of appearance on behalf of Jay. (Record p. 89). The Appellant's Brief was filed in the appeal on July 16, 2007. (*Jay v. State*, 2006-KA-01805COA). The State of Mississippi responded by filing a motion to dismiss the appeal noting that all post trial motions had not been ruled upon i.e. the motion for new trial filed by Mr. Harris. (*Jay v. State*, 2006-KA-01805COA). On November 7, 2007, the Court of Appeals dismissed the appeal. (Record p. 104 - 105). A motion to reconsider was filed and denied.

Mr. Palmer then filed "Defendant's Request for Hearing of Motion for New Trial" in which he requested that the trial court grant a hearing on the motion for new trial filed by Mr. Harris and rule upon said motion so that an appeal could be perfected. (Record p. 111 - 112). The trial court entered an order setting the matter for hearing on June 18, 2008. (Record p. 115). A hearing was held and the motion for new trial was denied for not being timely brought before the court for decision on June 19, 2008. (Record p. 138). An entry of appearance on behalf of Jay was filed by Marvin Wiggins and a notice of appeal was filed on July 3, 2008. (Record p. 140). This appeal is now before this Honorable Court.

## SUMMARY OF THE ARGUMENT

The trial court properly denied each of Jay's post trial motions. At the hearing on the motion for a new trial, Jay specifically requested that the trial judge deny the motion so that he could proceed with his appeal and therefore, cannot now complain about the trial court granting his

request. Further, even if were error for the trial court to deny the motion based on timeliness, the denial was proper under the "right result, wrong reason" doctrine as the motion would have been denied on the merits regardless. The issues raised with regard to Jay's motion for permission to appeal conviction and sentence of the court out of time are moot as Jay has now perfected an appeal of his conviction and sentence.

Jay was not entitled to a competency hearing simply because the trial court ordered a mental evaluation. Mississippi law is clear that a competency hearing is only required whenever a reasonable question of the defendant's capacity arises.

The record before the court does not establish that the trial judge improperly denied the appellant's motion to suppress. Neither the affidavit nor the search warrant are a part of the record. However, even if one were to assume that the affidavit contained only the information that can be gleaned from the record during the hearing on the motion to suppress, it would be sufficient to show that the warrant was properly issued as there was probable cause. The officer requesting the warrant indicated to the issuing judge that a confidential informant, whom he had found to be reliable in the past and who had given him trustworthy information in the past, personally witnessed Jay in possession of drugs at his home. As the warrant was properly issued, the drugs found as a result of the search and Jay's confession were properly admitted into evidence.

The trial court properly denied Jay's motion to recuse. First, the motion was not filed with the affidavit required by Uniform Circuit and County Court Rule 1.15. Furthermore, the motion was properly denied on the merits as the presumption that the trial judge is impartial was not overcome.

The trial judge did not err in trying Jay in absentia. Jay was present in the courthouse on the morning of trial and was instructed by his attorney to go to the courtroom as trial was about to begin. He willfully, voluntarily, and intentionally left the courthouse and did not appear at his trial. As

such, the trial court was allowed to proceed with his trial in his absence.

Jay wholly failed to establish the second prong of the *Strickland* analysis in that he did not show that but for his counsel's alleged deficiencies the outcome of his trial would have been different. Thus, he did not establish that he was denied effective assistance of counsel.

Jay is procedurally barred from raising this issue on appeal as the issue was not presented to the trial court for decision. Procedural bar notwithstanding, the indictment was proper and valid as Jay was sufficiently put on notice that he was being charged as a subsequent offender and the basis for such charge.

Jay is also procedurally barred from raising the issue of cumulative error as he did not raise the issue before the trial court. However, regardless of the bar, there is no cumulative error as there were no individual errors.

## ARGUMENT

### I. THE TRIAL COURT PROPERLY DENIED ALL POST-TRIAL MOTIONS FILED BY THE APPELLANT.

Jay first argues that "the trial court erred in not granting the post-trial motions of the Appellant for New Trial, To Set Aside the Judgment of Conviction, and/or to allow an out of time appeal." (Appellant's Brief p. 20).

#### A. Motion for New Trial

Shortly, after his sentencing, Jay filed a motion for new trial arguing the following:

1. The verdict was against the overwhelming weight of the evidence.
2. The Court erred in refusing to grant a peremptory instruction for the Defendant and further erred in refusing to direct a verdict for the Defendant at the conclusion of the State's case.
3. The Court erred in admitting evidence seized after an illegal search incident to an illegal arrest.
4. The Court erred in admitting into evidence the statement given by Defendant.
5. The Court erred in refusing to grant each instruction submitted by the

Defendant.

6. The Court erred in sustaining every objection made by the State and overruling every objection made by the Defendant.
7. The Court erred in failing to grant the Defendant's motion to recuse.
8. The Court erred in putting the Defendant to trial in his absence, as he was unable to confront his accusers in violation of his rights under the United States Constitution and Mississippi Constitution.
9. The Court erred in putting the Defendant to Trial in his absence by voir dire of the jury panel, in that the panel was put in the position that they pre-judged the guilt of the Defendant as he was not present, and the jurors were made aware that he had removed himself from the courtroom.

(Record p. 48 - 49). The motion was never ruled upon. After the Court of Appeals dismissed Jay's first appeal because the motion for new trial had never been ruled upon, Jay filed a request for hearing on the motion for new trial. A hearing was held on June 18, 2008. (Transcript p. 113 - 126). After noting at the hearing that "the position of . . . Mr. Jay . . . is according to Rule 4(e) of Mississippi Rules of Appellate Procedure, the appellate courts are without jurisdiction to consider an appeal until all outstanding post-trial motions have been disposed of by the Court," counsel for Jay began setting forth the arguments made in the motion. (Transcript p. 114 - 115). Eventually, the trial court questioned Jay as to why he was "now entitled to a ruling on your motion for a new trial at this late filing of the hearing of the motion." (Transcript p. 119). After some discussion of the possible reasons for Jay's first attorney's failure to pursue a ruling on the motion, Jay's counsel acknowledged that "essentially, then, what it boils down to is we're asking a motion to deny - - excuse me, an order to deny the motion Mr. Harris made." (Transcript p. 121). The following exchange then took place:

BY THE COURT: Sure. I know what you're doing. You want to have that so you can go back to Jackson on the case on its merits.

BY JAY'S COUNSEL: No need to dance around that, Judge.

(Transcript p. 121). After argument by the State, the trial judge denied the motion for new trial. (Transcript p. 125). The trial court entered an Order denying the motion on the same day. (Record

p. 137). The following day an Order Amending Previous Order was entered ordering that the motion for new trial "be dismissed and denied for not being timely presented to the Court for a decision thereon." (Record p. 138).

On appeal, Jay argues that "the denial of said motion was improper and based upon an incorrect legal standard." (Appellant's Brief p. 24). He specifically noted that "the trial judge cited a nonexistent time frame in his second order denying the motion" and that "no consideration . . . was given for the issues raised in said motion." (Appellant's Brief p. 24). The State would first note that Jay got exactly what he asked for in the hearing. He unequivocally stated that "what it boils down to is we're asking a motion to deny - - excuse me, an order to deny the motion Mr. Harris made." (Transcript p. 121). He then told the judge that he needed the Order denying the motion so that he could file the appeal which is currently before the Court. (Transcript p. 121). The trial court granted this request and denied the motion. As such, Jay was able to perfect an appeal which was, as he himself stated, his purpose for bringing the motion to hearing. Thus, he cannot now argue that he was prejudiced by this ruling.

Secondly, the State would argue that even if the motion for new trial were not denied for being untimely, the motion would have been denied on the merits. Many of the arguments made in the motion are addressed in this appeal and the State contends that each of the issues was properly handled by the trial court as set forth throughout this brief. As such, consideration of the record and this brief as a whole reveal that the trial court could have properly denied the motion on the merits regardless of the timeliness issue. Accordingly, even if this Court were to determine that the trial court should not have denied the motion based on timeliness, the denial should be affirmed under the doctrine of "right result, wrong reason." *See Towner v. State,* 837 So.2d 221, 225 (Miss. Ct. App. 2003) (citing *Puckett v. Stuckey*, 633 So.2d 978, 980 (Miss.1993)) (holding that "[i]t is the

customary practice, in the name of judicial economy, for an appellate court to affirm the trial court if the right result is reached even though for the wrong reason").

**B. Motion to Set Aside Judgment of Conviction and Sentence**

Jay filed a motion to set aside judgment of conviction and sentence on October 13, 2005 arguing that the trial of his case in his absence "is contrary to the laws and the Constitution of the State of Mississippi." (Record p. 50 - 51). A memorandum brief was also filed citing to various legal authority in support of his argument. (Record p. 58 - 62). The trial court entered an Order setting the matter for hearing on May 11, 2006. (Record p. 63). No transcript of said hearing is in the record. The motion was denied on May 24, 2006. (Record p. 65).

On appeal, Jay argues that "the motion to set aside the conviction should have been sustained, based upon the erroneous trial in absentia of Jay." (Appellant's Brief p. 25). He relies on the arguments made in Issue V of his brief. The State too would rely on its arguments made in Issue V of this brief to support its contention that the trial court properly denied Jay's motion to set judgment of conviction and sentence.

**C. Motion for Permission to Appeal Conviction and Sentence of the Court Out of Time**

On June 2, 2006, Jay filed a motion for permission to appeal conviction and sentence of the court out of time. (Record p. 67 - 68). The State responded to said motion and the motion was subsequently denied. (Record p. 72).

This issue is moot as Jay has been given an opportunity to appeal his conviction and sentence in the appeal now before the Court. Any prejudice which Jay may have suffered from the denial of

his motion for permission to appeal conviction and sentence of the court out of time[1], is now moot as his appeal is now being heard.

## II. THE TRIAL COURT DID NOT ERR IN REFUSING TO ORDER A COMPETENCY HEARING.

Secondly, Jay argues that "the trial court erred in not conducting a hearing in regard to the mental competency of the Appellant." (Appellant's Brief p. 26). On April 4, 2005, Jay filed a motion for an extension of time requesting "a continuance of this cause, so that he can continue his medical treatment and for a continued psychiatric exam to determine when he can assist his attorney in the defense of his case." (Record p. 9). Attached to said motion was a letter from Dr. Stuart A. Yablon of the Methodist Rehabilitation Center stating that Jay was assaulted on September 23, 2004 and that he sustained "severe traumatic brain injury." (Record p. 11). The letter further stated that Dr. Yablon believed that Jay was "unable to make competent medical decisions and unable to participate in any court proceedings at this time." (Record p. 11). On April 6, 2005, the court entered an order requiring that Jay be examined by Dr. Mark C. Webb on April 7, 2005 at 1:00 p.m. (Record p. 12 - 13). The order further required that Dr. Webb make a written report of his findings. (Record p. 13). Dr. Webb submitted a report finding that Jay "is improving from his brain injury and is functioning in the community" and that he is "able to stand trial, assist his attorney in his defense, able to know the difference between right and wrong, and understood the quality of his actions at the time of the alleged offense." (Record p. 41).

This Court has previously held that the standard for assessing competence to stand trial is "whether the defendant has 'sufficient present ability to consult with his lawyer with a reasonable

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[1] The State is not hereby conceding that Jay suffered any prejudice as a result of the denial of this motion. As confirmed by the fact that the Court of Appeals dismissed Jay's first attempt to appeal this conviction, the trial court properly denied the motion.

degree of rational understanding' and 'has a rational as well as factual understanding of the proceedings against him.'" *Martin v. State*, 871 So.2d 693, 698 (Miss. 2004) (quoting *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960)). Mississippi Code Annotated §99-13-11 allows a circuit judge to order a mental examination if the issue arises and reads as follows:

> In any criminal action in the circuit court in which the mental condition of a person indicted for a felony is in question, the court or judge in vacation on motion duly made by the defendant, the district attorney or on the motion of the court or judge, may order such person to submit to a mental examination by a competent psychiatrist or psychologist selected by the court to determine his ability to make a defense; provided, however, any cost or expense in connection with such mental examination shall be paid by the county in which such criminal action is pending.

Jay, like the defendant in *Evans v. State*, argues that because the trial judge ordered a mental examination, he was entitled to a competency hearing according to Uniform Rule of Circuit and County Court 9.06. 984 So.2d 308, 312 (Miss. Ct. App. 2007). However, the Court of Appeals in *Evans* held that:

> Uniform Rule of Circuit and County Court Practice 9.06 requires that a trial court order a psychiatric evaluation if it has reasonable grounds to believe that the defendant is incompetent to stand trial. The Rule further requires that if a reasonable ground exists to believe the accused is incompetent, then the trial court must also order a competency hearing. URCCC 9.06 . However, if the trial court does not make the threshold finding that a reasonable ground exists, which indicates that the accused is incompetent to stand trial, then the Rule 9.06 requirement to order to grant a competency hearing never arises. In other words, if a trial judge orders a psychiatric evaluation without a reasonable question as to the defendant's competency, he is not also required order a competency hearing. (*citation omitted*). . . . Because the trial judge did not find that a reasonable ground existed to suspect that [the defendant] was mentally incompetent to stand trial, the court was not required to order a competency hearing pursuant to Rule 9.06 . The trial court did not err in failing to grant [the defendant's] motion for a hearing to determine his competency.

*Id.* at 312 - 313 (*emphasis added*). *See also Magee v. State*, 914 So.2d 729, 736 (Miss. Ct. App. 2005) (holding that "under section 99-13-11, a circuit court may order a mental evaluation of the defendant even without a reasonable ground to believe the defendant is incompetent" and that "the

trial court's order of a mental evaluation for [the defendant] was not a finding of reasonable ground entitling [the defendant] to a competency hearing.") and *Jones v. State*, 902 So.2d 593, 597 - 598 (Miss. Ct. App. 2004). Furthermore, "a mental evaluation finding the defendant competent to stand trial may support the trial court's decision to forego a competency hearing." *Magee*, 914 So.2d at 735 (citing *Conner v. State*, 632 So.2d 1239, 1251 (Miss. 1993) (overruled on other grounds)). Accordingly, the mere fact that the trial judge ordered a mental evaluation did not entitled Jay to competency hearing.

Jay also asserts that Dr. Webb's report was not filed until two days after Jay's trial began. (Appellant's Brief p. 26). However, the record does not indicate on which day the trial judge received a copy of the report nor does it reflect whether the trial judge spoke with Dr. Webb prior to his decision to go forward with trial. "When . . . the trial court does not make express findings on its decision to forego a competency hearing, this Court 'must assume that the trial court objectively considered all the facts and circumstances, including those which are not available to this Court, which bore upon the defendant's competence to stand trial.'" *Magee*, 914 So.2d at 736 (quoting *Conner*, 632 So.2d at 1251). Moreover, "when the trial court has made a finding that the evidence does not show a probability that the defendant is incapable of making a rational defense, this Court will not overturn that finding unless the finding was manifestly against the overwhelming weight of the evidence." *Epps v. State*, 984 So.2d 1042, 1045 (Miss. Ct. App. 2008) (quoting *Dunn v. State*, 693 So.2d 1333, 1341 (Miss. 1997)). There is absolutely nothing in the record which indicates that the Jay was incapable of making a rational defense. Arguably, Dr. Yablon's letter stating that Jay was unable to participate in court proceedings at this time indicates that Jay may have been incompetent. However, Dr. Yablon offered no facts or evidence to support his opinion and did not assert that Jay was incapable of assisting his attorney in his defense. Dr. Webb's report,

however, made extensive findings supporting his opinion that Jay was competent to stand trial. (See Record p. 37 - 41). Thus, it cannot be said that the trial court's findings were "manifestly against the overwhelming weight of the evidence." As such, the trial court did not err in refusing to conduct a competency hearing.

## III. THE RECORD BEFORE THE COURT DOES NOT ESTABLISH THAT THE TRIAL JUDGE IMPROPERLY DENIED THE APPELLANT'S MOTION TO SUPPRESS.

Jay also argues that "the trial court erred in denying the motion to suppress the evidence made on behalf of the Appellant." (Appellant's Brief p. 30). The standard of review for the admission or exclusion of evidence is abuse of discretion. *Harrison v. McMillan*, 828 So.2d 756, 765 (Miss. 2002). In reviewing the denial of a motion to suppress evidence, the appellate court "looks to determine whether the trial court's findings, considering the totality of the circumstances, are supported by substantial credible evidence." *Evans v. State*, 823 So.2d 617, 621 (Miss. Ct. App. 2002). Where supported by substantial credible evidence, the Court will not disturb those findings. *Id.* (citing *Price v. State*, 752 So.2d 1070 (Miss. Ct. App.1999)). Further, "even if this Court finds an erroneous admission or exclusion of evidence, we will not reverse unless the error adversely affects a substantial right of a party." *Passman v. State*, 937 So.2d 17, 20-22 (Miss. Ct. App. 2006) (citing *Gibson v. Wright*, 870 So.2d 1250, 1258 (Miss. Ct. App. 2004)).

Jay specifically argues that the search warrant should not have been issued as there was insufficient indicia of the veracity or trustworthiness of the confidential informant. (Appellant's Brief p. 30 - 33). However, neither the search warrant nor the affidavit are a part of the record. Both were introduced at trial for identification purposes, but neither document nor any other exhibits were included in the record even though they were designated. Further, there was no testimony as to what information was actually contained in the affidavit other than a small amount of testimony given by

Deputy Spence. The only information regarding the exact contents of the affidavit was given by defense counsel in his arguments during the motion to suppress hearing. It is the duty of the appellant to make sure that the record contains all documents necessary to establish error. *See Latiker v. State*, 918 So.2d 68, 74 -75 (Miss. 2005). Thus, the issue is procedurally barred.

Without waiving the bar, the State would also note that even if the affidavit contained only the information noted on the record by Deputy Spence and defense counsel during arguments, the affidavit would have been sufficient to justify the issuance of the search warrant. At the hearing on the matter, Deputy Spence testified that he sought a search warrant for Jay's residence because he "had information from a confidential informant advising me that there was a illegal substance at Mr. Jay's - - under his control, matter of fact, in his pocket." (Transcript p. 32). While, both Deputy Spence and Judge Addy, the issuing judge, testified about the affidavit presented to her prior to her issuing the search warrant, the only indication on the record as to the information actually contained in the affidavit comes from Jay's counsel's arguments during the hearing in which he claims that the affidavit "alleges that the defendant - - the C.I. had observed - - uh narcotic - - crystal meth on Douglas Jay's person at his residence in Newton County and - - uh the officer later asserts that this C.I. had proven to be trustworthy in that she had given him reliable information."[2] (Transcript p. 53 - 54). As noted by the prosecutor during the hearing, the "underlying circumstances and facts set forth . . . [are] very short and concise, but it's to the point and it meets everything in the well-known two-point test." (Transcript p. 56 - 57).

The test the prosecutor referred to is the test set forth in *Illinois v. Gates*, 462 U.S. 213, 103

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[2] The State is not attempting to argue that defense counsel's remarks during the hearing are evidence of the exact information contained in the affidavit, but is simply, for the sake of argument, noting that the affidavit most likely contained the information stated by defense counsel.

S.Ct. 2317, 76 L.Ed.2d 527 (1983) and as the Court of Appeals noted in *Kirkland v. State*, "[u]nder that test, the 'task of the issuing magistrate is simply to make a practical, common-sense 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.'" 916 So.2d 537, 539 (Miss. Ct. App. 2005) (*emphasis added*). In the case at hand, Judge Addy properly ascertained that there was a fair probability that the drugs would be found where the confidential informant stated that they would be found and thus, that a crime was being committed. First, the informant personally saw Jay in possession of the drugs in question. Second, Deputy Spence stated that the informant had proven to be trustworthy in the past as she had previously given him reliable information.

Nevertheless, Jay argues that *Roebuck v. State,* 915 So.2d 1132 (Miss. Ct. App. 2005) "is almost dead on point with the instant matter." (Appellant's Brief p. 31). However, there is at least one MAJOR difference between the facts of *Roebuck* and the circumstances in Jay's case. In *Roebuck*, neither of the two officers requesting the search warrant on the basis of a confidential informant's statements mentioned to the issuing judge that the informant was credible or believable. *Id.* at 1138 - 1139. The Court determined that the warrant was invalid because nothing before the issuing judge " suggested that the informant's information was reliable or true." *Id.* at 1140. In Jay's case, Deputy Spence did inform Judge Addy that he had previously found the informant to be trustworthy and that the informant had given him reliable information in the past. Thus, the cases are distinguishable.

Furthermore, Mississippi law is clear that "[i]n reviewing a magistrate's finding of probable cause, [the appellate courts] do not make a de novo determination; but rather, . . . ascertain if there was a substantial basis for the magistrate's finding." *McKinney v. State* , 724 So.2d 928, 931 (Miss.

Ct. App. 1998) (citing *Davis v. State*, 660 So.2d 1228, 1240 (Miss.1995)) (*emphasis added*). As set forth above, there was a substantial basis for Judge Addy's finding. As such, the trial judge correctly found that the warrant was valid.

Jay also argues that because the search warrant should not have been issued, the results of the search, including the contraband and Jay's confession, "should be excluded as 'fruits of the poisonous tree.'" (Appellant's Brief p. 33). However, as set forth above the warrant was properly issued. Accordingly, the contraband and Jay's confession were properly admitted into evidence.

Jay further argues that his confession should not have been admissible because of the testimony by Deputy Walker indicating that he "believed that Jay was under the influence of something, and Jay was allegedly found with contraband on his person." (Appellant's Brief p. 34). However, Deputy Walker's testimony was NOT that he believed that Jay was under the influence:

Q: Based on your observations at that time, and your experience in law enforcement, did Douglas Jay at that time appear to be under the influence of any drugs or alcohol?
A: Uh - - he was real nervous.
Q: But was he under the influence?
A: He - - he could have been. He was real nervous acting, like he had been - - you know, doing something.
Q: Did he know what he was doing is what I am asking?
A: Yes, sir.
Q: Okay. So he - - he - - while he may have used some, he was not under the influence?
A: No, sir.
Q: To the degree that he didn't understand?
A: No, sir. He knew what he was doing?

(Transcript p. 44 - 45). During cross-examination, Deputy Walker testified:

Q: Officer Walker, you stated that you believed he was - - he had consumed some sort of substance?
A: Possibly. Yes.
Q: That was based on?
A: Being nervous.
Q: His eyes or anything?

A: I didn't.

(Transcript p. 47). Deputy Walker simply testified that it was POSSIBLE that Jay had consumed some sort of drugs but that he was not under the influence. Furthermore, Deputy Spence and Deputy Pennington testified that Jay did not appear to be under the influence of drugs or alcohol. (Transcript p. 36 and 49). These officers, including Deputy Walker, each testified that based on their personal experience as law enforcement officers, Jay understood his rights. (Transcript p. 36, 46, and 50). As such, the confession was properly admitted into evidence.

Based on the foregoing, the trial judge properly denied Jay's motion to suppress.

## IV. THE TRIAL COURT PROPERLY DENIED THE APPELLANT'S MOTION TO RECUSE.

Jay next argues that "the trial court erred in refusing to grant the motion for recusal." (Appellant's Brief p. 35). Uniform Rule of Circuit and County Court 1.15 sets forth the proper procedure for filing a motion for recusal:

> Any party may move for recusal of a judge of the circuit or county court if it appears that the judge's impartiality might be questioned by a reasonable person knowing all the circumstances, or for other grounds provided in the Code of Judicial Conduct or otherwise as provided by law. A motion seeking recusal shall be filed with an affidavit of the party or the party's attorney setting forth the factual basis underlying the asserted grounds for recusal and declaring that the motion is filed in good faith and that the affiant truly believes the facts underlying the grounds stated to be true. Such motion shall, in the first instance, be filed with the judge who is the subject of the motion within 30 days following notification to the parties of the name of the judge assigned to the case; or, if it is based upon facts which could not reasonably have been known to the filing party within such time, it shall be filed within 30 days after the filing party could reasonably discover the facts underlying the grounds asserted. The subject judge shall consider and rule on the motion, with hearing if necessary. If a hearing is held, it shall be on the record in open court. The denial of a motion to recuse is subject to review by the Supreme Court on motion of the party as provided in M.R.A.P. 48B.

(*emphasis added*). In the case at hand, the proper procedure was not followed. Jay filed a motion to recuse on April 7, 2005 without the appropriate affidavit. (Record p. 14). The trial judge

promptly denied the motion. (Record p. 17). The Order does not state the grounds for which the motion was denied. However, the above quoted rule clearly establishes that the trial court could have properly denied the motion on procedural grounds alone.

Regardless of the defect in filing the motion, the motion would have been properly denied on the merits. The standard of review for such motions is set forth below:

> "The decision to recuse or not to recuse is one left to the sound discretion of the trial judge, so long as he applies the correct legal standards and is consistent in the application."(*citation omitted*). When a judge is not disqualified under the constitutional or statutory provisions, the decision is left up to each individual judge and is subject to review only in a case of manifest abuse of discretion. In determining whether a judge should have recused himself, this Court uses an objective test: "A judge is required to disqualify himself if a reasonable person, knowing all the circumstances, would harbor doubts about his impartiality." (*citation omitted*).

*Shumpert v. State,* 983 So.2d 1074, 1078 (Miss. Ct. App. 2008). Additionally, there is a presumption that a judge is impartial and unbiased in every case before him. *Brooks v. State*, 953 So.2d 291, 295 (Miss. Ct. App. 2007) (citing *Baldwin v. State,* 923 So.2d 218, 222 (Miss. Ct. App.2005)). "This presumption may only be overcome by evidence which produces a reasonable doubt about the validity of the presumption." *Shumpert*, 983 So.2d at 1078.

The only arguments made on appeal to support Jay's position that the trial judge should have recused himself were that "the judge made comments indicating disdain of Jay" and that he ruled against Jay with regard to his motion to continue because of his absence, his motion to suppress, and his motion for a competency hearing. (Appellant's Brief p. 36). However, Jay did not specify which comments by the trial judge allegedly indicated "disdain of Jay." Further, this Court has previously held that "[f]or the purposes of recusal, 'judicial rulings alone almost never constitute a valid basis for a bias or partiality motion.... Unless the judge abuses this discretion so as to be prejudicial to the accused, the Court will not reverse this ruling.'" *Mingo v. State,* 944 So.2d 18, 31 (Miss. 2006)

(quoting *Farmer v. State,* 770 So.2d 953, 958 (Miss.2000)).

Moreover, the Court of Appeals recently noted that "[i]n determining whether a judge should have recused himself, the reviewing court must consider the trial as a whole and examine every ruling to determine if those rulings were prejudicial to the complaining party." *Jackson v. State,* 962 So.2d 649, 663 (Miss. Ct. App. 2007). As shown in the State's brief, not one of the complained of rulings made by the trial court were error. Thus, the rulings could not have been prejudicial to Jay. Accordingly, the motion to recuse was properly denied.

## V. THE TRIAL JUDGE DID NOT ERR IN TRYING THE APPELLANT IN ABSENTIA BASED ON THE WILLFUL, VOLUNTARY, AND DELIBERATE ACTIONS TAKEN BY THE APPELLANT TO AVOID TRIAL.

Jay also argues that "the trial court erred in denying to the Appellant his fundamental right to a fair trial by conducting the trial in the absence of the Appellant." (Appellant's Brief p. 37). "The issue of whether the trial court erred in trying a defendant in absentia is a question of law which this Court reviews *de novo*." *Williams v. State*, 881 So.2d 963, 965 (Miss. Ct. App. 2004) (citing *Jefferson v. State*, 807 So.2d 1222 (Miss. 2002)). Mississippi Code Annotated §99-17-9 sets forth the law with regard to trial in absentia and reads as follows:

> In criminal cases the presence of the prisoner may be waived (a) if the defendant is in custody and consenting thereto, or (b) is on recognizance or bail, has been arrested and escaped, or has been notified in writing by the proper officer of the pendency of the indictment against him, and resisted or fled, or refused to be taken, or is in any way in default for nonappearance, the trial may progress at the direction of the court, and judgment made final and sentence awarded as though such defendant were personally present in court.

Also, "in addition to the above statute, *Jefferson v. State*, 807 So.2d 1222 (Miss. 2002) carved out an exception where a defendant may be tried in absentia based on willful, voluntary, and deliberate actions to avoid trial." *Williams*, 881 So.2d at 965.

There can be no explanation for Jay's absence at trial other than his own willful, voluntary,

and deliberate actions. As set forth in detail in the "Statement of Facts" section of this brief, Jay was in the courthouse on the day of trial, met with his attorney to discuss the case, and was told to head to the courtroom because trial was about to begin. (Transcript p. 105 - 106). His counsel was later questioned regarding Jay's knowledge of when his trial as follows:

| | |
|---|---|
| THE COURT: | You were having that conference with Douglas Jay for the trial that was to commence at 9:00. Were you not? |
| MR. HARRIS: | Right. Yes, sir. |
| THE COURT: | He was aware that his trial - - his case was set for trial and it was to commence at 9:00? |
| MR. HARRIS: | Yes, sir. |
| THE COURT: | How do you know he knew that? |
| MR. HARRIS: | Well, we - - I - - we had - - he had been present for the court a couple times I know, and knew that, and I had told him that. I was - - I had jury instructions. I was ready for trial. I mean, I - - I know he knew that. |

(Transcript p. 106). Thus, there can be no question that Jay knew when his trial was to begin as he was present in the courthouse that day and spoke with his attorney about the trial. The fact that Jay willfully and intentionally avoided his trial is further evidenced by his attorney and the court's inability to locate him. Officers were sent to locate Jay and apparently notified the trial judge that he was on the run. The following exchange took place after the jury was chosen:

| | |
|---|---|
| THE COURT: | They say your man's in the woods, Shawn. |
| MR. HARRIS: | Literally? |
| THE COURT: | Uh - huh. The car's there. The truck's gone. |

(Transcript p. 29). As such, the trial court, after hearing Jay's second motion for a continuance due to his absence, held that:

> Well, this man voluntarily left this courthouse. Uh - - he has known all the time, since December of last year, that his case was being tried today, and he was here Monday of last week. It was announced that the case would be tried today. He was there Thursday on his motion. It was announced that the case would be tried today. He was number one on the docket. He was here this morning and he met with you, and - - uh - - you said that you - - you told him to go on in the courtroom and that you'd come and get him. He left, and we recessed. We looked for him. We waited,

> and - - uh - - if there's any harm that comes from him not being here, he's the one that caused it.

(Transcript p. 89). Moreover, Jay's counsel responded to the trial court's ruling by stating, "Can't - - can't argue that fact Your Honor." (Transcript p. 89).

Additionally, there is no indication from the record that Jay was actually prejudiced by his absence. First, the trial judge thoroughly instructed the jury regarding his absence. The following instructions were given prior to voir dire:

> I want to caution you and to admonish you, and to also instruct you, that you're not to consider the fact that [Jay] is not before the court, that he did not appear in this courtroom at this time, as any evidence of guilty of the crimes for which he is charged. He is not here for whatever reason, but you're not to take that and consider that as evidence of guilt of the crimes for which he is charged to have committed.

(Transcript p. 2). The judge again instructed the jury at the close of the trial just prior to their deliberations as follows:

> The court instructs the jury that Douglas Jay is being tried in his absence, and the fact that he is not present is not an indication or admission of guilt. You, the jury, are instructed to disregard the absence of the defendant and to decide this case solely on the testimony.

(Transcript p. 91). Mississippi law is clear that jurors are presumed to follow the instructions of the court. *Grayson v. State*, 879 So.2d 1008, 1020 (Miss. 2004). "To presume otherwise would be to render the jury system inoperable." *Id.*

Second, a review of the record as a whole indicates that Jay was given a fair trial. No errors, reversible or harmless, were made. The evidence against Jay was more than sufficient to convict him of the crimes for which he was charged.

Nonetheless, Jay argues that his circumstances were similar to the ones in *Ali v. State* and *Sandoval v. State*. In *Ali v. State*, the defendant, a Somalian citizen barely able to speak English, was present in the courtroom the morning of trial but failed to show up at 1:00 p.m. when the trial was

scheduled to start and later testified that he did not understand his attorney and was under the impression that his attorney would call him to let him know when trial was to begin. 928 So.2d 237, 240 (Miss. Ct. App. 2006). However, this situation is quite different from Jay's. While, like Ali, Jay was present the morning of his trial, Jay left just minutes before trial was set to begin even after being told by his attorney to go to the courtroom because trial was about to start. Likewise, *Sandoval* is distinguishable in that at the time it was decided there was no exception for when a defendant willfully, voluntarily, and deliberately takes actions to avoid trial as there was at the time of Jay's trial. As set forth above, the record clearly indicates that Jay willfully, voluntarily, and deliberately avoided trial and therefore his circumstances squarely fit into the exception carved out by *Jefferson*.

## VI. THE APPELLANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

While a defendant may raise the issue of ineffective assistance of counsel on direct appeal, "this Court may determine the merits of the claim only when '(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 the trial judge able to consider the demeanor of witnesses, etc. are not needed.'" *Clayton v. State,* 946 So.2d 796, 803 (Miss. Ct. App. 2006). **"A conclusion that the record affirmatively shows ineffectiveness of constitutional dimensions is equivalent to a finding that the trial court should have declared a mistrial or ordered a new trial *sua sponte*."** *Id.* (citing *Colenburg v. State*, 735 So.2d 1099, 1102 (Miss. Ct. App.1999) (*Emphasis added*). The record in this case does not demonstrate that the trial court should have declared a mistrial or ordered a new trial *sua sponte* because of the quality of defense counsel's representation of Jay and, therefore, does not support a claim of ineffective assistance of counsel.

With regard to ineffective assistance of counsel claims, this Court has held the following:

> In order to prevail on a claim of ineffective assistance of counsel, a defendant must prove (1) that his attorney's overall performance was deficient and (2) that the deficient performance, if any, was so substantial as to prejudice the defendant and deprive him of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Furthermore, there is a "strong but rebuttable presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Walters v. State*, 720 So.2d 856, 868 (Miss.1998). To overcome this presumption, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Schmitt v. State*, 560 So.2d 148, 154 (Miss.1990). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "Only where it is reasonably probable that, but for the attorney's errors, the outcome of the trial would have been different will this Court find the counsel's performance was deficient." *Id.*

*Smiley v. State,* 815 So.2d 1140, 1146-47 (Miss.2002) (quoting *Gary v. State*, 760 So.2d 743, 753 (Miss.2000)) (*Emphasis added*). Moreover, the Court of Appeals has held that "[i]n addition to the presumption that counsel's conduct is reasonably professional, there is a presumption that counsel's decision are strategic in nature, rather than negligent." *Alonso v. State*, 838 So.2d 309, 313 (Miss. Ct. App. 2002).

Therefore, in order for a defendant to prevail on a claim of ineffective assistance of counsel raised on direct appeal, the defendant must show "from the record that his counsel's performance was deficient, and that the deficient performance prejudiced him." *Walker v. State,* 823 So.2d 557, 563 (Miss. Ct. App. 2002) (citing *Strickland*, 466 U.S. at 686) (*emphasis added*). This determination is made based on the "totality of the circumstances." *Cole v. State*, 666 So.2d 767, 775 (Miss. 1995) (citing *Frierson v. State*, 606 So.2d 604, 608 (Miss. 1992)). "The target of appellate scrutiny in evaluating the deficiency and prejudice prongs of *Strickland* is counsel's 'over-all' performance." *Id.*

Accordingly, Jay must, not only show that his counsel was deficient in each of the areas he alleged, but he also must show how these alleged deficiencies prejudiced his case. In order to prove

prejudice, Jay must show from the record that his counsel's "errors were of such a serious magnitude as to deprive the defendant of a fair trial because of a reasonable probability that, but for counselor's unprofessional errors, the results would have been different." *Cole*, 666 So.2d at 775 (quoting *Martin v. State*, 609 So.2d 435, 438 (Miss. 1992)). Jay has failed to meet this burden.

Jay asserts that his "trial counsel provided ineffective assistance to the Appellant pre-trial by not adequately pursuing matters of recusal, suppression, and competency, and post-trial by not filing and pursuing any appeal of right for the Appellant." (Appellant's Brief p. 45). Specifically Jay wholly failed to show how these alleged deficiencies prejudiced his case.[3] His only argument with regard to prejudice is stated as follows in his brief: "The resulting prejudice included two appeal proceedings, a three-year delay in hearing a motion for new trial, no pre-trial suppression, the failure to procure the informant, and big jail time." (Appellant's Brief p. 46).

Defense counsel's alleged pre-trial deficiencies certainly caused no prejudice. Counsel's failure to file the proper affidavit in order to seek recusal did not prejudice Jay. As set forth in detail in the State's arguments with regard to Issue IV, the motion to recuse would have been properly denied on the merits even if the proper affidavit had been filed. *See Williams v. State,* 971 So.2d 581, 593 (Miss. 2007) (holding that "[i]t cannot be said that defense counsel was deficient in not making a request that could properly have been denied"). Likewise, as shown above in this brief, Jay's motion to suppress was properly denied. Additionally, defense counsel's alleged inadequate pursuit of competency issues also cause no prejudice as Mississippi law clearly establishes that Jay was not entitled to a competency hearing. Moreover, there is nothing in the record indicating that

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[3] The State is not conceding that Jay's attorney was deficient in his representation of Jay. The State is simply choosing to focus, for sake of brevity, on Jay's failure to satisfy the second prong of the *Strickland* analysis in order to show that his counsel was not ineffective.

Jay would have been declared incompetent had a hearing been held. Thus, no prejudice can be shown.

With regard to defense counsel's alleged post-trial deficiencies of failing to pursue an appeal, no prejudice was established as Jay's conviction and sentence are now being appealed. Jay did not lose his right to appeal his conviction and sentence as a result of his counsel's representation.

In order for any of these alleged deficiencies to constitute ineffective assistance of counsel, Jay must be able to show that but for his counsel's deficiencies the outcome of his trial would have been different. Jay has failed to do so.

## VII. THE APPELLANT IS PROCEDURALLY BARRED FROM RAISING THIS ISSUE ON APPEAL AS THE ISSUE WAS NOT PRESENTED TO THE TRIAL COURT; HOWEVER, PROCEDURAL BAR NOTWITHSTANDING, THE INDICTMENT WAS PROPER AND VALID.

Jay contends that "the indictment was enhanced improperly." (Appellant's Brief p. 50). However, Jay is procedurally barred from raising this issue as he never raised an objection at the trial court level. *See King v. State*, 739 So.2d 1055, 1058 (Miss. Ct. App. 1999).

Procedural bar notwithstanding, the issue is without merit. Jay relies on *Hentz v. State*, 852 So.2d 70 (Miss. Ct. App. 2003) to support his argument and simply states that in *Hentz*, "the defendant claimed that enhancement terms should have been included in the charging terms of the principal offenses, not as a separate count." (Appellant's Brief p. 50). He then argued that the Court of Appeals simply held that the matter was waived and that Jay's counsel failed to object and Jay was not present to waive the issue so this Court should "reverse for resentencing on this issue." (Appellant's Brief p. 50). The *Hentz* Court, however, after noting that the matter was waived, went on to hold that "notwithstanding this Court's finding of waiver, we hold that the indictment met the requirements of URCCC 7.06 and is therefore considered a valid indictment." *Id.* at 76.

In the *Hentz* case, the indictment set forth the primary offenses in Counts I - III and set forth the State's intent to charge the defendant as a habitual offender in Count IV. Similarly, in the case at hand, the indictment set forth the primary offenses in Counts I - IV. (Record p. 3 and 5). Just under Count IV, the indictment reads as follows:

SECOND DRUG OFFENDER

> And he, the said Douglas E. Jay, Jr. then and there having been convicted once previously of the felony crime of Count One - Possession of More than One Ounce of Marijuana and Count Two- Possession of Methamphetamine offenses under Section 41-29-139(c)(2) and Section 41-29-139(c)(1), Miss. Code Ann., (1972), the Mississippi Uniform Controlled Substances Law, said previous conviction having occurred on the 27th day of November, 1996, in Cause No. 4619 in the Circuit Court of Newton County, Mississippi, and from said conviction Douglas E. Jay, Jr. was sentenced in Count One to serve a term of two and one-half years and in Count Two was sentenced to serve a term of two and one-half years, this sentence to run concurrent with the sentence imposed in Count One, in the Mississippi State Penitentiary; he, the said Douglas E. Jay, Jr., therefore being a second offender pursuant to Section 41-29-147, Miss. Code Ann. (1972), against the peace and dignity of the State of Mississippi.

(Record p. 5). The *Hentz* Court held that "while inartfully drafted, it is clear that the State intended to, and did incorporate the enhancement language into each of the three actual charging sections, and in so doing properly concluded the indictment with the language 'against the peace and dignity of the State of Mississippi.'" *Id.* Likewise, the indictment at issue here incorporated the enhancement language into the counts set forth above and also concluded with the proper language.

Moreover, the indictment met the requirements of both Uniform Circuit and County Court Rules 7.06 and 11.03. Rule 7.06 reads as follows:

> The indictment upon which the defendant is to be tried 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. Formal and technical words are not necessary in an indictment, if the offense can be substantially described without them. An indictment shall also include the following:
> 1. The name of the accused;
> 2. The date on which the indictment was filed in court;

3. A statement that the prosecution is brought in the name and by the authority of the State of Mississippi;
4. The county and judicial district in which the indictment is brought;
5. The date and, if applicable, the time at which the offense was alleged to have been committed. Failure to state the correct date shall not render the indictment insufficient;
6. The signature of the foreman of the grand jury issuing it; and
7. The words "against the peace and dignity of the state."
The court on motion of the defendant may strike from the indictment any surplusage, including unnecessary allegations or aliases.

Rule 11.03(1) reads as follows:

> In cases involving enhanced punishment for subsequent offenses under state statutes:
>
> 1. The indictment must include both the principal charge and a charge of previous convictions. The indictment must allege with particularity the nature or description of the offense constituting the previous convictions, the state or federal jurisdiction of any previous conviction and the date of judgment.

Furthermore, the Mississippi Court of Appeals held that "the proper test is whether the charging instrument provides 'enough information to the defendant to identify with certainty the prior convictions relied upon by the State for enhanced punishment.'" *Rufus v. State,* 746 So.2d 851, 852 (Miss. Ct. App. 1998) (quoting *Benson v. State*, 551 So.2d 188, 196 (Miss.1989)). Therefore, as the indictment at issue here clearly met the requirements of Rule 7.06, Rule 11.03 and provided sufficient information to Jay to identify that the State intended to charge him as a subsequent offender and which prior convictions they were relying upon to establish that he was a subsequent offender, the indictment is valid.

## VIII. THE APPELLANT IS PROCEDURALLY BARRED FROM ARGUING CUMULATIVE ERROR AS THE ISSUE WAS NOT BROUGHT BEFORE THE TRIAL COURT.

Finally, Jay argues that "the cumulative effect of the errors at trial and post-trial denied to the Appellant his fundamental right of due process of law and constituted plain error." (Appellant's Brief p. 50). However, he is procedurally barred from raising this issue on appeal as it was not raised

before the trial court. *See Gibson v. State,* 731 So.2d 1087, 1098 (Miss. 1998); *Maldonado v. State,* 796 So.2d 247, 260 -261 (Miss. Ct. App. 2001); and *White v. State,* 958 So.2d 241, 246 (Miss. Ct. App. 2007).

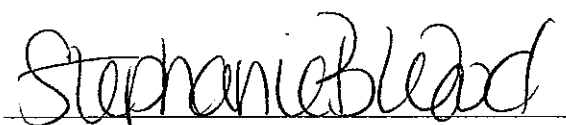
Procedural bar notwithstanding, "where there is no reversible error in any part, [there can be] no reversible error to the whole." *Doss v. State*, 709 So.2d 369, 401 (Miss.1996) (citing *McFee v. State*, 511 So.2d 130, 136 (Miss.1987)). Thus, as the trial court committed no errors, Jay's cumulative error argument is without merit.

## CONCLUSION

The State of Mississippi respectfully requests that this Honorable Court affirm the conviction and sentence of Douglas Jay, Jr. as the trial court committed no reversible errors.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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## CERTIFICATE OF SERVICE

I, Stephanie B. Wood, 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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