IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

THURMAN KIRKWOOD A/K/A MICKEY — APPELLANT

VS. — NO. 2008-KA-1349-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: W. GLENN WATTS
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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VERSUS — NO. 2008-KA-1349-COA

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BRIEF OF APPELLEE

PROCEDURAL HISTORY:

On January 28, 2008 , Thurman Kirkwood, "Kirkwood" was tried for burglary, grand larceny, possession of firearm by a convicted felon and felony fleeing an officer in a vehicle as an "habitual offender" before a Coahoma County jury, the Honorable Charles E. Webster presiding. R.1-2. Kirkwood was found guilty on all counts. He was given concurrent sentences of twenty five, ten, ten and five years in the custody of the Mississippi Department of Corrections. R. 112; C.P. 12-23. From these convictions as an habitual offender, he appealed to the Supreme Court. C.P. 34.

ISSUES ON APPEAL

I.
WERE PRIOR CONVICTIONS RELEVANT?

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DID CUMULATIVE ERRORS DENY KIRKWOOD A FAIR TRIAL?

STATEMENT OF THE FACTS

On January, 2008 , Kirkwood was indicted by a Coahoma County Grand Jury for burglary, grand larceny, felony fleeing an officer in vehicle and possession of a firearm by a previously convicted felon on October 11, 2007. C.P. 3-5.

On January 28, 2008 , Kirkwood was tried for burglary, grand larceny, felony fleeing and possession of firearm by a felon as an habitual offender before a Coahoma County jury, the Honorable Charles E. Webster presiding. Kirkwood was represented by Mr. Allan D. Schackelford. R.1.

Mr. Reginald Smith testified that on October 11, 2007, he saw someone driving "a blue and grey" van near his Uncle's house. R. 12. His uncle was Mr. W. C. Smith. The van was identified as the one shown in photographic exhibit S-1. R. 12, 13. Smith believed it was Kirkwood. R. 15. He knew Kirkwood from previous contact with him in the neighborhood.

Mr. W. C. Smith testified that his trailer was burglarized. This was on October 11, 2007. It was locked when he left for Memphis. R. 18. When he came home, his lock had been broken, and

the back door was open. R. 19. A briefcase, some radios, and some rifles were missing from his trailer. R. 19.

Mr. Smith testified that earlier in the day Kirkwood had come by his trailer "in a blue and gray van." R. 25. Kirkwood wanted to sell him "an air wrench." He said he needed work. Smith loaned him some ten dollars for gas. R. 17. Smith testified that Kirkwood was alone at that time. R. 18.

Smith informed Kirkwood he was going to Memphis. He would be back later in the day. Kirkwood called Smith on a phone later in the day. He asked him: "where I was and asked was I on the way back." R. 17.

Mr. Smith testified that four rifles and one of his radios were later returned to him. They were returned by law enforcement at a later date. He identified state's exhibit 3 and 4 as depicting one of his radios as well as his four missing rifles. R. 19-20. They were taken from his trailer home.

Mr. Roy Banks testified that on October 11, 2007, he discovered that his van was missing. It was a blue and silver GMC van, license "986 CWB." R. 29. He testified to having paid some "eight thousand dollars" for the van "several years ago." R. 32; 36. He also testified that it still had "a good motor and transmission." R. 33. He testified that the vehicle shown in state's photographic evidence S-1 was his van. It was returned to him a week or so later by law enforcement in Coahoma County. R. 32.

Officer Steven Poer with the Clarksdale Police Department testified to searching for a stolen GMC Van, license "896 CMD." He located it. Poer identified Kirkwood as the person he saw driving the van. R. 39-40. He did not have any doubt in his mind that Kirkwood was the person driving the van. R. 48.

After Officer Poer activated his lights and siren, the van increased its speed, trying to avoid being stopped. The van exceeded the speed limit in town. Poer testified that it went some 80 to 100 miles an hour on Highway 322. R. 40. The van ran a stop sign and almost struck a tractor trailer before it stopped.

Officer Poer testified to seeing Kirkwood flee the van on foot. He pursued him into the woods. R. 41. Kirkwood was found hiding in a field near some trees. R. 41. Inside the van was located a briefcase, rifles and some scanners. R. 43.

Officer Poer identified state's photographic exhibit 1-4 as the captured van, as well as the rifles found inside the van when Kirkwood fled on foot. R. 42-44.

Officer Poer testified that the only other person present in the van was a female. R. 45; 47.

Officer Ramirez testified to discovering that Kirkwood was the person apprehended. This was after a high speed chase of what was believed to be a stolen van. R. 50. There was a woman with Kirkwood but she was not arrested. Inside the van was located what was believed to be contraband.

Ramirez's knowledge that Kirkwood had been previously convicted of a felony was based upon his personal knowledge. There was no objection from Kirkwood. The objection to the accompanying judgement of conviction was to its "relevancy." R. 55. It was made outside the presence of the jury.

The offer to stipulate was general and not specific. R. 53.

See photographic exhibit 1 through 4 for views of Mr. Bank's blue and grey van that was stolen. The license plate "896 CMD," radios and four rifles found in the Van with Kirkwood are clearly visible.

At the conclusion of the prosecution's case, the trial court denied a motion for a directed verdict on all four counts. R. 71.

Mr. Kirkwood testified in his own behalf. R. 73-88. In Kirkwood's testimony, he confessed to being "a drug addict." R. 74. He testified that he went to Smith's trailer with others but allegedly only to buy some cocaine. He denied breaking in the house. He claimed his companions broke and entered but he merely used drugs with them. While he admitted that he was in the van that was pursued, he denied knowing that it contain any stolen property, radios, or rifles. And he denied that he was driving the van when it was pursued, and stopped. He merely admitted to fleeing with some other occupants, and throwing away the rest of the cocaine.

On cross examination, Kirkwood admitted that in his statement to investigator Bee, he did not say anything about "buying drugs from anybody," as he had repeatedly mentioned in his testimony. R. 83. Kirkwood also admitted that he had not attempted to get his alleged companions at the scene of the crimes to testify on his behalf. R. 83. He also admitted that he did not report any burglary to Mr. W.C. Smith even though he claimed to be his friend. R. 84. Nor did he report any breaking and entering of the trailer to the police. R. 84.

On cross examination, Kirkwood admitted that he was a convicted felon but blamed it on his "doing drugs." R. 85. After Kirkwood mentioned committing "a great deal of crimes from doing drugs, " he was asked "what kind of crimes." He then admitted to "a few burglaries." R. 85. There was a general objection to testimony about "going into prior crimes." R. 85.

The trial court denied requested circumstantial evidence jury instructions. The court found there was "direct evidence" in the form of law enforcement eye witness testimony as well as in the form of Kirkwood's admissions to deny such a request. R. 95-96.

There were no objections made by the defense during closing argument. R. 111.

Mr. Kirkwood was found guilty on all counts. He was given twenty five, two ten and five year concurrent sentences without parole in the custody of the Mississippi Department of Corrections. R. 112; C.P. 12-21.

Kirkwood's J.N.O.V. did not provide grounds for any error based upon a proposed stipulation, or any M.. R. E. 404 or M. R.E. 609 related issues. C.P. 24-25. From the trial court's denial of a J. N. O. V., Kirkwood appealed to the Supreme Court. C.P. 34.

SUMMARY OF THE ARGUMENT

1. The record reflects that this issue was waived for failure to object on the same grounds being argued on appeal. **Burns v. State** , 729 So. 2d 203, 219 (Miss 1998). The objection to the accompanying judgement of conviction was to "relevancy." This was at a bench conference, and not before the jury. R. 55. M. R.E. 404(b) and 609 evidentiary issues along with the alleged need for a limiting instructions were never raised with the trial court. R. 91-102; C.P. 24-25.

The motion to stipulate was general and not specific. R. 53. In addition, the record reflects that testimony from Officer Ramirez was relevant and material. Ramirez testified that he assisted in the pursuit of what was believed to be "a stolen vehicle." R. 49-50. **Williams v. State**, 991 So. 2d 593 (¶44-¶50) (Miss. 2008). Ramirez discovered that Kirkwood was the person captured after a high speed chase. R. 50. Inside the van were four rifles, radios and a briefcase. Ramirez's knowledge that Kirkwood had been previously convicted of a felony was based upon his personal knowledge. He did not mention any particular felony in his testimony. R. 53-54.

It was necessary for the prosecution to provide evidence that Kirkwood was a convicted felon in possession of a fire arm based upon his indictment.

2. The record reflects that Mr. Kirkwood's confessional testimony focused upon his being a cocaine "drug addict." R. 74. However, he also testified to being present when others allegedly committed the crimes for which he was charged. He testified that he was present but alleged only involved in buying and using drugs, a different uncharged felony. R. 75. He also testified that "his prints", unlike those of his alleged companions, were not on any of the stolen items. R. 78.

On cross examination, he testified that "the prints" of other men allegedly with him would have been found if proper "procedures" were used. R. 85. After admitting that he was knowledgeable about police "procedure," he was asked about his prior felonies. There was no objection. Kirkwood admitted to committing "a lot of crimes" because he was a "drug addict." R. 85. When asked "what kind of crimes," he admitted to "a few burglaries." R. 85. There was a general objection to "going into his prior crimes." R. 85.

The appellee would submit that Kirkwood's confessional testimony "opened up" relevant clarification questions about Kirkwood's prior convictions. R. 73-88. **Gill v. State**, 485 So. 2d 1047, 1051 (Miss. 1986).

The issues of impeachment by use of prior crimes under M. R.E. 609 or improper character evidence under M. R. E. 404(b) were not raised with the trial court. R. 53; 71; 85; 91; C.P. 24-25. And there was no request for a limiting instruction. R. 91-106.

3. & 4. The record reflects there was credible, substantial corroborated evidence in support of Kirkwood's conviction for grand larceny. Officer Poer identified Kirkwood as the person driving Mr. Banks' stolen van. R. 41. He also identified the radio and four rifles as having come out of the

stolen van.

While Mr. Banks could not testify to exactly when he bought the van, he testified that he paid "$8,000.00" for the van "several years ago." R.36. He also testified that the van "got a good motor and transmission." R. 33. Officer Poer testified that the stolen van Kirkwood was driving was traveling "between 80 and 100 miles an hour." R. 40.

If the van was driving well the day it was stolen, and exceeding 80 miles per hour, the appellee would believe it is reasonable to infer that the van was worth more than the five hundred dollar minimum necessary for grand larceny. **Smith v. State** 881 So.2d 908, 910 -911 (¶10-¶11) (Miss. App. 2004).

5. The record reflects the jury was properly instructed. C.P. 44-56. There was "direct evidence" in support of Kirkwood's numerous convictions. This included law enforcement eye witness testimony, as well as "admissions" by Kirkwood. Officer Poer testified to seeing Kirkwood driving a stolen van which contained the items reported stolen from Mr. W.C. Smith. R. 48. Officer Poer also testified to seeing Kirkwood driving the van over 80 miles an hour in a dangerous manner while being pursued with blue lights. R. 40-41.

Kirkwood admitted to being at the scene of the burglary, being in the stolen van with the stolen weapons. He admitted that the driver of the van panicked when he fled from the police car in pursuit with blue lights and siren. R. 73-88.

The record reflects there was sufficient direct evidence for denying circumstantial evidence instructions. Where there is "direct evidence" such as eye witnesses, confessions or some "admission" by a defendant in a case, circumstantial evidence instructions are not required. **Garrett v. State** 921 So.2d 288, 292 (¶20-21¶)(Miss. 2006).

6. The record reflects that peremptory instructions were properly denied on all counts. There was testimony indicating that Kirkwood kept clothes at his trailer, slept there most of the time and intended to reside there in the future. R. 25; 27-28. **Gillum v. State**, 468 So. 2d 856, 859-860 (Miss. 1985).

7& 8. There were no errors, procedural or substantive, that interfered with Kirkwood's receiving a fair trial by a jury of his peers. The record reflects that he received a fair trial with competent counsel before a jury of his peers. He exercised his right to testify in his own defense. **Coleman v. State**, 697 So. 2d 777, 787 (Miss. 1997).

ARGUMENT

PROPOSITION I & II.

THE RECORD REFLECTS THAT THIS ISSUE WAS WAIVED. IN ADDITION, KIRKWOOD TESTIFIED TO COMMITTING CRIMES AS A DRUG ADDICT, WHICH OPENED UP TESTIMONY ABOUT CONVICTIONS HE ATTRIBUTED TO HIS ADDICTION.

Mr. Kirkwood argues that the trial court erred in admitting testimony about his prior convictions. Kirkwood believes that he did not "open up" relevant testimony about his prior felonies. His counsel was willing to stipulate to these convictions. In addition, he argues the trial court did not properly make a record in keeping with **Peterson v. State**, 518 So. 2d 632, 636 (Miss. 1987) and M. R. E. Rule 609 impeachment by conviction or grant him a limiting instruction.

Kirkwood believes that the similarity between the burglary in this case to his prior burglary convictions in Florida and Mississippi resulted in prejudice to his ability to defend himself against the charges. Appellant's brief page 8-16.

The appellee would submit that these related issues were waived for failure to raise them with the trial court on the same grounds being raised on appeal.

The record reflects there was no objection to Officer Ramirez's testimony about his knowing that Kirkwood had a prior felony. R. 53. This testimony was relevant for the jury to understand how Kirkwood became a suspect in the felony fire arm possession charge. This was in addition to the related burglary, grand larceny, and felony fleeing law enforcement charges.

Nor was there an objection to Kirkwood being asked during his testimony if he was "a convicted felon." R. 53; 85. The objection came only after Kirkwood, in keeping with his testimony on direct examination, testified that: "I've committed a lot of crimes. I was a drug addict." R. 85. The objection came after Kirkwood testified that he had been convicted of "all kinds" of crimes. He was then asked about "what kind of crimes" he had committed based upon his being "a drug addict." R. 85. Therefore, the appellee would submit that it was Kirkwood, and not the prosecution, who made his prior felonies relevant for understanding his testimony about being a felon but not on the indicted charges. R. 85.

Nor was impeachment under M. R. E. 609 or improper character evidence under M. R. E. 404(b) included in Kirkwood's Motion For a JNOV. C.P. 24-25.

In **Burns v. State** , 729 So. 2d 203, 219 (Miss 1998), this court stated that "an objection can not be enlarged" upon on appeal.

> In **Conner**, this Court held that an objection on one or more specific grounds constitutes a waiver of all other grounds. **Id** at 1255 (citing **Stringer v. State**, 279 So. 2d 156, 158 (Miss. 1973). See also **Brown v. State**, 682 So. 2d 340, 350 (Miss 1996), It has long been the finding of this Court that "an objection at trial cannot be enlarged in a reviewing court to embrace an omission not complained of at trial." **Brown**, 682 at 350 (citing **McGarrh v. State**, 249 Miss. 247, 148 So. 2d 494, 506 (1963). This claim is procedurally barred.

> Objection on one or more specific grounds at trial constitutes a waiver of all other grounds for objection on appeal. **Burns v. State**, 728 So.2d 203 (Miss. 1998).

Without conceding that these issues were waived, the appellee believes the record indicates they are also lacking in merit. The record, which we will cite below, indicates to the appellee , that Kirkwood's confessional testimony "opened up" questions about his credibility, which included questions about his prior felony convictions. R. 73-82.

Officer Ramirez testified to finding another person in the van with Kirkwood. This was after a dangerous high speed chase. R. 40-41. Ramirez assisted in the pursuit of what law enforcement believed was a stolen vehicle. R. 49. The other person present was a female. However, it was determined that the female "couldn't hear or talk." On the other hand, Ramirez was familiar with Kirkwood from previous professional experience. Ramirez was involved in Kirkwood's apprehension for a previous felony for which he had been convicted. The record reflects no objection to Officer Ramirez's testimony about how he knew the defendant. And the offer to stipulate was general not specific. R. 53.

> Q. Was there anyone else out there that was in the van?
>
> A. Yes, sir, there was a young lady. She was in custody also when I got there. But we weren't able to--weren't able to get any information from her because she couldn't hear or talk.
>
> ...
>
> Q. Did you have any knowledge of her involvement in this incident?
>
> A. No, sir.
>
> Q. **You also stated that you were familiar with the defendant. Are you aware if the defendant has ever been convicted of a felony crime before?**
>
> A. **Yes, sir.**

Shackleford: And we so stipulate that he has.

Kirkham: Your Honor, the state would still submit what has been marked S-5(a) and S-5(b), a judgment and notice of criminal disposition. (Bench Conference occurred, outside presence of jury.) R. 52-54. (Emphasis by appellee).

In **Williams v. State**, 991 So. 2d 593 (¶44-¶50) (Miss. 2008), the Court held testimony about how Williams was arrested in a stolen car was relevant to providing the jury with "a complete story." This would be an account of the events leading up to his arrest. It also provided evidence for showing his connection to a series of related felonies.

In **Gilley v. State**, 748 So. 2d 123, 126 (Miss. 1999), the Court stated that a trial court will not be reversed where there was no abuse of discretion in admitting evidence during a trial.

> This Court has held that 'a trial judge enjoys a great deal of discretion as to the relevancy and admissibility of evidence. Unless the judge abuses this discretion so as to be prejudicial to the accused, the Court will not reverse this ruling.' **Turner v. State**, 732 So. 2d 937, 946 (Miss. 1999)(quoting **Fisher v. State**, 690 So. 2d 268, 274(Miss. 1996).

In addition, Kirkwood testified in his own behalf. R. 73-88. Kirkwood testified about being "a drug addict." R. 74. He was using "crack cocaine" on the day of the commission of the crimes. R. 74. Kirkwood also testified that he allegedly bought the "cocaine" from the burglary victim, Mr. W. C. Smith. R. 75. He also testified that his "prints" were not on any of the stolen goods. R. 81.

Mr. Kirkwood claimed that other men, neither of whom had been subpoenaed to testify, brought the stolen van to him. He then drove it to W.C. Smith's trailer to purchase cocaine. According to Kirkwood, these men broke into Smith's home. He claimed that later they "had a blanket with something in it." R. 77. This was when they allegedly came out of the trailer, while he walked around outside.

He testified that "my prints are not on no guns." R. 81. He also said there were "no prints"

on the captured radios. R. 81. He testified that police did not follow proper "procedure" in his case.

A. **If they took the prints they would have found Earnest Wood's prints on the gun; not my prints. If they took the prints, if they followed the procedure.**

Q. **You're an expert on police procedure now?**

A. **No, sir. I know that much, sir.**

Q. Okay. Well you are a convicted felon, are you not?

A. Yes, sir, I am.

Q. In fact, you've committed burglary before, haven't you?

A. **I've committed a lot of crimes. I was a drug addict.**

Q. I'm sorry?

A. **I committed a great deal of crimes from doing drugs.**

Q. **What kind of crimes?**

A. **All kinds.**

Q. **Well why don't you list a few for us?**

A. **I committed a few burglaries.**

Shackleford: I object to this. I don't think that going into his prior crimes–

Court: **I'm going to overrule. He opened it up.** R. 86. (Emphasis by appellee).

The record reflects there was no objection to Kirkwood's admission to "I've committed a lot of crimes. I was a drug addict." R. 85. When the objection occurred, it was a general objection, and not based on M. R. E. 609 or 404(B).

Kirkwood's confessional defense was about being a crack cocaine "drug addict." R. 74. According to his testimony, he was merely with the wrong persons at the wrong place. He admitted

to being at the place burglarized but only to committing other crimes for which he was not charged, or being tried. He admitted that he was involved in buying and using cocaine with other alleged but not subpoenaed felons. He admitted to being in the van but not knowing anything about the stolen guns and radios. R. 73-88.

His defense was also that the police had not used proper procedures. R. 85. Had they done so, they would have discovered that his fingerprints were not any of the stolen items found in the van. This was the van in which he admitted to being a passenger rather than the driver when stopped by law enforcement.

On cross examination, Kirkwood admitted that in his initial statement to law enforcement he did not mention buying or using drugs as a defense to the charges.

> Q. That's your signature. Okay. Now in this statement you don't say a word one about buying drugs from anybody, do you?
>
> A. No, I didn't say that at that time.
>
> Q. But you're saying that now?
>
> A. Yes, telling the truth.
>
> Q. And, of course, you've got Mr. Larry Mixon and Earnest Woods here to testify on your behalf, don't you?
>
> A. No, they're the ones that did it.
>
> Q. So they're not here to corroborate any of this, are they?
>
> A. The police, they didn't go find them. R. 83.

On cross examination, Kirkwood contradicted himself. He testified he did not commit any crimes. This was after testifying on direct to buying, using and sharing crack cocaine with others at the place where the burglary occurred.

Q. So just so we can be clear, you expect the jury to believe that you were running down the highway, high speed pursuit, in a stolen van with stolen guns in the back, high and drunk, but you didn't have anything to do with any of these crimes?

A. **I did not have anything to do with any crimes.** I was not driving the van down the highway speeding. Earnest Woods was driving down the highway speeding. He's the one that got away. I got away, too. I had got away myself. I got away as well. They didn't find me right away. They had to come look.

Q. You decided to turn yourself in?

A. No, I was just laying there. They got me. He got away. He kept going. R. 87-88. (Emphasis by appellee).

In **Hobson v. State**, 730 So. 2d 20, 24-25 (Miss. 1998), the Court stated that an appellant can not complain about testimony which he himself introduced into evidence.

> It is true that a party cannot open the door to admission of hearsay evidence. **Murphy v. State**, 453 So. 2d 1290, 1293-94 (Miss. 1984). However, in this case, the defendant elicited the hearsay himself. 'It is axiomatic that a defendant cannot complain on appeal concerning evidence that he himself brought out at trial...As the stated pithily in **Reddix v. State**, 381 So. 2d 999, 1009(Miss.), cert. denied, 449 U.S. 986, 101 S.Ct. 408, 66 L. Ed 2d 252(1980): 'If the defendant goes fishing in the state's waters, he must take such fish as he catches.' **Fleming v. State**, 604 2d. 280, 289 (Miss. 1992) (internal citations omitted)(holding that defendant waived error of admission of hearsay testimony when he elicited it himself. We find no error resulting from the admission of Officer Winstead's testimony in this case.

In **Gill v. State**, 485 So. 2d 1047, 1051 (Miss. 1986), the court found that cross examination "opened up" questions related to other wrongs. By inquiring on cross-examination about a conversation between Mary Gill and the victim, Lynn Gill, Gill opened the door. It was relevant for the jury to get an understanding of the context in which the conversation had occurred. As stated:

> Moreover, the objectionable testimony was a continuation of a conversation brought in by the defense in an attempt to show the prosecutrix's hostility toward her father and once having allowed a partial view of the circumstances, the prosecution was rightly allowed to include the remainder of the mother's conversation with the daughter, including accusations against the father of prior sexual assaults. The trial court told the appellant that he could not "shut the door". Where one side opens the

door, the other may come in and develop that point in greater detail. See **Jefferson v. State**, 386 So. 2d 200, 202 (Miss. 1980); Cf. **Simpson v. State**, 366 So. 2d 1085, 1086 (Miss. 1979).

In **DeLoach v. State** ,722 So.2d 512, 520 (Miss. 1998), the Supreme Court found that admissions of DeLoach's prior convictions was harmless error. It was "harmless error" where there was overwhelming evidence of guilt.

> ¶ 34. This Court finds that the admission of DeLoach's previous conviction into evidence without a determination on the record under Rule 609(a)(1), that the probative value of the evidence outweighed its prejudicial effect, was erroneous. However, the contested testimony constitutes harmless error in the instant case because of the overwhelming evidence of guilt. This Court has held that the basic test for harmless error in the federal constitutional realm goes back to **Chapman v. California**, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

In **Brown v. State**, 890 So. 2d 901, 912 (Miss. 2004), the Court abandoned the **Smith v. State**, 656 So. 2d 95,100 (Miss. 1995) requirement that a trial court grant a limiting instruction. This would be after a M. R. E. 404(b) admission. The record reflects no request for a limiting instruction. R. 91-102.

> Today we abandon Smith's requirement that a judge issue a sua sponte limiting instruction and return to the clear language of Rule 105. The rule clearly places the burden of requesting a Rule 404(b) limiting instruction upon counsel. The rule is controlling, and to the extent that Smith and its progeny contradict that plain language they are overruled.

In **Sawyer v. State**, 2008 WL 2582530 (Miss. App. 2008), relied upon by Kirkwood, there was a motion to severe in limine , an objection to admissions of crimes similar to the ones for which Sawyer was being tried as well as a request for a limiting instruction.

The appellee would submit that the record reflects, this issue was waived for failure to make a contemporaneous objection, and for not raising it with the trial court on the same grounds being raised on appeal. R. 53-55; 71; 85; 91; C.P. 24-25.

It is also lacking in merit because, as shown with cites to the record, Kirkwood's defense involved a confession of committing crimes caused by his being "a drug addict." R. 74. It also involved allegations of improper police investigative techniques. R. 85.

One can not confess to felony crimes openly without expecting the prosecution to follow up with questions about what kind of crimes. Particularly would this be true, where some of these admitted felonies allegedly occurred at the same time and place as the indicted felonies for which one is being tried.

The appellee would submit that these related issues were not only waived, but are also lacking in merit.

PROPOSITION III & IV.

THIS ISSUE WAS WAIVED. AND THE RECORD REFLECTS SUBSTANTIAL EVIDENCE IN SUPPORT OF KIRKWOOD'S CONVICTION FOR GRAND LARCENY.

Kirkwood argues that there was insufficient evidence in support of his grand larceny conviction. He believes there was insufficient evidence as to the actual value of the van that was stolen. He believes the lack of evidence as to its value at the time it was stolen was critical. This was sufficient for undermining any confidence that the value of the van was sufficient for meeting the $500.00 statutory limit for grand larceny. Appellant's brief page 17-22.

The record reflects that this market value issue was never raised with the trial court or in Kirkwood's motion for a JNOV or New Trial. R. 70; 88; C.P. 24-25.

It was waived for failure to raise it with the trial court on the same grounds raised on appeal. **Haddox v. State**, 636 So. 2d 1229, 1240 (Miss. 1994).

Officer Poer testified that he pursued the driver of the van. It was "a blue and grey" CMC

safari with "896 CMD" license plates. R. 39. The driver refused to yield. During a high speed chase, the van reached speeds "between eighty to one hundred miles an hour."R. 40

Officer Steven Poer testified to seeing Kirkwood driving the reported stolen van. He saw his face as he passed him on the highway. He had no doubt in his mind that Kirkwood was driving the missing van. R. 48.

Q. Is there any doubt in your mind as to who was driving this vehicle?

A. No, sir. 48.

Mr. Roy Banks testified that he paid "eight thousand dollars" for the van. R. 32. He was the owner of the stolen van. He testified that this purchase occurred "several years ago." R. 36. He also testified that at the time of trial he was still using the van. It had "a good motor and transmission," meaning a functional, usable van.

Q. How much is that van worth?

A. Eight thousand dollars.

Q. How do you know that?

A. Because I bought it.

Q. That's how much you paid for it?

A. Yes, sir. R. 32-33.

...

Banks also testified that he was still driving the van at the time of trial.

Q. It still works?

A. Absolutely. Got a good motor and transmission. R. 33.

On cross examination, Burns admitted that he did not know exactly when he bought the van.

His wife assisted him with business matters. Burns had limited educational experiences, and was working at a Casino at the time.

> Q. You testified that you gave $8,000.00 for the van. When did you buy it?
>
> A. Several years ago.
>
> Q. And at that time you gave $8,000.00. Is that right?
>
> A. At that time. Because when I bought the van it was in good condition, I like the van.
>
> Q. –I'm not asking–that's what you gave several years ago. Is that right?
>
> A. When did I buy the van. I have no recollection or records or nothing, man. I do not know. My wife take care of all of my when and wheres and what time and what dates. Sir, I just do not write stuff down. I'm not that educated, you know. But I do have a lot of common sense. Thank you. R. 37.

In **Smith v. State** 881 So.2d 908, 910 -911 (¶10-¶11) (Miss. App. 2004), the court found there was sufficient evidence for inferring the approximate market value of stolen "auto rims." It was enough to meet the statutory minimum which at that time was $250.00. In that case, as in this, there was testimony about the purchase price of the rims, and a lack of testimony about present market value.

> ¶10. We also find that Smith's argument-that the trial court erred in allowing Susan's husband, Sammy, to testify regarding the value of the rims because he did not have a receipt of purchase, nor was he qualified as an expert-is without merit. Although Smith contends that the trial court erred in allowing testimony of the value of the rims, our examination of the record reveals that the witness testified as to the purchase price, not the value of the rims, as Smith argues. Sammy testified that he paid between three and four thousand dollars for the rims, but he did not testify as to their current value. Therefore, we find no error in the admission of Sammy's testimony, for he was entitled to testify to things within his personal knowledge.
>
> [3] ¶ 11. We agree, however, with Smith that the prosecution failed to present any direct evidence as to the value of the rims. However, Sammy testified that he paid between three and four thousand dollars for the rims. Although this was not direct

> testimony of the value of the rims, we find that it circumstantially provided a basis from which the jury could infer that the rims were worth at least $250 because of the amount of the purchase price. While this is not the strongest evidence that could have been, and should have been presented, we cannot say that no fair-minded juror could find Smith guilty on this evidence or that allowing the verdict to stand will amount to an unconscionable injustice.

In **Cooper v. State** 639 So.2d 1320, 1324 (Miss.1994), the Supreme Court found there was sufficient evidence for meeting the $100.00 minimum for grand larceny at that time. It was necessary to infer from the original cost to the cost at the time the flowers were stolen.

The record reflects that this issue was waived for failure to raise it with the trial court. In addition, it is lacking in merit.

PROPOSITION V

THE RECORD REFLECTS THAT THE JURY WAS PROPERLY INSTRUCTED UNDER THE FACTS OF THIS CASE.

Mr. Kirkwood believes that the trial court erred in denying him circumstantial evidence instructions. He believes that he was entitled to circumstantial evidence instructions.

Kirkwood believes there was no direct evidence that he was the person who broke into the trailer. He thinks there was only indirect evidence. These means to him no eye witnesses or confessions. He thinks this should have resulted in circumstantial evidence instructions for the burglary of Mr. W.C. Smith's trailer and for his possession of a firearm as a convicted felon. Appellant's brief page 22-24.

To the contrary, the record reflects that Officer Poer testified that he saw Kirkwood driving a blue and grey van reported as stolen. R. 39-41. Poer testified that he witnessed the driver of the van run a red light, and almost strike another vehicle. This was while Poer was actively pursuing the

van with his blue lights activated.

When the van stopped, Poer testified that Kirkwood "exited the van and ran into the wood line..." R. 41. Officer Poer and Ramirez testified to seeing what was reportedly four stolen rifles, some radios, and a briefcase inside the van. R. 43; 51-52.

Mr. W.C. Smith testified that Kirkwood was present at his trailer asking for money. This was the same day he returned to find his trailer had been burglarized. Kirkwood had borrowed money from him earlier in the day. Kirkwood also knew that Smith would be away from his trailer in Memphis for most of the day. R. 17. When Smith returned, his door lock was broken, and a briefcase, four rifles and some radios were missing. R. 19.

The colloquy over jury instructions was as follows:

> ...As concerns the felon in possession of a firearm, of course there's no issue as to his status as a convicted felon.
>
> Shackelford: No.
>
> Court: He admits that. The only question has to do with his possession of the firearms. The testimony from the officer is that he observed him driving the vehicle and these weapons were found inside the vehicle. Even though it may be disputed, aspects of it may be disputed, that does seem to the court to constitute direct proof therefore on that issue. With regard to the larceny, similarly, testimony of the officer does indicate that he was driving the vehicle. We've got testimony from an owner that the vehicle was in fact stolen. I find there is sufficient direct proof on each of the–each of those crimes. I'm going to deny the request for a circumstantial evidence instruction.
>
> Shackelford: I object and I would like to call the possession of the firearm could only be constructive possession which has been equated to circumstantial. I just want to make that statement so there will be no– R. 95-96.

In **Garrett v. State** 921 So.2d 288, 292 (¶20-21¶)(Miss. 2006), the Supreme Court pointed out that where there was "any direct evidence presented at trial" a circumstantial evidence instruction

was not required. Direct evidence does not have to be an eye witness to the actual crime or a confession to the crime, but can be an admission of some involvement in the crime.

> ¶ 20. Regina's statements to the four people about her desire to kill her husband and her requests for others to kill him constitute an admission of deliberate design which is an element of the crime. This Court has held that a defendant's statement to the police that he thought his partner was going to carjack somebody was an admission against interest, and thus, the capital murder case was not purely circumstantial even though the statement did not constitute a confession. See **Lynch**, 877 So.2d at 1254. See also **Swinney v. State**, 829 So.2d 1225 (Miss.2002) (confession to a shooting could be direct evidence to an underlying felony for capital murder purposes where defendant admitted to pointing the gun at the victim and stated the gun accidently fired). **Our precedent consistently adheres to the rule that any direct evidence presented at trial is sufficient to preclude a circumstantial evidence instruction.**
>
> ¶ 21. Accordingly, the trial court judge was correct in striking the circumstantial evidence language in Jury Instruction D-5 and in refusing to submit the circumstantial evidence instruction D-6. Regina's second assignment of error is also without merit.

In **Hughes v State**, 983 So. 2d 270, 278 (Miss. 2008), the court stated that "an admission" constituted direct evidence of a felony. A circumstantial evidence instruction is not required.

> An admission is a statement, direct or implied, of facts pertinent to the issue, and tending, in connection with other facts, to prove guilt. **Reed v State**, 229 Miss. 440, 446, 91 So. 2d 269, 272 (1956) (citing **Pringle v. State**, 108 Miss. 802, 67 So. 455 (1914).

The appellee would submit that the trial court correctly denied a request for circumstantial evidence instructions. R. 95-96. The record cited above indicates that there was direct evidence in the form of eye witness testimony from law enforcement, as well as admissions by Kirkwood. R. 48; 52-53. Kirkwood admitted to being a convicted felon at the scene of the burglary, as well as to being in the stolen van in which the stolen rifles, radios and a briefcase were located. R. 73-88. See **Ladner v. State**, 584 So. 2d 743, 750 (Miss. 1991)

This issue is lacking in merit.

PROPOSITION VI

THE TRIAL COURT CORRECTLY DENIED PEREMPTORY INSTRUCTIONS.

Mr. Kirkwood argues that the trial court erred in denying him a peremptory instruction on the burglary of a dwelling. Kirkwood thinks there was insufficient evidence presented for indicating that the trailer that was broken into was actually Smith's "dwelling." Rather he believes Smith's testimony indicated that the trailer was not his permanent dwelling place where he continuously resided. Smith admitted that he also owned other property and only slept there occasionally. Appellant's brief page 26-28.

Mr. W. C. Smith on redirect examination testified that he owned the land on which the trailer resided. He testified that he slept there "most of the time." R. 25. He testified he kept his clothes and other belongings there. He also testified that he intended to reside there rather than at another location where he also owned land.

Q. Who owns the property it sits on?

A. I do.

Q. You do. Okay. And how often do you stay there? Sometimes?

A. Sometimes.

Q. **Do you keep your clothes there?**

A. **Yeah.**

Q. **Do you keep other personal belongings there?**

A. **Yeah.**

Q. **Do you intend to go back there at some point?**

A. **At some point, yeah, I intend to go back there. Yeah.** R. 27-28. (Emphasis by appellee).

In **Course v. State** 469 So.2d 80, 82 (Miss.1985), the Court found that "the intention of the residents" was crucial for determining whether a building was a dwelling house as opposed to a building other than a dwelling.

> In our opinion, it was intended for Code section 97-17-33 to apply under the circumstances now before us. We hold that the term "dwelling house" is, as the term implies, a place where people dwell or reside. In the event there is permanent dwelling of a person or his family in a hotel or motel, that would be his dwelling house. The intention of the residents is the material consideration.364 So.2d at 1133, 1134.

In **Gillum v. State**, 468 So. 2d 856, 859-860 (Miss. 1985), the court found that the week end vacation home of a couple who resided in New Orleans would be considered a dwelling. They kept clothing there and slept there every two or three weekends.

> The seasonal or intermittent use of a residence, according to the weight of authority, does not prevent it from becoming a dwelling. See 20 A. L. R. 4 th 349, § 9(a), pp. 367-70 (1983). The view that occupancy need not be continuous is likewise shared by many courts. Id. at § 7(c), p. 365. A doubt as to one's intention to return coupled with long-continued absence, such as in Scott v. State, may be sufficient to destroy the character of a house as a dwelling, but such is not the case here. The frequency and regularity of the Highstreets' visits distinguish this case from Scott v. State. The presence of clothing, furniture, food and other amenities of life also lends credence to the position of the state that the house qualified as a dwelling under § 97-17-19.

The appellee would submit that this issue is also lacking in merit.

PROPOSITION VI AND VII

THERE WERE NO ERRORS THAT INTERFERED WITH KIRKWOOD RECEIVING A FAIR TRIAL.

Mr. Kirkwood argues that he was denied a fair trial. He believes that the alleged improper admission of his prior offenses along with the failure of the trial court to grant him circumstantial evidence instructions was sufficient for establishing reversible error. He argues that these errors could not be considered "harmless errors." Appellant's brief page 30-32.

To the contrary, as shown under prior propositions, the admission of Kirkwood's prior conviction was waived for failure to make an objection on the same ground being argued on appeal. R. 52; 85. In addition, the record reflects that Officer Ramirez's knowledge about Kirkwood's previous conviction was relevant under the circumstances of finding him apparently in possession of a stolen van and fire arms. R. 41-43. The van contained what was determined to be items stolen after a burglary. Among the items were stolen rifles. There was another person in the van but she was not found to be involved in any illegal activity. R. 51-53.

The record cited above also indicates that evidence of other crimes was opened up by Kirkwood's confessional "drug addict" testimony. R. 74. He testified freely about criminal activity only not about the crimes for which he was being tried. In other words, he confessed to being a criminal but not the type of criminal charged in this particular case. R. 73-88.

He attributed his criminal activity to his crack cocaine drug addiction. He also testified about alleged improper police procedures being followed in his case. R. 85.

In addition, there was no objection on grounds of **Peterson, supra**. and M. R. E. 609. Nor was this issue raised in Kirkwood's motion for a new trial. It was never raised with the trial court.

C.P. 24-25.

In **Scott v. State** 878 So. 2d 933, 953 (¶ 63) (Miss. 2004), the Supreme Court pointed out that issues not raised during the trial, such as occurred in the instant cause, are waived on appeal. This is true even where there is heightened appellate scrutiny in death penalty cases.

> ¶ 63. Scott also claims that being placed in solitary confinement was unconstitutional and interfered with his right to trial. This Court finds that the defense never raised this issue during trial and is therefore procedurally barred from raising it on appeal. "[H]eightened appellate scrutiny in death penalty cases does not require abandonment of our contemporaneous objection rule which applies with equal force to death cases. For many years this Court has held that trial errors cannot be raised in this Court for the first time on appeal." **Williams v. State**, 684 So.2d 1179, 1203 (Miss.1996). "If no contemporaneous objection is made, the error, if any, is waived. This rule's applicability is not diminished in a capital case." **Cole v. State**, 525 So.2d 365, 368 (Miss.1988) (citations omitted)

In **Coleman v. State**, 697 So. 2d 777, 787 (Miss. 1997), the Supreme Court stated that where there was no reversible error in any part, there was no reversible errors in the whole.

> This court may reverse a conviction and sentence based upon the cumulative effect of errors that independently would not require reversal...However, where there was no reversible error in any part, so there is no reversible error to the whole, quoting **McFee**, 511 So. 2d 130, 136 (Miss. 1987)

In the instant cause, Kirkwood chose to confess to non-indicted crimes before the jury. R. 74-77. He testified to being "a drug addict." He testified to purchasing cocaine, using it and sharing it with others at the scene of the crimes for which he was charged. R. 73-88. As shown with cites to the record, there were no contemporary objections to cross examination questions until after Kirkwood admitted to having committed "a lot of crimes." R. 86.

Therefore, the appellee would submit that the issue was not only waived, it was opened up by Kirkwood's confessional testimony.

The appellee would submit that these issues were lacking in merit.

CONCLUSION

Mr. Kirkwood's convictions should be affirmed for the reasons' cited in this brief.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: W. Glenn Watts

W. GLENN WATTS, MSB [redacted]
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

CERTIFICATE OF SERVICE

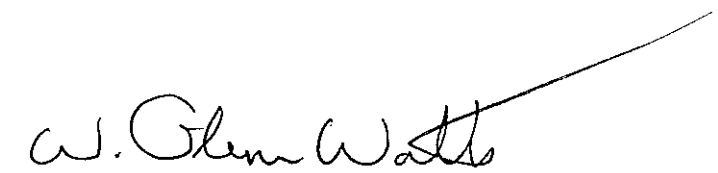
I, W. Glenn Watts, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Charles E. Webster
Circuit Court Judge
Post Office Drawer 998
Clarksdale, MS 38614

Honorable Laurence Y. Mellen
District Attorney
Post Office Box 848
Cleveland, MS 38732

Justin T. Cook, Esquire
Attorney at Law
301 North Lamar Street, Suite 210
Jackson, MS 39201

This the 29th day of April, 2009.



W. GLENN WATTS
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680