IN THE SUPREME COURT OF MISSISSIPPI OF THE STATE OF MISSISSIPPI

THURMAN KIRKWOOD AKA MICKEY **APPELLANT**

V. **NO. 2008-KA-01349-COA**

STATE OF MISSISSIPPI **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Thurman Kirkwood aka Mickey, Appellant
3. Honorable Laurence Y. Mellen, District Attorney
4. Honorable Charles E. Webster, Circuit Court Judge

This the 21st day of FEB, 2009.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

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BRIEF OF THE APPELLANT

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ISSUE THREE:

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STATEMENT OF INCARCERATION

Thurman Kirkwood, the Appellant in this case, is presently incarcerated in the Mississippi Department of Corrections.

STATEMENT OF JURISDICTION

This honorable Court has jurisdiction of this case pursuant to **Article 6, Section 146 of the Mississippi Constitution** and **Miss. Code Ann. 99-35-101.**

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Coahoma County, Mississippi, and a judgment of conviction on one count of burglary of a dwelling, one count of grand larceny, one count of fleeing, and one count of being a felon in possession of a firearm against Thurman Kirkwood, following a trial on January 28-29, 2008, the honorable Charles E. Webster, Circuit Judge, presiding. Kirkwood was subsequently sentenced to forty (40) years in the custody of the Mississippi Department of Corrections under **Mississippi Code Annotated § 99-19-81**.

FACTS

On October 11, 2007, W.C. Smith's (Smith) trailer, located at 944 Oak Ridge Street in Friars Point, Mississippi, was broken into. (T. 16). Smith testified at trial that he owned another residence, and he mostly used the trailer in question as an office to do paperwork in. (T. 16). Smith admitted to sometimes sleeping there. (T. 17). Smith testified that early in the morning on October 11, Thurman Kirkwood, the Appellant, came to his house and asked about work. (T. 17). Smith testified that when Kirkwood arrived at his house that morning, Kirkwood was driving a van. (T. 18).

According to his testimony, Smith told the Appellant that he was going to Memphis. (T. 17).

Later in the day, Smith testified that the Appellant called, and Smith told him that he was on his way back from Memphis. (T. 17). Smith testified that after he returned from Memphis, he noticed that the back door to his trailer had been broken into, and that he was missing four guns, a briefcase, and two radios. (T. 19).[1]

Roy Banks (Banks), a resident of Clarksdale, Mississippi, testified that on October 11, he awoke to find that his 1991 GMC Safari Van was missing. (T. 29). Banks claimed that he purchased the vehicle for eight thousand (8000) dollars. (T. 29-30). Banks admitted to purchasing the vehicle "several years" prior to the time it was stolen. (T. 36). Banks, however, could not give a definite answer of when he purchased the van. (T. 37).

Officer Steven Poer (Officer Poer), a patrolman for the Clarksdale Police Department, testified to receiving a BOLO report regarding a blue and grey van. (T. 37-39). Office Poer, while on patrol, located the vehicle, and testified to locating the vehicle. (T. 40). When Officer Poer saw the vehicle, he commenced in a high-speed chase for a considerable amount of time. (T. 40-41). Once the vehicle was stopped, Officer Poer testified that the person in the vehicle ran into the woods. (T. 41). Poer testified that two other law enforcement agents arrested the Appellant shortly thereafter. (T. 41).

Officer Poer testified that inside the van, law enforcement agents located a briefcase, several guns, and radios. (T. 41-43). On cross-examination, Officer Poer revealed that there was another individual in the van when it was stopped. (T. 44-46). The individual was taken to the police station but released when officers realized she was unable to hear. (T. 47-48).

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[1]Throughout the course of his testimony, Smith uses the term "shop" and "trailer" almost interchangeably. It's unclear whether they are one in the same or two separate buildings on the same property.

Clarksdale Police Department Detective Vincent Ramirez (Detective Ramirez) arrived at the scene where the chase ended, photographed potential evidence, and investigated. (T. 49-52). During the course of his testimony, defense counsel offered to stipulate to the Appellant's status as a prior convicted felon. (T. 53). In spite of this stipulation, the State still sought to introduce evidence of the Appellant's prior conviction. (T. 53-54). Without any explanation as to the basis on its ruling, the trial court overuled the defense counsel's objection. (T. 55). After one additional witness, the State rested, and defense counsel made a motion for a directed verdict. (T. 70-71). The motion was denied by the trial court. (T. 71).

The Appellant took the stand in his own defense. In his testimony, the Appellant openly admitted being a drug addict. (T. 74). The Appellant testified that on the day in question, Earnest Woods (Woods), Larry Mixon (Mixon) and a female named Blair picked him up in the van in question, and the three went to W.C. Smith's trailer to purchase drugs. (T. 74). The Appellant testified that he purchased drugs from Smith. (T. 75).

The Appellant testified that the group left, did some drugs, and came back to the trailer, but Smith was not there. (T. 76). It was at that point, according to the Appellant's testimony, that the Appellant called Smith. (T. 76). Smith informed the Appellant that Smith would not be returning for awhile. (T. 76). At this point, Mixon and Woods went into the trailer, over the objection of the Appellant. (T. 76).

The Appellant left and began walking down the street. (T. 77). The rest of the group picked him up soon thereafter. (T. 77). The Appellant testified that inside the van was a blanket which was wrapping something. (T. 77). The group then went back to Clarksdale to Woods' house and used drugs, rode around in the van some more, and attempted to buy more drugs. (T. 78-9). Then, a police

vehicle pulled behind the fan. (T. 79). The Appellant further testified that he, Woods, and Blair were in the vehicle when it was ultimately stopped by the police. (T. 79).

During the cross-examination of the Appellant, the State, over the objection of defense counsel proceeded to go into the Appellant's criminal history, offense by offense. (T. 85-86). After the Appellant's testimony, the defense rested its case and the court adjourned for the evening.

The next morning, the defense again moved for a directed verdict which was denied. (T. 91-92). Then, it was brought to the court's attention that the prosecution failed to disclose that one of its witnesses, W.C. Smith, had recently pled guilty to three counts of the sale of a controlled substance. (T. 103-104). There was a motion for a mistrial made by defense counsel, and, eventually, the trial court decided to reopen the case for the limited purposes of the cross-examination of Smith. (T. 103-105). In a brief cross-examination, Smith admitted to pleading guilty to three sale counts. (T. 109-110).

After Smith's testimony, closing arguments were given, and the jury deliberated, ultimately convicting the Appellant of all four counts. The Appellant was sentenced to forty (40) years in the custody of the Mississippi Department of Corrections under Mississippi Code Annotated § 99-19-81. (C.P. 9-11, R.E. 8-10). On February 4, 2008, the Appellant filed a Motion for Judgment Not Withstanding the Verdict, or, in the alternative, a New Trial. (C.P. 24, R.E. 11-12).[2] On August 6, 2008, feeling aggrieved by the verdict of the jury and the sentence of the trial court, the Appellant filed a notice of appeal. (C.P. 34, R.E. 13).

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[2]Currently, there is no order overruling defense counsel's motion. However, it is apparent from the record that such an order exists. The Appellant is filing this brief with anticipation of supplementing the record to contain said order when a certified copy of said order arrives.

SUMMARY OF THE ARGUMENT

The trial court erred when it allowed the prosecutor to submit into evidence the Appellant's prior felony convictions. The Appellant offered to stipulate that he was in fact a prior-convicted felon. This admission into evidence of the Appellant's prior conviction was directly in conflict with ***Old Chief*** and was far more prejudicial than probative.

The trial court further erred in failing to correctly apply Mississippi Rule of Evidence 609. The prosecution, in cross-examination of the Appellant, questioned the Appellant, over the objection of trial counsel, concerning his prior felony convictions. These prior convictions were inadmissible under ***Peterson*** and were far more prejudicial than probative. Their admission into evidence warrants reversal.

Furthermore, the State presented no evidence of the actual value of the vehicle which was required for the Appellant's grand larceny conviction. The only evidence of any value was testimony as to the vehicle's purchase price at an undetermined date. Such evidence is not legally sufficient, as it would require speculation, conjecture, and guesswork to determine the actual value of the van at the time the Appellant was alleged to have stolen it.

Even if such evidence is sufficient in that the jury is allowed to draw an inference as to the value of the stolen goods, the inference in this case was not reasonable. The vehicle was in an obvious shape of cosmetic disrepair and nearly twenty (20) years old. Therefore the jury's inference is incorrect. Thus, the appellant's conviction on grand larceny against the overwhelming weight of the evidence.

The trial court further erred in denying the Appellant's circumstantial evidence jury instruction. The trail court's conclusion was based on an improper analysis, and the court did not

find that there was direct evidence showing the guilt of the Appellant. Such an improper legal analysis resulted in a jury that was misinformed as to the law and warrants reversal.

The state further failed to provide sufficient evidence that the building the Appellant was alleged to have burglarized was a dwelling. The alleged victim testified that the building that was broken into was used as a shop and that he slept at his "home," referring to another building. The Appellant respectfully submits that the building in question does not meet the necessary requirements to be considered a dwelling. Therefore, the Appellant's conviction of burglary of a dwelling should be reversed.

Lastly, none of the above error should be considered harmless, and, even if harmless, if taken in concert, the above errors surely constitute cumulative error and warrant reversal.

ARGUMENT

ISSUE ONE:

WHETHER THE TRIAL COURT ERRED WHEN IT ALLOWED THE PROSECUTOR TO SUBMIT THE APPELLANT'S PRIOR FELONY CONVICTIONS NOT WITHSTANDING THE APPELLANT'S OFFER OF A STIPULATION.

i. Standard of Review.

The standard of review governing the admission or exclusion of evidence is abuse of discretion. ***Brown v. State***, 969 So. 2d 855, 860 (Miss. 2007)(citing ***Poole v. Avara***, 908 So. 2d 716, 721 (Miss. 2005)). Thus, "[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 [Appellate] Court will not reverse this ruling." ***Shaw v. State***, 915 So. 2d 442, 445 (Miss. 2005).

felonies, even though there was an offer to stipulate to his status as a convicted felon.

In ***Old Chief v. United States***, the United States Supreme Court reversed and remanded a case for further proceedings when the district court allowed the State to introduce evidence of a defendant's prior conviction over the defendant's objection, where the defendant had offered to stipulate to his prior conviction. ***Old Chief v. United States***, 519 U.S. 172, 172 (1997).

Recently, in interpreting ***Old Chief***, the Mississippi Supreme Court held;

> Where evidence of a prior conviction is a necessary element of the crime for which the defendant is on trial (i.e., possession of a firearm by a convicted felon), but evidence of the *specific nature of the crime* for which the defendant was previously convicted (i.e., armed robbery), is not an essential element of the crime for which the defendant is on trial. . . the trial court should accept a defendant's offer to stipulate and grant a limiting instruction.

Williams v. State, 2007-KA-00135 (Miss. 2008)(emphasis in original).

Recently, this Court concluded that a even limiting instruction could not cure the error in admitting a defendant's prior-felony in spite of an offer of stipulation. ***Sawyer v. State***, 2007-KA-00136 ¶ 25 (Miss 2008). This Court concluded;

> The facts presented here are identical to the facts in ***Old Chief***. We therefore conclude that the United States Supreme Court's opinion in ***Old Chief*** governs the outcome. Indeed, it would be difficult, if not impossible, for the jury to put aside evidence in Count II that Sawyer had twice before committed armed robbery when it considered Count I, regarding Sawyer's guilt of armed robbery one...

Id. ¶28.

The ***Sawyer*** Court concluded that any probative value of the defendant's prior convictions was substantially outweighed by the danger of unfair prejudice under **Mississippi Rule of Evidence 403**. *Id.*

In the instant case, the Appellant's prior conviction(s) has little, if any, probative value,

which is clearly substantially outweighed by the danger of unfair prejudice.

iii. Conclusion.

The trial court abused its discretion when allowing the State to bring forth evidence of the Appellant's prior felony conviction even though the Appellant offered to stipulate that he had previously been convicted of a felony. Because the admission of evidence resulted in unfair prejudice, the Appellant's conviction should be reversed, and the matter remanded for new trial.

ISSUE TWO:

WHETHER THE TRIAL COURT ERRED IN FAILING TO CORRECTLY APPLY MISSISSIPPI RULE OF EVIDENCE 609, INCLUDING CONDUCTING A BALANCING TEST ON THE RECORD AND/OR GIVING LIMITING INSTRUCTIONS WHEN THE STATE IMPROPERLY IMPEACHED THE APPELLANT REGARDING HIS PRIOR CONVICTIONS DURING CROSS-EXAMINATION. FURTHERMORE, WHETHER THE TRIAL COURT ERRED IN DETERMINING THAT THE APPELLANT "OPENED THE DOOR" TO SUCH CROSS-EXAMINATION BY ANSWERING A QUESTION POSED TO HIM BY THE STATE.

i. Standard of Review

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ii. The trial court failed to correctly apply Mississippi Rule of Evidence 609, and failed to conduct a balancing test on the record.

During the course of cross-examination, the State sought to question the Appellant on his prior convictions;

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

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

Q. Okay. Well, you are 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, sir.

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.

[BY DEFENSE COUNSEL]: I object to this. I don't think that going into his prior crimes –

BY THE COURT; – I'm going to overrule. He opened it up.

Q. [BY THE PROSECUTOR] And where was that?

A. That was in Florida.

Q. In Florida. Any other crimes in Florida aside from burglaries?

A. No, sir.

Q. No. You never committed an aggravated assault?

A. Yes, I did. Yes.

Q. You did. You've also been convicted of fleeing before; haven't you?

A. Yes, sir.

Q. Seven different convictions in Florida for burglary. Is that right?

A. Not quite that many, as I recall.

Q. One for aggravated assault, another for burglary of a dwelling here, and finally another felony fleeing in Florida. Does that about sum it up?

A. Yes, sir.

(T. 85-86).

Miss. Rule of Evidence 609 sets out the proper procedure for attempting to impeach a criminal defendant's testimony by prior conviction of crime, and requires that before admitting evidence of a defendant's felony conviction, the judge must determine "that the probative value of admitting this evidence outweighs its prejudicial effect." ***Miss. Rule. Evid. 609(a)(1)***.

The language of the rule is clear enough, but the Mississippi Supreme Court in ***Peterson v. State*** held that "Rule 609(a)(1) requires the trial judge to make an on-the-record determination that the probative value of the prior conviction outweighs its prejudicial effect before admitting any evidence of a prior conviction." ***Peterson v. State***, 518 So.2d 632, 636 (Miss. 1987). However, the prosecution first has to clear a threshold requirement of probative value. ***Hickson v. State***, 697 So. 2d 391, 397 (Miss. 1997)(citing ***Peterson v. State***, 518 So.2d 632, 636-37 (Miss. 1987)).

The ***Peterson*** court outlined the factors for the trial court to weigh in considering whether to admit the evidence of conviction of the defendant at a subsequent trial. Those factors are: (1) the impeachment value of the prior crime, (2) the point in time of the conviction and the witness' subsequent history, (3) the similarity between the past crime and the charged crime, (4) the importance of the defendant's testimony, and (5) the centrality of the credibility issue.

Though the court should consider all the factors, the trial court will not be reversed if it gives an "honest effort" to the balancing test. ***Bush v. State***, 895 So. 2d 836, 848 (Miss. 2005). Regardless, the "trial judge must make an on-the-record finding that the probative value of admitting a prior conviction outweighs its prejudicial effect." ***Triplett v. State***, 881 So.2d 303, 305 (Miss. 2004) (emphasis added). "An on-the-record finding that the probative value outweighs the prejudicial effect is not merely an idle gesture." ***Id.***

Application of the ***Peterson*** factors militate against admitting the evidence in this case. The first ***Peterson*** factor is the impeachment value of the crime. None of the mentioned prior crimes of the Appellant are crimes involving dishonesty. Calling it a "rule of thumb," the Mississippi Supreme Court has expressed that "convictions which do not relate to credibility, i.e., deceit, fraud, cheating, generally have little probative value for impeachment purposes." ***Johnson v. State***, 525 So. 2d 809, 812 (Miss. 1988). Therefore, the first ***Peterson*** factor weighs heavily against admitting the prior convictions.

The next factor is the temporal proximity of the crime for which the defendant is on trial and the crime(s) to be used as impeachment evidence. In the case *sub judice*, there is nothing in the record to indicate the temporal proximity of the crimes brought out by the State, at least as to how it relates to the Appellant's charges in the case *sub judice*. The Appellant respectfully contends that, at the very least, this factor is neutral.

The third factor to be considered is the similarity between the crimes for which the defendant has been convicted and those for which the defendant is on trial. This factor "weighs *heavily* against admissibility." ***Hopkins v. State***, 639 So. 2d 1247, 1253 (Miss. 1993) (emphasis in original). The analysis in ***Hopkins*** is instructive. The Court explained the problem with impeachment by prior

similar crimes, noting "it was quite likely that the jury would believe 'if he did it before, he probably did it this time.'" ***Id.*** The Appellant herein was on trial for, among other things, burglary, and the prosecutor elicited evidence of prior conviction of burglary. The danger that the jury would view the prior crimes as substantive evidence of guilt was heightened due to the exact nature of the crimes. Further, this danger was not mitigated by a limiting instruction.

The fourth factor in ***Peterson*** examines the importance of the witness's testimony. Clearly, the Appellant's testimony was very important in this case as the Appellant's theory of the case was that he was not the person who committed the crime. .

Peterson enunciated that the more important the defendant's testimony is to his defense, the more likely prior crimes are to be prejudicial. ***Peterson***, 518 So. 2d at 637. The Appellant's testimony was the only way for him for him to assert his defense. Therefore, the fourth ***Peterson*** factor clearly holds that this impeachment by prior crimes should have never occurred and weighs in favor of the Appellant.

The fifth factor is the centrality of the credibility issue. Credibility was very important to this case. Jurors had to rely on witness testimony and very little physical evidence to reach their verdict. Nevertheless, even if this factor weighs against the Appellant, the centrality of the credibility issue is but one factor in a five-factor test.

Had the trial court performed the required ***Peterson*** balancing test, the proper result would have been to exclude the evidence. If the prosecution had followed the procedural requirements of **Miss. R. Evid. 609**, at least four of the five factors would have clearly militated against admitting the prior conviction.

As stated by the Mississippi Supreme Court, crimes which do not involve dishonesty have

little probative value. ***Johnson v. State***, 525 So. 2d 809, 812 (Miss. 1988).

In ***Jones***, the Supreme Court held that an appellate court has two basic choices when the trial court fails to conduct the required ***Peterson*** balancing test. ***Jones v. State***, 702 So. 2d 419, 421 (Miss. 1997). The appellate court can either perform the balancing test itself or it can remand the case for retrial. ***Id.*** The Court stated, "in those cases where the accused's credibility was central to his defense or where the evidence was hotly disputed, we took a different course and remanded the case for retrial." ***Id.***

In the case at bar, this honorable Court should choose the second option and remand for a new trial. Certainly the Appellant's credibility was central to his defense; certainly the evidence was hotly disputed. The Appellant's prior crimes were admitted in his trial with no *prima facie* showing of probative value, no ***Peterson*** balancing, and no limiting instruction.

iii. The Appellant did not "open the door."

The Appellant anticipates that the State will likely argue that, as the trial court found, at the Appellant opened the door to the use of his prior convictions when he discussed his prior convictions. In fact, the Appellant's mentioning of his prior conviction was not the first time it was opened. "[W]here an accused, on direct examination, seeks to exculpate himself, such testimony is subject to normal impeachment via cross-examination, and this is so though it would bring out that the accused may have committed another crime." ***Stewart v. State***, 596 So. 2d 851, 853 (Miss. 1992). When a defendant opens the door to the admission of otherwise inadmissible evidence, the State then may proceed to question further into the matter. ***Crenshaw v. State***, 520 So. 2d 131, 133 (Mis.. 1988).

The Appellant did not open the door to the evidence of any prior crime, however. First, the

State improperly admitted evidence of the Appellant's prior conviction, over the objection of defense counsel, during the State's case-in-chief, when it, over the objection of defense counsel, did not allow the defense to stipulate that the Appellant was a convicted felon.

Secondly, there is nothing present in the direct examination to indicate that the Appellant sought to exculpate himself to the degree that might be deemed opening the door.

Thirdly, during cross-examination, the Appellant, as noted by the transcript, merely answered the question posed to him by the State. Therefore, the State opened the door and shoved the Appellant through it. The door was not opened. There was not even any light peaking through a crack. Simply put, the trial court erred.

Therefore, the admissibility turns on whether or not the trial court should have performed a ***Peterson*** balancing test, not whether there was any need to at all due to the Appellant opening the door regarding the admissibility of his prior convictions for impeachment purposes.

iv. Conclusion

The procedures enumerated in the rules of evidence and Mississippi common law are not idle suggestions. These procedures are mandatory and serve the ultimate goal of justice. "In criminal procedures, due process requires, among other things, that a criminal prosecution be conducted according to established criminal procedures." ***Mackbee v. State***, 575 So.2d 16, 24 (Miss. 1990).

The jury was improperly informed by the prosecution that the defendant had been convicted of previous felonies. The prosecution made no showing that the prior crime was probative under the rules of evidence, and the trial court never considered the prejudicial effect of that evidence.

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i. Standard of Review.

The standard of review applied to a denial of a request for peremptory instructions, motions for a directed verdict, and motions for a judgment notwithstanding the verdict is the same. ***Easter v. State***, 878 So. 2d 10, 21 (Miss 2004). Each of them challenges the legal sufficiency of evidence presented at trial. ***Id.*** In considering whether to disturb a jury verdict based on insufficient evidence, the Mississippi Supreme Court will consider:

> Whether the evidence shows beyond a reasonable doubt that the accused committed the act charges, and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction. The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Stewart v. State, 986 So. 2d 304, 308 (Miss 2008).

ii. The State did not present sufficient evidence that the value of item in question exceeded five-hundred (500) dollars.

The Appellant respectfully contends that the State presented insufficient evidence as to the value of the property alleged to have been stolen.

The amount of money paid for something is not evidence of the value of the property. One could purchase something which, at the time of purchase, was less than the statutory requirement under **95-17-41**, but has, over time, appreciated to exceed that statutory requirement. Conversely, one could purchase something which, at the time of purchase, did meet the statutory requirements of **95-17-41**, but, over time, depreciated in value below the statutory requirement. Especially with

regard to a motor vehicle.

It is well settled that property valuation must be based on what the property would sell for on the open market, not what it cost originally.

> This Court held that the proof was insufficient to prove grand larceny. The Court held that the proper measure of the value of property is the market value of the property at the time and place of the larceny, not the original purchase price.

Ellis v. State, 469 So.2d 1256, 1259 (Miss.,1985) (citing ***Barry v. State***, 406 So. 2d 45 (Miss. 1981)).

In ***Barry***, the Mississippi Supreme Court relied on **50 Am.Jur.2d Larceny s 45 (1970),** which states;

> Thus, in the case of common articles having a market value, the courts have usually rejected the original cost and any special value to the owner personally as standards of value for purposes of graduation of the offense, and have declared the proper criterion to be the price which the subject of the larceny would bring in open market-its 'market value' or its 'reasonable selling price,' at the time and place of the theft, and in the condition in which it was when the thief commenced the acts culminating in the larceny.

Barry, 406 So. 2d at 46 **(50 Am.Jur.2d at page 209-10).**

The ***Barry*** Court further relied on 3 Wharton's Criminal Law s 357 (14th Ed. 1980) which states;

> When the grade of larceny depends upon the value of the property taken, such value must be proved as a fact and be determined by the jury.
>
> In the ordinary case, the proper yardstick is the market value of the property at the time and place of the larceny: the original cost of the property or any special value to the owner personally is not considered.

Barry, 406 So. 2d at 46 (citing **3 Wharton's at 309-11).**

Barry further provides the correct disposition: this count should be affirmed as to petit larceny only and remanded for re-sentencing.

The Appellant does concede that this Court has, in the past, upheld convictions for grand larceny when the only evidence of the value of stolen goods was testimony of purchase price. In ***Smith v. State***, this court upheld a conviction of grand larceny of truck rims, when the only testimony as to value was that of the victim's father, who testified he paid between $3,000 and $4,000 for them. ***Smith v. State***, 881 So. 2d 908, 910 (Miss. Ct. App. 2004).

In ***Thompson v. State***, this Court found sufficient evidence to sustain a conviction for grand larceny where testimony indicated that a stolen desk was worth more that the statutory requirement because it was purchased for more than the requirement. ***Thompson v. State***, 910 So. 2d 60, 62 (Miss. Ct. App. 2005).

The facts of the case *sub judice* are clearly distinguishable from those of ***Thompson*** and ***Smith***, however. The alleged stolen good in the case sub judice is a van. Vehicles depreciate in value in far more substantial degree than nearly any other purchasable items. The ***Thompson*** Court, in fact, based it's opinion, in part, on the fact that the desk in question tended to not decline in value. ***Id.***

Undoubtedly, motor vehicles (the van) suffer depreciation in value to a worse degree than most, if not all tangible goods. It's common knowledge that merely driving a new vehicle off of the lot results in a sharp declination of value. The vehicle at issue was a sixteen year old van in a state of extreme disrepairTherefore, the facts of the case *sub judice* are clearly distinguishable and do not warrant a jury making an inference as to the value of goods allegedly stolen.

iii. Conclusion.

Because the prosecution failed to present sufficient evidence that the value of the vehicle in question exceeded the statutory amount. The jury was left to speculate or guess as to the value, and

the verdict against the Appellant for grand larceny is not based on sufficient evidence. Therefore, this honorable Court should reverse the Appellant's conviction for grand larceny and render a verdict of not guilty.

ISSUE FOUR:

WHETHER THE APPELLANT'S CONVICTION FOR GRAND LARCENY WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE WHEN THE ONLY EVIDENCE PRESENTED BY THE STATE WAS A WITNESS'S TESTIMONY AS TO PURCHASE PRICE WHICH WAS IN NO WAY ANCHORED BY A DATE AND WHEN, AS SHOWN IN THE EXHIBITS, THE VEHICLE IN QUESTION WAS IN AN OBVIOUS SHAPE OF DISREPAIR.

i. Standard of Review

The familiar standard of review for the denial of a post-trial motion seeking a new trial is abuse of discretion. ***Dilworth v. State***, 909 So. 2d 731, 736 (Miss. 2005). A motion for a new trial challenges the weight of the evidence presented at trial. ***Dilworth***, 909 So.2d at 737. A reversal is warranted only if the lower court abuses its discretion in denying a motion for new trial. ***Id.*** When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, an appellate court will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that allowing it to stand would sanction an unconscionable injustice. ***Bush v. State***, 895 So. 2d 836, 844 (Miss. 2005). In a hearing on a motion for a new trial, the trial court sits as a thirteenth juror, but the motion is addressed to the discretion of the court, which should be exercised with caution, and the power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict. ***Id.*** The evidence should also be weighed in the light most favorable to the verdict. The ***Bush*** Court stated:

A reversal on the grounds that the verdict was against the overwhelming weight of

> the evidence, unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict. Rather, as the "thirteenth juror," the court simply disagrees with the jury's resolution of the conflicting testimony. This difference of opinion does not signify acquittal any more than a disagreement among the jurors themselves. Instead, the proper remedy is to grant a new trial."

Id.

In the context of a defendant's motion for new trial, although the circumstances warranting disturbance of the jury's verdict are "exceedingly rare," such situations arise where, from the whole circumstances, the testimony is contradictory and unreasonable, and so highly improbable that the truth of it becomes so extremely doubtful that it is repulsive to the reasoning of the ordinary mind. ***Thomas v. State***, 92 So. 225, 226 (Miss. 1922). Though this standard of review is high, the appellate court does not hesitate to invoke its authority to order a new trial and allow a second jury to pass on the evidence where it considers the first jury's determination of guilt to be based on extremely weak or tenuous evidence, even where that evidence is sufficient to withstand a motion for a directed verdict. ***Dilworth***, 909 So.2d at 737.

ii. The overwhelming weight of the evidence shows that the Appellant did not commit grand larceny.

Even if this Court concludes that the evidence would be sufficient, the evidence is still against the overwhelming weight of the evidence. Looking at the sixteen year-old vehicle, it becomes abundantly clear that the jury's determination or inference of value was tenuous at best. The record contains a photograph of the vehicle in question. It is apparent from the photograph that the vehicle is not in good condition. What appears to be paint and rust covers the body of the van. The van's tires appear as if they have been worn down over the years. The open door of the van shows it missing side paneling. Essentially, every possible view that can be ascertained from the

photograph of this van shows it in an obvious state of disrepair. Furthermore, there is no evidence as to the amount of miles on the odometer of the vehicle.

While this honorable Court *may* find that the testimony was enough to allow the jury to infer the value of the van, it is not the case that simply because the jury *could* infer value that there inference is *reasonable*. The Appellant respectfully contends that any inference made by the jury in the case *sub judice* was not reasonable and was the product of mere speculation, conjecture, or guesswork.

The Appellant respectfully contends that any inference drawn by the jury is wholly unsupported by the evidence. The only evidence as to the value of the vehicle in question is a purchase price from an unknown date. All other evidence points that the vehicle was in a complete state of disrepair.

iii. Conclusion.

Any inference allowed to be drawn by the jury was against the overwhelming weight of the evidence. The vehicle in question was in obvious disrepair, with cosmetic defects, bald tires, chipped paint, etc. Therefore, this honorable Court should reverse the Appellant's conviction of grand larceny and remand this case for a new trial.

ISSUE FIVE:

WHETHER THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S CIRCUMSTANTIAL EVIDENCE JURY INSTRUCTION WHEN IT APPLIED THE IMPROPER METHOD OF ANALYSIS IN CONCLUDING THE DIRECT EVIDENCE OF THE OCCURRENCE OF A CRIME IS THE APPROPRIATE METHOD OF ANALYSIS, RATHER THAT DIRECT EVIDENCE SHOWING THE GUILT OF THE APPELLANT.

i. Standard of Review.

"[I]f the [jury] instructions fairly announce the law of the case and create no injustice, no reversible error will be found." ***Williams v. State***, 803 So. 2d 1159, 1161 (Miss. 2001) (citing ***Hickombottom v. State***, 409 So. 2d 1337, 1339 (Miss. 1982)). "If all instructions taken as a whole fairly, but not necessarily perfectly, announce the applicable rules of law, no error results." ***Milano v.*** *State*, 790 So. 2d 179, 1984 (Miss. 2001).

ii. A circumstantial evidence instruction was appropriate.

During the course of argument over jury instructions, defense counsel asked for a circumstantial evidence jury instruction on several of the counts in the indictment. In response to defense counsel's argument, the trial court concluded:

> Of course, the rule, as the court understands the rule on circumstantial, the entire case has to be circumstantial before a circumstantial instruction is to be given. Certainly we have direct proof as to the breaking and entering.

(T. 94)(emphasis added).

> After some argument, trial counsel responded;
>
> "With regard to the burglary, there's no direct proof that he went in or had any part. The only proof is constructive proof that he had possession of the items that were found in the vehicle which he was driving. There's no other, nothing else. And with regard to the [larceny], he was in possession of the vehicle, from which it can be inferred that he took it, that he stole it. But it is not direct evidence that he did."

(T. 94-95)(emphasis added).

> Ultimately, with respect to the burglary count, the trial court concluded;
>
> I am persuaded that with regard to the burglary, as I indicated earlier, there is direct proof that a burglary occurred. There is some question as to whether or not this individual was in fact the perpetrator of that burglary. However there is direct proof as concerns the occurrence of the burglary.

(T. 95)(emphasis added).

Concerning the larceny count, the trial court similarly concluded that a circumstantial jury instruction was not warranted;

> 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 counts. I'm going to deny the request for a circumstantial evidence instruction

(T. 95-96).

When all of the evidence tending to prove the guilt of a defendant is circumstantial, the trial court must grant a jury instruction that every reasonable hypothesis other than guilt must be excluded in order to convict. ***Manning v. State***, 735 So. 2d 323, 338 (Miss. 1999). Circumstantial evidence is evidence which, without going directly to prove the existence of a fact, gives rise to logical inference that such fact does exist. ***Id.***

A circumstantial evidence instruction must be given only when the prosecution can produce neither an eyewitness nor a confession/statement by the defendant. ***Clark v. State***, 503 So. 2d 277, 279 (Miss. 1987). A confession which constitutes direct evidence of a crime is not limited to a confession to a law enforcement officer but also includes an admission made to a person other than a law enforcement officer. ***Mack v. State***, 481 So. 2d 793, 795 (Miss. 1985).

In the instant case, the State presented neither a confession nor an eyewitness. Accordingly, there is simply no basis in law for the trial court's conclusion that there was direct evidence that the Appellant committed the burglary. The trial court's conclusion that there was direct evidence that the burglary itself occurred does not, in any way, implicate the appropriate considerations for the appropriateness of a circumstantial evidence jury instruction. Circumstantial evidence jury instructions, as noted above, concern whether there is direct evidence tending to prove the guilt of

the defendant – not direct evidence that a crime itself occurred.

In the instant case, the prosecution provided no direct evidence showing the guilt of the Appellant. There was no eyewitness to the alleged burglary. There was no confession. Thus, there was no direct evidence of the Appellant's guilt of the crime.. Therefore, with respect to the burglary conviction, there is no direct evidence, and, therefore, a circumstantial evidence jury instruction was warranted.

A circumstantial evidence jury instruction was also warranted for the charge of grand larceny. The state presented no eyewitness or confession to prove the Appellant's guilt of the charge of grand larceny. Therefore, a circumstantial evidence jury instruction was appropriate for the grand larceny count also.

iii. Conclusion.

The trial court's reasoning that direct evidence of the occurrence of a crime was an improper standard in which to analyze the appropriateness of a circumstantial evidence jury instruction. Rather, the focus should have been on whether there is any direct evidence that tends to prove the guilt of the defendant. Because the prosecution failed to provide direct evidence as to at least two of the counts alleged in the indictment (burglary and larceny), the trial court erred in denying defense counsel's circumstantial evidence jury instruction. Accordingly, the Appellant respectfully requests that this honorable Court reverse the Appellant's convictions and remand this case for a new trial, so that a jury may be instructed in accordance with the law.

ISSUE SIX:

WHETHER THE TRIAL COURT ERRED IN OVERRULING DEFENSE COUNSEL'S PEREMPTORY INSTRUCTION WHEN THE STATE FAILED TO PROVIDE

SUFFICIENT EVIDENCE THAT THE BUILDING IN QUESTION WAS A DWELLING HOUSE.

i. Standard of Review

The standard of review applied to a denial of a request for peremptory instructions, motions for a directed verdict, and motions for a judgment notwithstanding the verdict is the same. ***Easter v. State***, 878 So. 2d 10, 21 (Miss 2004). Each of them challenges the legal sufficiency of evidence presented at trial. ***Id.*** In considering whether to disturb a jury verdict, the Mississippi Supreme Court will consider:

> Whether the evidence shows beyond a reasonable doubt that the accused committed the act charges, and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction. The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Stewart v. State, 986 So. 2d 304, 308 (Miss 2008).

ii. The State presented no evidence that the building in question was a dwelling.

Under **Mississippi Code Annotated Section 97-17-23**, the first element of burglary of a dwelling is that it must occur in a dwelling house:

> Every person who shall be convicted of breaking and entering the dwelling house or inner door of such dwelling house of another, whether armed with a deadly weapon or not, and whether there shall be at the time some human being in such dwelling house or not, with intent to commit some crime therein shall be punished by imprisonment in the Penitentiary not less than three (3) years nor more than twenty-five (24) years.

Miss. Code Ann. 97-17-23

In order for a building to be a dwelling house, it must be the permanent dwelling place of the resident. ***Course v. State***, 469 So.2d 80, 82 (Miss. 1985). Smith testified that the trailer that was

burglarized was not his permanent dwelling house. In fact, Smith testified that he used the trailer for business purposes, rarely slept there and did not even own it, only the land on which it sat. (T. 25) Smith owns a house, which he claims for homestead tax exemption purposes . (T. 25) Because the trailer is not Smith's permanent dwelling place, there could be no burglary of a dwelling there.

The trailer cannot be classified as a dwelling house because at the time of the alleged robbery, Smith was not using it as a dwelling house. ***Course*** says that a major distinction between burglary that is of a dwelling house and burglary that is not of a dwelling house is whether at the time of the burglary there was actually a person residing within the building. ***Course*** at 81, (citing ***Watson v. State***, 254 Miss. 82 (1965)). Indeed, the Mississippi Court of Appeals has found that in order to constitute burglary, the dwelling must be in present use as one's residence. ***Carr v. State***, 770 So.2d 1025 (Miss. App. 2000)(emphasis added).

In the case *sub judice*, there is no evidence that Smith or anyone else resided in the trailer at the time of the robbery. Smith himself could not remember where he had recently been sleeping around the time of the burglary and said that it was very likely that he had been sleeping at his home or at the home of a girlfriend. (T. 24) Smith's testimony clearly shows that he was actually using the trailer as a place of business at the time of the burglary, not as a dwelling place. Not only did both Smith and the prosecuting attorney refer to the trailer as his "shop," but Smith also testified that on the day of the burglary, he "went on home" to his residence at the end of the work day. (T. 16, 19, 26)

Smith testified that he stayed at the trailer doing paperwork. (T. 16, 19) Smith testified that the trailer was his "shop." (T. 16, 19, 26) In the most obvious statement of the nature of the trailer, when asked at trial where he had slept the night before, Smith said that he slept at home, not the

trailer but the house that he claims the homestead exemption on. (T. 24). The trailer was not Smith's permanent residence but rather his office and consequently it could not have been burglarized.

iii. Conclusion.

In order to be guilty of burglary of a dwelling, the building in question must be a dwelling house. Because the State presented insufficient evidence to show that the building in question was a dwelling house, this honorable Court should reverse the Appellant's conviction for burglary of a dwelling and render a verdict of not-guilty.

ISSUE SEVEN:

WHETHER ANY OF THE ABOVE ERRORS CONCERNING VIOLATION OF THE APPELLANT'S FAIR TRIAL RIGHTS MAY BE CONSIDERED HARMLESS.

The repeated holdings of the United States Supreme Court show that the proper harmless error analysis for a constitutional violation is not a review of whether there was overwhelming evidence of guilt properly before the jury upon which the jury could have convicted. Rather, the appropriate analysis is whether the constitutional error "might have contributed to the conviction" or "possibly influenced the jury."

In ***Payne v. Arkansas***, the state of Arkansas asked the United States Supreme Court to affirm a conviction despite the admission of a coerced confession into evidence. ***Payne v. Arkasnas***, 356 U.S. 560, 568 (1958). The State asserted that the conviction should be affirmed because "there was adequate evidence before the jury to sustain the verdict." ***Id.*** at 567-68. However, the Supreme Court rejected the State's assertion recognizing that "no one can say what credit and weight the jury gave to the confession." ***Id.*** at 568.

In ***Fahy v. Connecticut***, the Court revisited this issue ultimately holding, "[W]e are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable probability that the evidence complained of might have contributed to the conviction." ***Fahy v. Connecticut***, 375 U.S. 85, 86-87 (1963)(emphasis added).

Four years later, the Court recognized that the state of California applied a "miscarriage of justice" rule with "emphasis, and perhaps overemphasis, upon the court's view of 'overwhelming evidence.'" ***Chapman v. California***, 386 U.S. 18, 23 (1967). There, the Supreme Court rejected the California rule, preferring instead the ***Fahy*** approach: "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." ***Id.*** The court reasoned that this analysis "emphasizes an intention not to treat as harmless those constitutional errors that 'affect substantial rights' of a party." ***Id.*** Thus, an "error in admitting plainly relevant evidence which *possibly influenced* the jury adversely to a litigant cannot, under ***Fahy***, be conceived of as harmless." ***Id.*** at 23-24 (emphasis added).

These cases show that for at least fifty years, the United States Supreme Court has rejected a harmless error analysis which simply questions whether there was overwhelming evidence of guilt properly before the jury upon which the jury could have convicted. Rather, the reviewing court should look at the facts and evidence of the case to determine whether the constitutional error "might have contributed to the conviction" or "possibly influence the jury."

Under the proper analysis, it is clear that the multiple violations of the Appellant's fundamental right to a fair trial, considered separately or in conjunction, "might have

contributed to [his] conviction" and "possibly influene[d] the jury." Therefore, the above errors should not and cannot be deemed "harmless."

ISSUE EIGHT:

WHETHER CUMULATIVE ERROR DEPRIVED THE APPELLANT OF HIS FUNDAMENTAL RIGHT TO A FAIR TRIAL.

The cumulative error doctrine stems from the doctrine of harmless error. ***Ross v. State,*** 954 So. 2d 968, 1018 (Miss. 2007). It holds that individual errors, not reversible in themselves, may combine with other errors to constitute reversible error. ***Hansen v. State***, 582 So.2d 114, 142 (Miss. 1991); ***Griffin v. State***, 557 So. 2d 542, 553 (Miss. 1990). The question under a cumulative error analysis is whether the cumulative effect of all errors committed during the trial deprived the defendant of a fundamentally fair and impartial trial. ***McFee v. State***, 511 So. 2d 130, 136 (Miss.1987).

Relevant factors to consider in evaluating a claim of cumulative error include whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged. ***Ross***, 954 So. 2d at 1018.

The quantity of the error in the instant case is significant. The improper evidence of the Appellant's prior convictions was brought out twice: first, over the offer of a stipulation by defense counsel and secondly during the improper cross-examination of the Appellant. There was further error in failing to instruct the jury concerning circumstantial evidence. These errors, considering the inability of the state to provide both sufficient evidence, are relevant inquiries for the purpose of a cumulative error analysis.

Therefore, the Appellant contends that the above errors, taken alone, constitute reversible error, and further that the cumulative effect of these errors deprived the Appellant of his fundamental right to a fair trial and warrant reversal.

CONCLUSION

The Appellant herein submits that based on the propositions cited and briefed hereinabove, together with any plain error noticed by the Court which has not been specifically raised, the Appellant herein would submit that the judgment of the trial court and the conviction and sentence as aforesaid should be vacated, this matter rendered, and the Appellant discharged from custody, as set out hereinabove. In the alternative, the judgment of the trial court and the Appellant's convictions and sentences should be reversed and vacated, respectively, and the matter remanded to the lower court for a new trial on the merits of the indictment on appropriate charges, with instructions to the lower court. The Appellant further states to the Court that the individual and cumulative errors as cited hereinabove are fundamental in nature, and, therefore, cannot be harmless beyond a reasonable doubt.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

Justin T Cook
COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I, Justin T Cook, Counsel for Thurman Kirkwood aka Mickey, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

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