IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DAVID BERNARD THOMPSON — APPELLANT

VS. — NO. 2008-KA-1946

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT THE APPELLANT MADE A VALID, KNOWING, AND INTELLIGENT WAIVER OF HIS RIGHT TO COUNSEL.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE TESTIMONY OF OFFICER DESKA VARNADO.

III. THE APPELLANT'S RIGHT TO CALL AND CONFRONT WITNESSES AGAINST HIM WAS NOT VIOLATED.

IV. THE VERDICT WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

STATEMENT OF THE FACTS

The Appellant, David Bernard Thompson, was charged with possession of marijuana with intent to distribute within one thousand five hundred feet of a church and with possession of cocaine with intent to distribute within one thousand five hundred feet of a church. He obtained

private counsel, but during pre-trial hearings informed the trial court that he no longer wished to be represented by his counsel. (Transcript p. 33 - 37). The trial judge ordered him to obtain new counsel. (Transcript p. 38). After claiming that no one would represent him with only a few days to prepare for trial, the Appellant indicated his desire to represent himself. (Transcript p. 40). He was fully warned of the pitfalls of representing himself and was offered counsel from the public defender's office. (Transcript p. 40 - 44 and 64 - 66). He initially refused, but eventually agreed to allow court appointed counsel to offer limited assistance in his defense. (Transcript p.44 and 66). During trial, Officer Deska Varnado of the McComb Police Department testified that a search warrant was obtained for the house in which the Appellant was residing after a confidential informant was able to purchase drugs from the Appellant at the house. (Transcript p. 140 - 144). Officer Varnado also testified that during the execution of the search warrant, the following was found: approximately 105 grams of marijuana in the stove, approximately 408 grams of marijuana in the closet of the master bedroom, approximately 456 grams of marijuana in some of the Appellant's clothing, approximately 20 grams of crack cocaine in the freezer of the refrigerator, sandwich bags and a finger scale in the closet of the master bedroom, and $2000 in cash under the mattress of the bed in the master bedroom. (Transcript p. 147 - 148). Paige Mills of the Mississippi Crime Lab also testified and confirmed that the drugs found at the house were, in fact, marijuana and cocaine. (Transcript p. 171).

The Appellant was ultimately convicted of both counts and sentenced to serve twenty years with five suspended for Count I and to serve fifteen years with five years suspended for Count II with the sentences to run consecutively.

SUMMARY OF THE ARGUMENT

The trial court did not abuse its discretion in holding that the Appellant made a valid waiver of his right to counsel. The trial court would have violated the Appellant's rights if he had forced him to be represented by an attorney when the record clearly established that he desired to represent himself. Furthermore, the requirements of Uniform Rule of Circuit and County Court 8.05 were met.

The portion of Officer Varnado's testimony which the Appellant calls into question was not hearsay as it was not offered to prove the truth of the matter asserted. It was only offered to show why the police acted as they did during their investigation of illegal drug activity in the area and to tell a complete story. Furthermore, the issue is procedurally barred and does not constitute plain error as first, there was no error and second, as the testimony caused no prejudice to the Appellant's case.

The Appellant's right to call and confront witnesses against him was not violated. He failed to show why the testimony of Assistant District Attorney Timothy Jones would have been relevant and/or vital to his case. The record clearly establishes that Mr. Jones's testimony would have been that he saw and heard nothing of significance during the search and was actually outside the residence during most of the search. Additionally, no prejudice to the Appellant's case was caused by the trial court's decision.

Furthermore, the verdict was not against the overwhelming weight of the evidence.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT THE APPELLANT MADE A VALID, KNOWING, AND INTELLIGENT WAIVER OF HIS RIGHT TO COUNSEL.

The Appellant first argues that "it is clear from the record . . . that there was not a valid waiver of [his] Sixth Amendment right to counsel." (Appellant's Brief p. 15). "Trial courts are required to make a 'case by case determination of a defendant's assertion of the right to proceed pro se.'" *Wallace v. State*, 957 So.2d 1047, 1048 (Miss. Ct. App. 2007). "An appellate court is to review the decision of a trial court allowing a defendant to act as his own attorney for an abuse of discretion." *Id.* at 1048-49.

"The Sixth Amendment to the United States Constitution grants every criminal defendant a right to the assistance of counsel." *Hairston v. State*, 4 So.3d 403, 404 (Miss. Ct. App. 2009). "However, implicit in this right is the right to waive to counsel, thus insuring the right of a defendant to conduct his or her own defense." *Id.* (*emphasis added*). In fact, as this Court has previously held, "a refusal to allow a defendant to represent himself is a violation of his constitutional rights and requires reversal." *Taylor v. State*, 812 So.2d 1056, 1059 (Miss. Ct. App. 2001) (*emphasis added*). The *Taylor* Court further noted that, "an accused could place the trial judge in a difficult situation by insisting on a pro se trial, and upon conviction, claim that he/she did not have the benefit of counsel and did not knowingly waive counsel." *Id.* at 1060. The Appellant did just that. He argued at trial that he should have the right to represent himself and now, on appeal, argues that he did not knowingly waive counsel.

Specifically, the Appellant argues that the trial court did not meet the requirements of Uniform Rule of Circuit and County Court 8.05. (Appellant's Brief p. 13). The State, however, counters that the requirements were met and exceeded. The Rule is set forth below:

> When the court learns that a defendant desires to act as his/her own attorney, the court shall on the record conduct an examination of the defendant to determine if the defendant knowingly and voluntarily desires to act as his/her own attorney. The court shall inform the defendant that:
>
> > 1. The defendant has a right to an attorney, and if the defendant cannot afford an attorney, the state will appoint one free of charge to the defendant to defend or assist the defendant in his/her defense.
> > 2. The defendant has the right to conduct the defense and that the defendant may elect to conduct the defense and allow whatever role (s)he desires to his/her attorney.
> > 3. The court will not relax or disregard the rules of evidence, procedure or courtroom protocol for the defendant and that the defendant will be bound by and have to conduct himself/herself within the same rules as an attorney, that these rules are not simple and that without legal advice his/her ability to defend himself/herself will be hampered.
> > 4. The right to proceed pro se usually increases the likelihood of a trial outcome unfavorable to the defendant.
> > 5. Other matters as the court deems appropriate.
>
> After instructing the defendant and ascertaining that the defendant understands these matters, the court will ascertain if the defendant still wishes to proceed pro se or if the defendant desires an attorney to assist him/her in his/her defense. If the defendant desires to proceed pro se, the court should determine if the defendant has exercised this right knowingly and voluntarily, and, if so, make the finding a matter of record. The court may appoint an attorney to assist the defendant on procedure and protocol, even if the defendant does not desire an attorney, but all disputes between the defendant and such attorney shall be resolved in favor of the defendant.

URCCC 8.05. First, the trial judge insured that the Appellant knew he had a right to an attorney as evidenced, in part, by the fact that he was told he could have court-appointed counsel. (Transcript p. 40 - 41). However, the Appellant stated that he felt such counsel would be "helping the State" and refused. (Transcript p. 43). Even after being told that Mr. Estess, the court-appointed counsel, won his last case which was also a possession with intent case, the Appellant refused. (Transcript p. 43). After some further discussion the Appellant ultimately agreed to allow Mr. Estess to assist him in defending his case. (Transcript p. 44). Secondly, the

record fully establishes that the Appellant was aware of his right to conduct the defense as he sees fit and to allow whatever role he desires of his attorney. In fact, prior to trial, Mr. Estess clarified for the record and for the Appellant exactly what his role was to be in the trial. (Transcript p. 45, 49, and 67). The Appellant also knew that the rules would not be disregarded or relaxed as evidenced by both the trial court's and Mr. Estess's repeated admonishment that the Appellant was not familiar with the rules of court. Additionally, the Appellant was informed that proceeding pro se could interfere with a favorable outcome:

> THE COURT: . . . you can represent yourself. However, it's also probably not a very wise decision on your part to represent yourself. . . . But out of an abundance of caution, I think it would be beneficial for you to have court-appointed counsel to sit with you during your trial just to help you with the technical aspects of a trial; you know, when to object, when not to object. Because you don't know the rules of court, Mr. Thompson.

(Transcript p. 40 - 41). Moreover, the Appellant's court-appointed advisory attorney counseled him on the record as follows:

> There are many pitfalls that are going to come during the course of trial. There are going to be decisions that have to be made on a split-second basis. And by the time I lean over to you to talk to you about it and try to educate you on the reasons either why to do so or why not to do so, then you haven't had the opportunity; time has passed and your objection may not be contemporaneous, which is a requirement for a lot of objections during the course of trial. . . . But suffice it to say that while I understand that you're an intelligent man and you understand what you're talking about, we can't make up for you not having a law degree in the span of a couple of weeks. In all reality, it can't be fixed without you going to law school. That's the reason most defendants have lawyers to represent them. There are issues concerning issues of fact which should be argued before the jury and there are issues of procedure which are argued before the judge. While I understand that you know the facts of your case and you're passionate about your case, you, just like every other pro se defendant, is hampered in not having the benefits of an education that is provided you know hose differences. . . .

(Transcript p. 64 - 65).

> . . . There are a lot of things that are going to happen during this trial that you may not understand. I'm going to do my absolute best to help you understand it. But

> it's still, I think if you look at the situation, anyone would be better served having an attorney to represent them versus representing themselves. If I were charged with a crime, I went to law school and I would hire someone to represent me. I just wanted to make that record so that everyone here knows that If you chose to represent yourself, you've done so knowing the pitfalls and knowing the risks.

(Transcript p. 66). The trial court also informed the Appellant of the minimum and maximum sentence for his crimes. (Transcript p. 68 - 69). Thus, the record clearly indicates that the Appellant was properly advised according to the Rule.

Furthermore, the Appellant repeatedly stated his desire to represent himself. (Transcript p. 40, 55, and 66). As noted in *Taylor v. State*, "there is nothing more that the trial court could have done-the court had no right to insist on [the Appellant]'s having counsel after he had refused it." 812 So.2d at 1060.

As such, the record fully establishes that the Appellant knowingly and intelligently made a valid waiver of his right to counsel. "Once the court is satisfied that such a decision has been made, the authority of the court to deny the [Appellant]'s wish no longer exists." *Brooks v. State*, 835 So.2d 958, 960 (Miss. Ct. App. 2003). Thus, the Appellant's first issue is without merit.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE TESTIMONY OF OFFICER DESKA VARNADO.

The Appellant also "asserts that the trial court improperly allowed 'testimonial hearsay' to be admitted at trial during the testimony of Officer Deska Varnado." (Appellant's Brief p. 15). However, the Appellant is procedurally barred from making this argument. The record illustrates that the following exchange took place during Officer Varnado's testimony:

> Q: I'd like to bring your attention to January 7, 2007. Can you tell me about any contact you had with him on that date?
> A: Yes, on that day, Logan Griffin met myself and Agent Dan Hawn at a pre-arranged location and we discussed buying illegal drugs in McComb. Agent Hawn searched Logan's vehicle. I searched Logan; issued Logan $250.00 official SMNEU funds, the funds being photocopied. Sent Logan

out to buy drugs. He said he knew someone that he could buy drugs from. He knew them by the name of "Head." He knew him by a nickname, called him "Head." It actually took place at 1119 Nelson Avenue.

(ADDITIONAL TESTIMONY)

APPELLANT:	Objection
COURT:	What's the basis for your objection?
APPELLANT:	I'm only charged with a possession charge. I'm not charged with the sale of nothing, sir.
* * *	
APPELLANT:	Relevance
COURT:	Oh, relevance? Alright. Well, this Court finds that the charge for today is possession with intent. As such, the intent has relevance and the Court is going to overrule your objection.
APPELLANT:	Thank you, sir.

(Transcript p. 140 - 141). As shown above, shortly after the now complained of testimony was given, the Appellant objected on the grounds of relevancy not on the grounds of testimonial hearsay. Mississippi law is clear that an objection on one ground waives all other grounds. *Swington v. State,* 742 So.2d 1106, 1110 (Miss.1999).[1]

Thus, the Appellant must proceed on this issue under the plain error doctrine. To establish plain error, the Appellant "must prove that the inclusion of the [testimony at issue] 'seriously affects the fairness, integrity or public reputation of judicial proceedings.'" *Neal v. State*, 15 So.3d 388, 403 (Miss. 2009) (quoting *United States v. Olano*, 507 U.S. 725, 732, 113 S.Ct. 1770, 1776, 123 L.Ed.2d 508, 518 (1993)). "To determine if plain error has occurred, [this Court] must determine if the trial court has deviated from a legal rule, whether that error is plain, clear or obvious, and whether the error has prejudiced the outcome of the trial." *Id.* (quoting

[1] While the State does recognize that the Appellant was pro se, Mississippi law states that "pro se parties should be held to the same rules of procedure and substantive law as represented parties." *Ivy v. Merchant,* 666 So.2d 445, 449 (Miss.1995) (quoting *Dethlefs v. Beau Maison Development Corp.*, 511 So.2d 112, 118 (Miss.1987)). *See also Sumrell v. State,* 972 So.2d 572, 574 (Miss.2008). Furthermore, as noted earlier in this brief, the Appellant had the assistance of an attorney with regard to objections.

McGee v. State, 953 So.2d 211, 215 (Miss. 2007)). In the case at hand, there was no plain error as there was no error. Moreover, even if allowing the testimony at issue were error, it did not prejudice the outcome of the trial.

There was no error as the testimony at issue is not hearsay. Officer Varnado's testimony in general about the buy was from first hand knowledge and was not hearsay. His testimony regarding the confidential informant's statement that he knew he could get drugs from "Head" was also not hearsay as it was not offered to prove the truth of the matter asserted. *See Neal v. State*, 805 So.2d 520, 523 (Miss. 2002). This portion of Officer Varnado's testimony was offered first to show why the police investigated as they did. In *Stubbs v. State*, this Court held that it was not error to allow similar testimony as it was offered "to explain how [the defendant] came under investigation." 878 So.2d 130, 135 (Miss. Ct. App. 2004). *See also Kolberg v. State*, 829 So.2d 29, 76-77 (Miss. 2002) and *Watts v. State*, 976 So.2d 364, 369 (Miss. Ct. App. 2008). This testimony was also offered to show the jury the big picture and tell a complete story. *See Conerly v. State,* 879 So.2d 1101, 1106 (Miss. Ct. App. 2004) (holding that "the State has a legitimate interest in telling a rational and coherent story of what happened") and *Ballenger v. State,* 667 So.2d 1242, 1257 (Miss.1995). In other words, Officer Varnado's testimony that the confidential informant told him that he knew he could get drugs from Head was not offered to show that the confidential informant actually knew this but only to show why the police acted as they did in furtherance of their investigation of illegal drug activity in the area.

Moreover, even if it were error for the trial judge to allow this testimony, it was not prejudicial to the Appellant's case. These type of alleged errors may be deemed harmless "where the weight of the evidence against the accused is so overwhelming." *Clark v. State*, 891 So.2d 136, 143, (Miss. 2004) (quoting *Riddley v. State*, 777 So. 2d 31, 35 (Miss. 2000)). As set forth in

detail later in this brief, the evidence in this case was overwhelming. Furthermore, the now complained of testimony did not make the conviction more sustainable. It merely illustrated why the police acted as they did and presented the full story of how the events transpired. Additionally, the jury was properly instructed regarding how they were to consider Officer Varnado's testimony regarding the sale:

> The Court instructs the Jury that the testimony of witnesses, regarding the prior drug activity of David Thompson, was offered in an effort to prove motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident, on the part of the defendant, David Thompson. You may give this testimony such weight and credibility as you deem proper under the circumstances. However, you cannot and must not consider this testimony in any way regarding whether or not this defendant is guilty or not guilty of the charges for which he is presently on trial.

(Record p. 27). Mississippi law is clear that jurors are presumed to follow the instructions of the court. *Watts v. State*, 976 So.2d 364, 370 (Miss. Ct. App. 2008) (citing *King v. State*, 857 So.2d 702, 724 (Miss. 2003)).

As such, the record clearly indicates that allowing the testimony at issue was not error and even if it were, allowing it did not seriously affect the fairness, integrity or public reputation of judicial proceedings and therefore, cannot be deemed plain error.

III. THE APPELLANT'S RIGHT TO CALL AND CONFRONT WITNESSES AGAINST HIM WAS NOT VIOLATED.

The Appellant next argues that "the court's denial of his request to call Assistant District Attorney Timothy Jones was in violation of his right to confront witnesses." (Appellant's Brief p. 20). This issue was originally presented to the trial court by the Appellant's counsel prior to his removal from the case during pretrial hearings. The Appellant's counsel informed the trial court of the Appellant's assertion that Mr. Jones was present during the search of his house. (Transcript p. 15). Mr. Jones then admitted that he was present "during a portion of the

execution of the search warrant." (Transcript p. 22). Shortly thereafter, the Appellant's prior counsel filed a motion for Assistant District Attorney Timothy Jones to be recused from prosecuting the case and a hearing was held on the matter. (Record p. 11 and Transcript p. 27). During the hearing on the matter, the following was discussion was made a part of the record:

COURT: Mr. Jones, as an officer of the Court, I'm going to pose a few questions to you right now. I think you have discussed on the record the fact that you were at least present on or about the time of the search in question?
MR. JONES: Yes, sir, during some portion of it.
COURT: Does the State have any intention of using you as a witness in this case?
MR. JONES: We do not, Your Honor.
COURT: Are there other competent witnesses who can testify as to the search in this case?
MR. JONES: Yes, sir, Your Honor.

(Transcript p. 28)

COURT: . . . . Are there additional person who are competent to testify to any and everything that you saw and heard that day?
MR. JONES: Yes, sir; Your Honor. And I am not a witness to any significant element or any significant fact of the case.
COURT: Were you simply present during the search?
MR. JONES: I was present, yes.
COURT: During the entire search or part of it?
MR. JONES: A small portion of the search. I do remember entering the residence, but largely I was outside standing next to a vehicle.

(Transcript p. 29). The trial court then denied the motion ruling that Mr. Jones was "not likely to be a necessary witness" in the case. (Transcript p. 29).

The issue arose again prior to trial after the Appellant began representing himself. The Appellant notified the judge that he desired to call Mr. Jones a witness on his behalf, and therefore, wanted to disqualify him from prosecuting the case. (Transcript p. 56). Subsequently, Mr. Jones was again questioned by the trial court:

COURT: Mr. Jones, can you please disclose for the record the level of your

involvement, level and extent of your involvement in the search of [the Appellant's] home on the date which it is alleged in this indictment?

MR. JONES: I did not participate in the search at all. I was present on the premises of the search, legally outside the residence near vehicles. I did walk through the house, you know, once or twice maybe during the course of the time that I was there. I am not a witness that discovered any evidence or even observed the discovery of any evidence that was there. I was there for the purpose of providing some legal advice with regard to both criminal evidence and civil evidence that was to be seized.

(Transcript p. 57 - 58). The Appellant was then allowed to question Mr. Jones on the record regarding his involvement:

THE APPELLANT: . . . a SMNUE officer, walked to the door and he asked you personally, "Timothy O. Jones, I found such-and-such in these bushes over here. Who do you want to charge it with?" Could you state for the Court who did you say you wanted to charge this with, Mr. Timonthy Jones?

MR. JONES: I did not recommend that they charge or not charge anyone.

* * *

THE APPELLANT: Okay. I would like to ask you for what reason was you present that day, Mr. Timothy?

MR. JONES: To provide law on issues that came up during the search to the agents that were conducting the search.

* * *

THE APPELLANT: . . . Timothy, I would also like to ask you, you were there to giving them questions on their job or was you there to help yourself in this trial? That's the question.

MR. JONES: I was there to answer their questions.

* * *

THE APPELLANT: The question was that you, you built this case in order to advise them, don't do this or don't do that. I'm asking you, what was your intentions, was you building this case so you would have a stronger case in this matter or you was just there just because you had never been on one?

MR. JONES: I was just there simply to answer their questions with regard to the law.

* * *

THE APPELLANT: . . . But, Timothy, I just wanted to ask you, sir, do you think it was ethical that you was there do you think it was for a good cause? That's all. That's my last question. Do you think it was for a good cause, Mr. Timothy Jones.

MR. JONES: Yes.

(Transcript p. 58, 60, 61, and 64). The motion was again denied.

On appeal, the Appellant argues that he should have been allowed to call Mr. Jones as a witness and argues that it was a violation of his constitutional rights for the court to refuse. The standard of review for such issues has been set forth by this Court as follows:

> A trial court may exercise its discretion when deciding upon the admissibility of evidence. *Sturdivant v. State,* 745 So.2d 240, 243 (Miss.1999). A reviewing court must "determine whether the trial court employed the proper legal standards in its fact findings governing evidence admissibility." *Sturdivant,* 745 So.2d at 243. "[T]he trial court's discretion must be exercised within the scope of the Mississippi Rules of Evidence and reversal will be appropriate only when an abuse of discretion resulting in prejudice to the accused occurs." *Id.*

Armstead v. State, 805 So.2d 592, 596 (Miss. Ct. App. 2001). The Mississippi Supreme Court has previously held that Mississippi's Constitution "provides that an accused of right may have compulsory process for obtaining witnesses in his favor, but this does not mean he may subpoena anybody or anything he pleases." *Gofoth v. City of Ridgeland*, 603 So.2d 323, 327 (Miss. 1992). Likewise, this Court has held that the right is not absolute and that the Appellant "must show that the proposed witness' testimony would have been relevant, material, and vital." *King v. State*, 962 So.2d 124, 127 (Miss. Ct. App. 2007). The Appellant failed to show at trial and failed to argue on appeal any reasons why Mr. Jones's testimony would have been relevant and/or vital to his case. As set forth above, Mr. Jones's testimony would have been that he saw and heard nothing of significance during the search and was actually outside the residence during most of the search. Thus, the record supports the trial court's holding that Mr. Jones was not a necessary witness. Moreover, no prejudice to the Appellant's case was caused.

IV. THE VERDICT WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Lastly, the Appellant argues that "the verdict of the jury is contrary to the weight of credible evidence." (Appellant's Brief p. 22). The following standard has previously been set forth with regard to weight of the evidence issues:

> In determining whether a jury verdict is against the overwhelming weight of the evidence, the court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial. (*citations omitted*). Only when the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will it be disturbed on appeal. (*citations omitted*). It has been said that on a motion for new trial the court sits as a thirteenth juror. The motion, however, 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. (*citation omitted*). Thus, the scope of review on this issue is limited in that all evidence must be construed in the light most favorable to the verdict. (*citation omitted*).

Wooten v. State, 752 So.2d 1105, 1108 (Miss. Ct. App. 1999) (*emphasis added*).

The Appellant was charged with "possession of at least five hundred (500) grams but less than one (1) kilogram of marijuana, a controlled substance, with the unlawful and felonious intent . . . to distribute said marijuana, to some other person or persons . . . the above-described possession of marijuana having then and there occurred within one thousand five hundred (1,500) feet of that certain Mt. Olive Baptist Church, McComb, Mississippi." (Record p. 3). He was also charged with "possession of at least two (2) grams but less than (10) grams of cocaine, a controlled substance, with the unlawful and felonious intent . . . to distribute said cocaine to some other person or persons . . . the above-described possession of cocaine having then and there occurred within one thousand five hundred (1,500) feet of that certain Mt. Olive Baptist Church, McComb, Mississippi." (Record p. 4). The following evidence was presented which

establishes each element beyond a reasonable doubt:

a. The Appellant identified 1119 Nelson Avenue as his residence. (Transcript p. 159).
b. Exhibit 1, which was approximately 105 grams of marijuana total package weight, was found in the stove. Exhibit 2, which was approximately 408 grams of marijuana total package weight, was found in the closet of the master bedroom. Exhibit 3, which was 456 grams of marijuana total package weight, was found in some of the Appellant's clothing. Exhibit 4, which was 20 grams of crack cocaine was found in the freezer of the refrigerator. (Transcript p. 147 - 148).
c. A sandwich bag and finger scales were also found in the closet of the master bedroom. Two thousand dollars in cash was found under the mattress in the master bedroom. (Transcript p. 148).
d. The residence where the drugs were found, 1119 Nelson Avenue, is within 1500 feet of Mt. Olive Baptist Church. (Transcript p. 144 - 145).
e. There was a video of the Appellant selling drugs to the confidential informant inside the residence located at 1119 Nelson Avenue. (Exhibit S-1).

The jury was properly instructed regarding each of the elements required and evidence was presented establishing each of the elements. The Appellant claims that this evidence was not enough; however, "the law is well settled in this State that the jury is the sole judge of the credibility of the witnesses and the weight and worth to be given their testimony." *Carter v. State,* 310 So.2d 271, 272 (Miss. 1975) (*emphasis added*). Thus, the verdict was not against the overwhelming weight of the evidence.

CONCLUSION

For the foregoing reasons, the State of Mississippi respectfully requests that this Honorable Court affirm the Appellant's conviction and sentence.

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CERTIFICATE OF SERVICE

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

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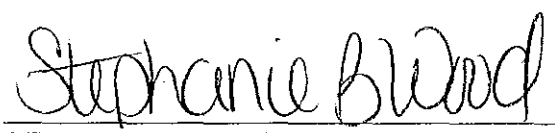
This the 5th day of November, 2009.



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