IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JOEL SISTRUNK — APPELLANT

VS. — NO. 2009-KA-0179

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATE STATUTES

SUMMARY OF THE ISSUES

I. Exhibit S-1, a recording of Sistrunk's statement to Officer Tracy O'Quin, was not obtained in violation of Sistrunk's 5th Amendment rights under Miranda v. Arizona, 384 U.S. 426 (1966) and the trial court did not err in admitting the recording into evidence.

II. The State did not commit prosecutorial misconduct in offering S-1 as evidence at trial.

III. Sistrunk's trial counsel provided constitutionally effective assistance of counsel regarding the admission of S-1.

IV. The State did not commit a discovery violation relating to Mills' testimony concerning the milligram amount of the pills recovered from Sistrunk's truck.

V. The verdict was supported by the weight and sufficiency of the evidence.

STATEMENT OF THE CASE

On or about January 29, 2008, Joel Sistrunk was indicted for the unlawful possession of at least two (2) but less than ten (2) dosage unites of hydrocodone, and unlawful possession of less than thirty (30) grams of marijuana. (C.P. 3-4) On October 8, 2008, Sistrunk was tried and found guilty of possession of at least two (2) but less than ten (2) dosage unites of hydrocodone. (Tr. 157) The indictment was amended to charge Sistrunk as an habitual offender pursuant to Mississippi Code Annotated § 99-19-81. (Tr. 160-161) Sistrunk was convicted of one count of possession of at least two but less than ten dosage units of hydrocodone. He was sentenced as an habitual offender to 8 years in the custody of the Mississippi Department of Correction and a fine in the amount of $5,000.00.

STATEMENT OF THE FACTS

Officer Tracy O'Quin, testified that on July 4, 2007 he was working for the Tylertown Police Department. (Tr. 109) On that date he received a call from the Walthall County Sheriff's

Department that there was an older model yellow truck on 27 South headed north. The caller informed O'Quin that the truck was driving carelessly and that it could possibly be a drunk driver. (Tr. 109) Officer O'Quin went to the flag pole at the main red light in Tylertown and waited until a truck came by that fit that description. (Tr. 110) He testified that he was positioned at the flag pole for approximately one and a half to two minutes when an older model yellow Ford truck came through the red light. (Tr. 110) O'Quin testified that he got behind the truck and proceeded north on Highway 27. (Tr. 110) As the truck passed the old Byrd's Feed Mill, it crossed over the center line. O'Quin activated his emergency equipment and attempted to stop the truck. He pulled the truck over in a little gravel spot just south of the radio station on Highway 27. (Tr. 110)

Upon getting out of the car and approaching the driver's side, O'Quin recognized the driver, Joel Sistrunk, as well as the passenger, Bertram O'Quin. Officer O'Quin could smell the odor of alcoholic beverages coming from the truck. (Tr. 111) He was unable to tell whether the driver or the passenger was the source of the smell, so he asked Sistrunk to get out of the truck. (Tr. 111) Sistrunk opened the door and O'Quin, who was standing beside the door, noticed a small brown bottle laying on the kick panel between the seat and the door. Sistrunk shut the door and came to the back. O'Quin talked to him and asked him if he had consumed any alcohol. (Tr. 111) Sistrunk said that he had consumed one or two beers. Officer O'Quin asked Sistrunk if he had anything illegal in the trunk. Sistrunk replied "No." O'Quin asked if he could take a look. Sistrunk replied that he could. O'Quin then walked back up to the front, opened the truck door and picked up the bottle. O'Quin shook the bottle, discovered there was something in it and opened the bottle. He found three pills he believed to be hydrocodone. (Tr. 111) O'Quin took

Sistrunk to the sheriff's department and called Agent Aubrey Hill from Southwest Narcotics. O'Quin turned Sistrunk and the evidence over to Agent Hill. (Tr. 113)

O'Quin had a subsequent conversation with Agent Hill that lead to a subsequent meeting between O'Quin and Joel Sistrunk. Officer O'Quin made a recording of his conversation with Sistrunk. He testified that he had a tape recorder laying on the desk and that he recorded the conversation because he wanted to clear up some accusations that had been made by Sistrunk. (Tr. 116) O'Quin testified that Sistrunk was not charged on July 4th, 2007 because he indicated he wanted to work as a confidential information. It is the normal practice not to charge a potential confidential information with a crime in order to maintain his or her identity confidential. (Tr. 117)

Paige Mills testified that the three tablets found in Sistrunk's truck contained hydrocodone in the amount of 10 milligrams and acetaminophen in the amount of 650 milligrams. She testified that the tablets did not match the milligram amount of Sistrunk's prescription or his mother's prescription. (Tr. 124-130)

SUMMARY OF THE ARGUMENT

Sistrunk contends that the admission of the tape of his conversation with Officer O'Quin and Agent Hill is error because Sistrunk made the statement in the absence of Miranda warnings. However, the failure to raise a contemporaneous objection was not an unintentional omission, but rather a strategic decision, an intentional waiver of the potential objections to this piece of evidence. Sistrunk cannot now claim error, plain or otherwise, where he *agreed* to the evidence in question and relied on it in making his defense.

As noted above, prior to the start of trial, counsel for the defense moved to exclude

testimony of past bad conduct and criminal convictions of the defendant. (Tr. 92) During the argument on the Motion in Limine, defense counsel did not mention the tape, but only stated, "Criminal convictions of the defendant to be excluded." (Tr. 93) The trial court stated that the defendant's Motion in Limine as to prior convictions was granted and that there would not be any mention of the prior convictions without first approaching the bench and obtaining a ruling. (Tr. 95)

Immediately after the defendant's Motion in Limine as to prior convictions was ruled on by the trial court, the parties pre-marked the evidence including the records from the pharmacy and doctors, the crime lab report, the drugs and *the taped statement*. All these exhibits were *agreed upon* by the parties. (Tr. 95-96) No objection was made to the taped statement and the defense counsel did not claim surprise regarding the taped statement. In fact, the defense counsel identified the statement to the trial court. (Tr. 96) There followed considerable discussion as to the method by which the taped statement, which was on a compact disk, would be played to the jury. Defense counsel joined in and informed the court that the compact disc would play on the CD player in his truck. (Tr. 96) At this point, defense counsel had clearly waived any objections, stemming from his Motion in Limine or otherwise, as to the tape. Further, where evidence is agreed upon by the parties and both side are completely informed as to the nature of the evidence, there can be no prosecutorial misconduct in offering the evidence to be admitted at trial.

During the testimony of Officer Tracy O'Quin the prosecution introduced the recorded statement into evidence without objection from the defense. (Tr. 115) O'Quin attempted to testify that Agent Hill told him that Sistrunk had been telling people that O'Quin planted the

strategy." *Lattimore v. State*, 958 So.2d 192, 200 (Miss.2007) (citing *Leatherwood v. State*, 473 So.2d 964, 969 (Miss.1985)). An additional presumption that Sistrunk must overcome is "that all decisions made during the course of trial were strategic." *Id.* (citing *Leatherwood*, 473 So.2d at 969). Here, the record is clear that the deficiencies Sistrunk alleges were strategic in nature.

The verdict is supported by the sufficiency and the overwhelming weight of the evidence. The evidence clearly established that Sistrunk possessed three pills of hydrocodone in violation of Section 41-29-139 of the Mississippi Code Annotated of 1972 (as amended). The testimony of Officer O'Quin established that Sistrunk possessed three tablets of hydrocodone. The testimony of Paige Mills established that the pills were in fact hydrocodone tablets containing 10 milligrams each. The pills did not match the prescriptions provided by Sistrunk and his mother. Sistrunk argues that "the record does not indicate and Mills does not testify to the facts or data upon which she based this opinion and that she relied on reliable principles and methods in reaching this opinion." However, this argument was not made at trial. The trial court cannot be held in error on a legal point never presented for its consideration. *Chase v. State*, 645 So.2d 829, 846 (Miss.1994). Further, the trial court made a finding prior to Mills testimony that she was qualified to testify pursuant to Daubert.

ARGUMENT

I. Exhibit S-1, a recording of Sistrunk's statement to Officer Tracy O'Quin, was not obtained in violation of Sistrunk's 5th Amendment rights under *Miranda v. Arizona*, 384 U.S. 426 (1966) and the trial court did not err in admitting the recording into evidence.

Sistrunk argues on appeal that the taped statement of his conversation with Officer Tracy O'Quin and Agent Hill was inadmissible because it was obtained in violation of his fifth

amendment rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). However, the record clearly shows that the tape was admitted by agreement, with the express approval of his counsel.

Prior to the start of trial, counsel for the defense moved to exclude testimony of past bad conduct and criminal convictions of the defendant. (Tr. 92) The prosecution replied that if Sistrunk argued that he was being prosecuted due to animosity between himself and the officers, then the State would wish to offer that evidence. (Tr. 93) The prosecution further noted that there was a motion pending to amend the indictment to charge Sistrunk as an habitual offender pursuant to Mississippi Code Annotated section 99-19-83 (Rev.2007). (Tr. 93) The trial court ruled that if the defense opened the door, the State would be able to request a ruling. (Tr. 94) The trial court stated that the defendant's Motion in Limine as to prior convictions was granted and that there would not be any mention of the prior convictions without first approaching the bench and obtaining a ruling. (Tr. 95)

After the defendant's Motion in Limine as to prior convictions was ruled on by the trial court, the parties pre-marked the evidence including the records from the pharmacy and doctors, a taped statement, the crime lab report and the drugs. All these exhibits were *agreed upon* by the parties. (Tr. 95-96) Further, the defense attorney identifies the taped statement for the trial court as the exhibits are being pre-marked. 9Tr. 96) The defense did not make any objection to the taped statement and did not claim surprise regarding the taped statement. (Tr. 96) The conversation regarding the agreed evidence occurred immediately after the defense offered its Motion in Limine for 404(b) evidence. (Tr. 95-96) This constitutes an intentional waiver of objections to the statement on the part of defense counsel for strategic purposes. There was considerable discussion as to the method by which the taped statement, which was on a compact

disk, would be played to the jury. (Tr. 96) Defense counsel, in an effort to assist the trial court in determining what method could be used to play the statement, which was on a compact disk, informed the trial court that it was playable as a CD in his truck. (Tr. 96)

During the testimony of Officer Tracy O'Quin the prosecution introduced the recorded statement into evidence. (Tr. 115) O'Quin attempted to testify that Agent Hill told him that Sistrunk had been telling people that O'Quin planted the hydrocodone tablets on him. (Tr. 115) Defense counsel objected as to hearsay and stated during a bench counsel that he would prefer that the tape was played without the testimony from O'Quin as to how the conversation came to occur. (Tr. 115) The trial court sustained defense counsel's objection as to hearsay. Officer O'Quin testified that as a result of the conversation he had with Agent Hill a conversation took place between O'Quin, Hill and Sistrunk on August the 9th. Officer O'Quin testified that he made the recording using a tape record laying on the desk. He testified that the taped conversation occurred because there had been accusations made which he wanted to clear up. (Tr. 116) At one point during the argument over the admissibility of hearsay testimony leading up to the introduction of the tape into evidence the following colloquy took place:

By Mr. Tidwell: The truth of the matter is is that it's pretty clear on the tape what he heard.

By Mr. McNeil: Yeah, I mean, I'd just rather play the tape.

The trial court sustained the objection to hearsay and the prosecution was allowed to establish how O'Quin came to meet with Hill and Sistrunk. There were no objection to the tape being admitted into evidence, and indeed, the record shows that defense counsel agreed that the tape should be admitted into evidence and that it should be played for the jury.

The defense strategy with regard to the tape becomes clear in defense counsel's direct examination of Police Chief Aubrey Hill in Sistrunk's case-in-chief. Chief Hill was the Southwest Mississippi Narcotics Enforcement Agent at the time the conversation was taped. Defense counsel questioned Hill in detail regarding the policy of not charging confidential informants. He further suggested through his questioning that if O'Quin had not heard rumors that Sistrunk was alleging that O'Quin planted the pills on him that the charges would not have been filed against him. (Tr. 142) It was the defense strategy at trial to use the tape to show that Sistrunk was being manipulated by the officers and that he was charged for not serving as a confidential informant. The defense counsel did not object to the tape on the ground of a violation of Sistrunk's Fifth Amendment right against self incrimination because the defense planned to use the tape to suggest that Sistrunk was mistreated by the police and that the charge was brought vindictively. Defense counsel waived any and all objections to the tape for strategic reasons. Therefore, the tape was correctly admitted into evidence, and there was no error, plain or otherwise.

If a contemporaneous objection is not made, an appellant must rely on plain error to raise the argument on appeal. *Watts v. State*, 733 So.2d 214, 233 (Miss.1999). "The plain error doctrine requires that there be an error and that the error must have resulted in a manifest miscarriage of justice." *Williams v. State*, 794 So.2d 181, 187 (Miss.2001) (citing *Gray v. State*, 549 So.2d 1316, 1321 (Miss.1989)). "Further, this Court applies the plain error rule only when it affects a defendant's substantive/fundamental rights." *Id.* (citing *Grubb v. State*, 584 So.2d 786, 789 (Miss.1991)). Analysis of the plain error rule includes a determination of whether there is, in fact, "error," that is, some deviation from a legal rule. *United States v. Olano*, 507 U.S. 725,

732-33, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). Sistrunk argues that the tape was inadmissible because he allegedly was not given a Miranda warning when the statement was taken and was thus "compelled to give evidence against himself." However, Sistrunk agreed to the admission of the tape. He was not compelled to give this evidence against himself at trial, but rather submitted it himself for pre-marking as evidence in the case in agreement with the prosecution. (Tr. 96) And, further, the defense counsel worked in concert with the court to ensure that the jury would have a way to hear the tape in the jury room. (Tr. 96)

Sistrunk contends that the admission of the tape of his conversation with Officer O'Quin and Agent Hill is error because Sistrunk made the statement in the absence of Miranda warnings. However, the failure to raise a contemporaneous objection was not an unintentional omission, but rather a strategic decision, an intentional waiver of the potential objections to this piece of evidence. Sistrunk cannot now claim error, plain or otherwise, where he *agreed* to the evidence in question and relied on it in making his defense.

Further, this alleged violation of Sistrunk's 5th Amendment right against self incrimination did not rise to the level of plain error. "The plain error doctrine has been construed to include 'anything that seriously affects the fairness, integrity or public reputation of judicial proceedings.' " *Porter v. State*, 749 So.2d 250, 261 (Miss.Ct.App.1999) (quoting Olano, 507 U.S. at 736, 113 S.Ct. 1770). In this case, there is no evidence that Sistrunk was prejudiced by admission of the tape into evidence, and, in fact, his counsel believed that it inured to his benefit.

II. The State did not commit prosecutorial misconduct in offering S-1 as evidence at trial.

As noted above, prior to the start of trial, counsel for the defense moved to exclude

testimony of past bad conduct and criminal convictions of the defendant. (Tr. 92) During the argument on the Motion in Limine, defense counsel did not mention the tape, but only stated, "Criminal convictions of the defendant to be excluded." (Tr. 93) The trial court stated that the defendant's Motion in Limine as to prior convictions was granted and that there would not be any mention of the prior convictions without first approaching the bench and obtaining a ruling. (Tr. 95)

Immediately after the defendant's Motion in Limine as to prior convictions was ruled on by the trial court, the parties pre-marked the evidence including the records from the pharmacy and doctors, the crime lab report, the drugs and *the taped statement*. All these exhibits were *agreed upon* by the parties. (Tr. 95-96) No objection was made to the taped statement and the defense counsel did not claim surprise regarding the taped statement. In fact, the defense counsel identified the statement to the trial court. (Tr. 96) There followed considerable discussion as to the method by which the taped statement, which was on a compact disk, would be played to the jury. Defense counsel joined in and informed the court that the compact disc would play on the CD player in his truck. (Tr. 96) At this point, defense counsel had clearly waived any objections, stemming from his Motion in Limine or otherwise, as to the tape. Further, where evidence is agreed upon by the parties and both side are completely informed as to the nature of the evidence, there can be no prosecutorial misconduct in offering the evidence to be admitted at trial.

During the testimony of Officer Tracy O'Quin the prosecution introduced the recorded statement into evidence without objection from the defense. (Tr. 115) O'Quin attempted to testify that Agent Hill told him that Sistrunk had been telling people that O'Quin planted the

hydrocodone tablets on him. (Tr. 115) Defense counsel objected as to hearsay and stated during a bench conference that he would *prefer that the tape was played without the testimony from O'Quin as to how the conversation came to occur.* (Tr. 115) This was not only a failure to object on grounds of 404(b), but it was a positive statement that the defense desired the tape to be played. The trial court sustained defense counsel's objection as to hearsay. Officer O'Quin then testified that as a result of the conversation he had with Agent Hill a conversation took place between O'Quin, Hill and Sistrunk on August the 9th. Officer O'Quin testified that he made the recording using a tape record laying on the desk. He testified that the taped conversation occurred because there had been accusations made which he wanted to clear up. (Tr. 116) Here again, by failing to object to the admission of the tape on grounds of 404(b), to the extent that the Motion in Limine was ever intended to cover the tape, the objection is waived as to the tape. It appears from the record that the Motion in Limine was addressed to the convictions which were being used to charge Sistrunk pursuant to Mississippi Code Annotated section 99-19-83 (Rev.2007), and that the tape, which was an agreed upon piece of evidence, was therefore excepted from the Motion in Limine.

Again, this waiver of objections to the tape appears to be strategic on the part of defense counsel. The defense strategy with regard to the tape becomes clear in defense counsel's direct examination of Police Chief Aubrey Hill in Sistrunk's case-in-chief. Chief Hill was the Southwest Mississippi Narcotics Enforcement Agent at the time the conversation was taped. Defense counsel questioned Hill in detail regarding the policy of not charging confidential informants. He further suggested through his questioning that if O'Quin had not heard rumors that Sistrunk was alleging that O'Quin planted the pills on him that the charges would not have

been filed against him. (Tr. 142) It was the defense strategy at trial to use the tape to show that Sistrunk was being manipulated or punished by the officers because he did not serve as a confidential informant or because the officers were angry at him for other reasons. The defense counsel did not object to the tape on the ground of a violation of Sistrunk's Fifth Amendment right against self incrimination or pursuant to 404(b) or his Motion in Limine because the defense planned to use the tape to suggest that Sistrunk was mistreated by the police and that the charge was brought vindictively.

III. Sistrunk's trial counsel provided constitutionally effective assistance of counsel regarding the admission of S-1.

Sistrunk alleges that he was denied ineffective assistance counsel. To prove ineffective assistance of counsel, Sistrunk bears the burden of showing that there were deficiencies in his counsel's performance and that the deficiences prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687-96, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). There is a strong presumption that counsel's performance was within a wide range of reasonable professional assistance. *Moody v. State*, 644 So.2d 451, 456 (Miss. 1994).

To bring a successful claim for ineffective assistance of counsel, pursuant to the court's ruling in *Strickland*, the defendant must prove that his attorney's overall performance was deficient and that this deficiency deprived him of a fair trial. *Strickland*, 466 U.S. at 689; *Moore v. State*, 676 So.2d 244, 246 (Miss.1996) (citing *Perkins v. State*, 487 So.2d 791, 793 (Miss.1986)). There is a "strong but rebuttable presumption that an attorney's performance falls within a wide range of reasonable professional assistance and that the decisions made by trial counsel are strategic." *Covington v. State*, 909 So.2d 160, 162 (Miss.Ct.App.2005) (quoting

Stevenson v. State, 798 So.2d 599, 602 (Miss.Ct.App.2001)). Sistrunk must also overcome the "strong presumption that the attorney's conduct falls within the wide range of reasonable professional conduct and strategy." *Lattimore v. State*, 958 So.2d 192, 200 (Miss.2007) (citing *Leatherwood v. State*, 473 So.2d 964, 969 (Miss.1985)). An additional presumption that Sistrunk must overcome is "that all decisions made during the course of trial were strategic." *Id.* (citing *Leatherwood*, 473 So.2d at 969).

To overcome this presumption, the defendant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *Woodson v. State*, 845 So.2d 740, 742 (Miss.Ct.App.2003).

Sistrunk cannot meet the criteria set out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct.2025, 80 Led.2d 674 (1984). To prove ineffective assistance of counsel, Sistrunk must demonstrate that his counsel's performance was deficient and that this deficiency prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct.2025, 80 Led.2d 674 (1984). Sistrunk must overcome a strong presumption that his counsel rendered adequate assistance. *Id.* At 689. To show prejudice, he must show that there is a reasonable probability that but for his counsel's unprofessional errors, the outcome would have been different. *Woodson v. State*, 845 So.2d 740, 742 (Miss. Ct. App. 2003).

As argued earlier, this waiver of objections to the tape was strategic on the part of defense counsel. The defense strategy with regard to the tape becomes clear in defense counsel's direct examination of Police Chief Aubrey Hill in Sistrunk's case-in-chief. Chief Hill was the Southwest Mississippi Narcotics Enforcement Agent at the time the conversation was taped.

Defense counsel questioned Hill in detail regarding the policy of not charging confidential informants. He further suggested through his questioning that if O'Quin had not heard rumors that Sistrunk was alleging that O'Quin planted the pills on him that the charges would not have been filed against him. (Tr. 142) It was the defense strategy at trial to use the tape to show that Sistrunk was being manipulated or punished by the officers because he did not serve as a confidential informant or because the officers were angry at him for other reasons. The defense counsel did not object to the tape on the ground of a violation of Sistrunk's Fifth Amendment right against self incrimination or pursuant to 404(b) or his Motion in Limine because the defense planned to use the tape to suggest that Sistrunk was mistreated by the police and that the charge was brought vindictively.

Sistrunk cannot overcome the presumption that his trial attorney's performance fell within the wide range of reasonable professional assistance and that the decisions made by his trial counsel were strategic. This issue is without merit and the jury's verdict and the rulings of the trial court should be affirmed.

IV. The State did not commit a discovery violation relating to Mills' testimony concerning the milligram amount of the pills recovered from Sistrunk's truck.

Sistrunk alleges unfair surprise due to the testimony of expert witness Paige Mills. Mills was qualified by the trial court pursuant to the Daubert standards as a forensic scientist. The trial court noted that Mills was qualified to testify as such and that the methods she utilized were peer-reviewed. Mills testified that she performed a literature reference as well as a gas chromatograph mass spectrometer test. (Tr. 128) She testified that the tablets found in Sistrunk's possession were composed of hydrocodone and acetaminophen. Mills further testified that the

pills contained 650 milligrams of acetaminophen and 10 milligrams of hydrocodone. (Tr. 129) Defense counsel objected to Mills' testimony regarding the milligram amount of the pills, alleging that her report did not state what dosage the pills were that Mills' testimony was the first he had heard of the dosage of the pills. (Tr. 129) The prosecutor stated for the record that he had told the defense attorney that he had talked to Mills and that she had identified the pills as Lorcets which were 10 milligrams with 650 milligrams of acetaminophen. The trial court overruled the objection, holding that defense counsel had the report and was on notice that Mills was a potential witness. The trial court held that defense counsel had the opportunity to explore the matter further. (Tr. 130)

As part of discovery, defense counsel received a copy of Aubrey Mills' report stating that she had analyzed the evidence submitted in the case and had performed gas chromatography, mass spectrometry and literature reference in order to identify the pills. Her results and conclusions stated that the three tablets were hydrocodone and acetaminophen. (State's Exhibit, 7) Sistrunk argues that he was unfairly surprised when Mills testified that the hydrocodone was in the amount of 10 milligrams per tablet.

Sistrunk argues that even though his counsel did not explicitly request a continuance, he desired one. If this was the remedy Sistrunk desired, it is waived. The trial court cannot be held in error on a legal point never presented for its consideration. *Chase v. State*, 645 So.2d 829, 846 (Miss.1994). Further, as the trial court noted, defense counsel had been made aware of this witness and had ample opportunity to interview her prior to the date of trial. Also, the prosecutor represented to the court that he had informed the defense attorney that the pills were 10 milligram dosage tablets.

Based on the procedure first outlined in Box v. State, 437 So.2d 19, 23-24 (Miss.1983), when a trial court is faced with previously undisclosed evidence to which the defendant has objected, it should give the defendant a reasonable opportunity to familiarize himself with the evidence." *Bell v. State*, 963 So.2d 1124, 1133 (Miss.2007). It is then the defendant's responsibility to request a continuance if, thereafter, he believes he may be prejudiced by his lack of opportunity to prepare for the admission of the evidence. *Id.* The defendant may also request a motion for a mistrial. *Id.* If the defendant does not request a continuance, he waives the issue. *Id.*; see also Porter v. State, 869 So.2d 414, 420 (Miss.Ct.App.2004) (finding an alleged discovery violation was waived on appeal for failure to request a continuance). In *Barnes v. State*, 854 So.2d 1, 5 (Miss.Ct.App.2003) (citing *Kelly v. State*, 778 So.2d 149, 152(Miss.Ct.App.2000)) this Court found no error on a claim of an alleged discovery violation because Rule 9.04(I) "requires Barnes to have sought a continuance or mistrial, which he did not."

Sistrunk argues that because the trial court did not "follow the procedure" set out in UCCCR 9.04, he is entitled to a new trial. However, since his attorney did not request a continuance or a mistrial and the prosecutor clearly stated that he had provided defense counsel with the information, this issue is without merit and the trial court should be affirmed.

V. The verdict was supported by the weight and sufficiency of the evidence.

A. The verdict was supported by the sufficiency of the evidence.

The Mississippi Supreme Court has held that the standard of review for the denial of a motion for a judgment notwithstanding the verdict is determined by the sufficiency of the evidence. *Withers v. State*, 907 So.2d 342, 350-51 (Miss.2005). "This Court must review the trial court's finding regarding sufficiency of the evidence at the time the motion for JNOV was

overruled." *Id.* (quoting *Eakes v. State*, 665 So.2d 852, 872 (Miss.1995)). The evidence is viewed in the light most favorable to the State and all credible evidence supporting the conviction is taken as true. *Id.* at 351. "Only where the evidence, as to at least one of the elements of the crime charged, is such that a reasonable and fair minded jury could only find the accused not guilty, will this Court reverse." *Id.*

In order to succeed on a challenge to the sufficiency of the evidence supporting his conviction, Sistrunk must prove that no "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Smith v. State*, 925 So.2d 825, 830 (Miss.2006) (quoting *Brown v. State*, 907 So.2d 336, 339 (Miss.2005)). Challenges to the sufficiency of the evidence are viewed in the light most favorable to the State. *Id.* Therefore, Mississippi appellate courts "must accept as true all evidence consistent with the defendant's guilt, together with all favorable inferences that may be reasonably drawn from the evidence, and disregard the evidence favorable to the defendant." *Robinson v. State*, 940 So.2d 235, 240 (Miss.2006) (citing *McClain v. State*, 625 So.2d 774, 778 (Miss.1993)). The trial court's decision is reviewed under an abuse of discretion standard. *Smith*, 925 So.2d at 830 (citing *Brown*, 907 So.2d at 339). "As long as 'reasonable fair-minded men in the exercise of impartial judgment might reach different conclusions on every element of the offense,' [then] the evidence will be deemed to have been sufficient." *Id.* (quoting *Edwards v. State*, 469 So.2d 68, 70 (Miss.1985)).

The evidence clearly showed each element of the crime. O'Quin's testimony established that Sistrunk was in possession of three tablets of hydrocodone. O'Quin testified that he stopped Sistrunk for crossing the center line and that when Sistrunk opened the door of the truck and the pill bottle was on the truck floor between Sistrunk's seat and his door. The pill contained three

tablets. Analysis by the crime lab established that the pills contained 10 milligrams each of hydrocodone. Prescription records from Sistrunk and his mother were for pill containing 5 milligrams or 7.5 milligrams of hydrocodone. The prosecution proved, therefore, that Sistrunk possessed three dosage units of hydrocodone (three 10 milligram tablets) in violation of Section 41-29-139 of the Mississippi Code of 1972 (as amended).

B. The verdict was supported by the overwhelming weight of the evidence.

A motion for a new trial challenges the weight of the evidence and is reviewed by an abuse-of-discretion standard. *Smith v. State*, 925 So.2d at 832. "In reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, this Court will disturb a verdict only 'when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice.' " *Id.* (quoting *Bush v. State*, 895 So.2d 836, 844 (Miss.2005)).

The evidence clearly established that Sistrunk possessed three pills of hydrocodone in violation of Section 41-29-139 of the Mississippi Code Annotated of 1972 (as amended). The testimony of Officer O'Quin established that Sistrunk possessed three tablets of hydrocodone. The testimony of Paige Mills established that the pills were in fact hydrocodone tablets containing 10 milligrams each. The pills did not match the prescriptions provided by Sistrunk and his mother. Sistrunk argues that "the record does not indicate and Mills does not testify to the facts or data upon which she based this opinion and that she relied on reliable principles and methods in reaching this opinion." However, this argument was not made at trial. The trial court cannot be held in error on a legal point never presented for its consideration. *Chase v. State*, 645 So.2d 829, 846 (Miss.1994). Further, the trial court made a finding prior to Mills testimony that

she was qualified to testify pursuant to Daubert, holding:

> I just wanted the record to reflect that under the Daubert standards I find that the testimony would be helpful to a trier of fact, that there does, in fact, exist a specialty, recognized specialty called Forensic Science, and that she's qualified and that the methods utilized in that are peer-reviewed, and also, of course, find – there's no objection, but the – as the gatekeeper I need to make those findings regardless if there's an objection or not, so just wanted that to be on the record.

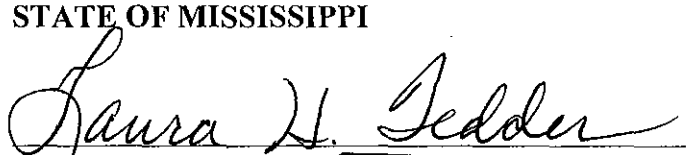
Therefore, the verdict is not so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. This issue is without merit and the jury's verdict and the rulings of the trial court should be affirmed.

CONCLUSION

The Appellee's assignments of error are without merit and the jury's verdict and the rulings of the trial court should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL
STATE OF MISSISSIPPI

By: 

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CERTIFICATE OF SERVICE

I, Laura H. Tedder, 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 Michael M. Taylor
Circuit Court Judge
P. O. Drawer 1350
Brookhaven, MS 39602

Honorable DeWitt (Dee) Bates, Jr.
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This the 15th day of October, 2009.

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