IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JAMAR AMIN MOORE — APPELLANT

VS. — NO. 2009-KA-1375

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: JOHN R. HENRY
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR N[redacted]

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

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JAMAR AMIN MOORE **APPELLANT**

vs. **CAUSE No. 2009-KA-01375-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against a judgment of the Circuit Court of Coahoma County, Mississippi in which the Appellant was convicted and sentenced for his felony of **POSSESSION OF A CONTROLLED SUBSTANCE.**

STATEMENT OF FACTS

The Appellant does not assert that the evidence presented against him was insufficient to permit the jury to pass on his guilt for possession of a controlled substance. Neither does he assert that the verdicts are opposed by the great weight of the evidence. It will not be necessary, then, to set out the evidence of his guilt it detail.

The Appellant was indicted in a two- count indictment of possession of hydrocodone and of marijuana. (R. Vol. 1, pp. 3 - 4). Generally stated, the proof was that the Appellant, a Domino's

Pizza driver, was reported to be in possession of marijuana by a reliable confidential informant, who happened to be the Appellant's co-worker. The Appellant was stopped as he was on his way to deliver pizza's. There was a strong odor of marijuana emanating from his car. No narcotics were found in the car, but marijuana and hydrocodone were found on his person. The Appellant claimed that he was not aware that there were drugs in his car but found them when he opened the glove box. He said he opened the glove box to get his insurance card, discovered marijuana, and put the drugs in his pants pocket to hide them from the police. The Appellant thought that the confidential informant put the marijuana into the car. He admitted being in possession of the hydrocodone pills.

The Appellant was convicted of possession of hydrocodone, but acquitted of possession of marijuana. (R. Vol. 3, pg. 242)

STATEMENT OF ISSUES

1. DID THE TRIAL COURT ERR IN REFUSING THE APPELLANT'S THEORY OF THE CASE JURY INSTRUCTION?

2. DID THE TRIAL COURT ERR IN REFUSING TO GRANT A MISTRIAL?

3. DID THE CUMULATIVE EFFECT OF ALLEGED ERRORS DENY THE APPELLANT A FAIR TRIAL?

SUMMARY OF ARGUMENT

1. THAT THE TRIAL COURT DID NOT ERR IN REFUSING THE APPELLANT'S PROPOSE THEORY OF THE CASE JURY INSTRUCTION

2. THAT THE TRIAL COURT DID NOT ERR IN REFUSING TO DECLARE A MISTRIAL

3. THAT NO CUMULATIVE ERROR EXISTS IN THE CASE AT BAR

ARGUMENT

1. THAT THE TRIAL COURT DID NOT ERR IN REFUSING THE APPELLANT'S PROPOSE THEORY OF THE CASE JURY INSTRUCTION

In the First Assignment of Error, the Appellant asserts that the trial court erred in refusing

his theory - of - the - case instruction. In that instruction, the Appellant attempted to inform the jury that his car would not have been stopped had not the confidential informant put marijuana in his car and then called law enforcement. (R. Vol. 1, pg. 87). The trial court refused this instruction because the instruction stated that the informant put the marijuana in the car, as though that was an uncontested fact. It also found that the instruction was a comment on the evidence. (R. Vol. 2, pp. 219 - 222).

The instruction did peremptorily state that the Appellant would not have been stopped and charged with possession had not the confidential informant put the marijuana in the car. It is true that the instruction concluded that if the jury "so found" it was required to acquit the Appellant. But this language would have been confusing in light of what appeared just before it. The instruction singled out evidence in the case and was a comment on the evidence. It was properly refused for that reason. *Banks v. State*, No. 2008-KA-01523-COA (Miss. Ct. App., decided 23 February 2010)(Instruction that would have informed jury that "Daniel Banks' theory of the case is that Aldean Johnson stabbed George Palmer with a knife and then threw the knife in the river and told officer (*sic*) they arrested the wrong man and if you so find you must find Daniel Banks not guilty" held to be an improper comment on the evidence).

Beyond this consideration, though, is the fact that the instruction was speculative. It assumed that no stop would have occurred but for the confidential informant having placed marijuana in the car and then reporting the matter to the police. In fact, there was testimony that the Appellant was stopped for having failed to use a turn signal and because of a report that he had marijuana in his car. (R. Vol. 2, pp. 106 - 107).

It is not clear what defense the instruction related to, if any. The instruction seems to say that had the Appellant would not have been apprehended had he not been reported to be in possession

of marijuana. That may or may not have been true, but we are unaware of a defense in this State to the effect of "I would have gotten away with it had I not been caught."

The Appellant cites *Manuel v. State*, 667 So.2d 590 (Miss. 1995) for the proposition that an accused has the right to have the jury instructed as to his theory of the case. It is quite true and an accused has such a right. However, it is equally true that a trial court properly denies instructions that are peremptory in nature, such as the one in *Manuel*, or instructions that single out and comment on parts of the evidence.

The Appellant further asserts that it is "reasonable" to believe that he would have been acquitted of possession of hydrocodone had the instruction been given. The Appellant admitted that he had been in possession of the hydrocodone. The admission was more than sufficient to find him guilty of possession. The instruction sought by the Appellant had nothing to do with the hydrocodone.

The First Assignment of Error is without merit.

2. THAT THE TRIAL COURT DID NOT ERR IN REFUSING TO DECLARE A MISTRIAL

During the examination one of the officers involved in the arrest of the Appellant, the officer was asked by the prosecutor whether the Appellant said anything to the officer. The officer stated that the Appellant said that he had been in trouble and did not want to go back to prison. The Appellant objected and the objection was sustained. The Appellant then asked the court to admonish the jury to disregard that statement. The court instructed the jury to disregard the statement. The Appellant then moved for a mistrial. The trial court denied relief on that motion. (R. Vol. 2, pg. 99).

As noted by the Appellant, the decision to grant a mistrial is a decision left to the discretion of a trial court. This Court will only find error in the decision to refuse a mistrial where it finds that

the trial court abused its discretion. The comment made by the officer was a non-responsive one. That it did not prejudice the Appellant is a thing that ought to be plain to see– the Appellant was acquitted of the marijuana charge and he admitted possession of the hydrocodone.

The action taken by the trial court was sufficient to cure the matter. *Hill v. State*, 4 So.3rd 1063, 1065 - 1066 (Miss. Ct. App. 2009).

The Appellant makes an aside concerning "prosecutorial misconduct." This very tired war horse has no part here. The prosecutor's question was not designed to elicit an objectionable answer. The witness was the one who volunteered the answer. Whether *Miranda* warnings were given or not is neither here nor there in view of the fact that there was no custodial statement introduced into evidence and in view of the fact that no issue was made in the trial court or here about *Miranda*. In any event, the response made by the officer was not incriminating as to the Appellant, in terms of his guilt in the case at bar.

The Second Assignment of Error is without merit.

3. THAT NO CUMULATIVE ERROR EXISTS IN THE CASE AT BAR

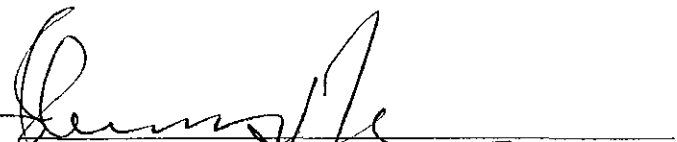
In the Third Assignment of Error, the Appellant alleges that the foregoing claims of error amount to cumulative error. As there is no merit in the individual claims, there is no cumulative error. *Jordan v. State*, 21 So.3rd 697 (Miss. Ct App. 2009).

CONCLUSION

The Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

JOHN R. HENRY
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO[redacted]

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

CERTIFICATE OF SERVICE

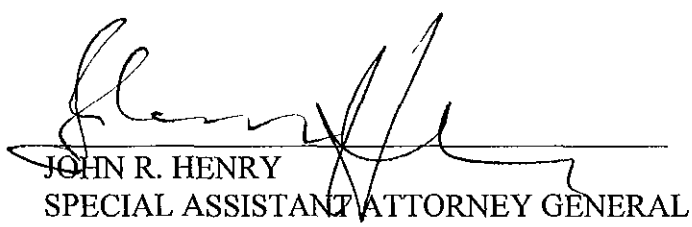
I, John R. Henry, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Charles E. Webster
Circuit Court Judge
P. O. Drawer 998
Clarksdale, MS 38614

Honorable Brenda Mitchell
District Attorney
115 First St., Suite 130
Clarksdale, MS 38614

Imhotep Alkebu-Lan, Esquire
Attorney At Law
Post Office Box 31107
Jackson, Mississippi 39286-1107

This the 23rd day of July, 2010.



JOHN R. HENRY
SPECIAL ASSISTANT ATTORNEY GENERAL

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