

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**CURTIS ASTER HOGAN**

**APPELLANT**

**VS.**

**NO. 2009-KA-2012-SCT**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

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**VS.**

**NO. 2009-KA-2012-SCT**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**PROCEDURAL HISTORY:**

On November 20, 2009, Curtis Aster Hogan, "Hogan" was tried for sale of cocaine before a Bolivar County Circuit Court jury, the Honorable Kenneth L. Thomas presiding. R. 1. Hogan was found guilty and given a sentence of twelve years with six years suspended in the custody of the Mississippi Department of Corrections. R. 73.

From that conviction, Hogan, through counsel, filed notice of appeal. C.P. 43-46.

**ISSUES ON APPEAL**

**I.**

**WAS THERE CREDIBLE, SUBSTANTIAL CORROBORATED  
EVIDENCE IN SUPPORT OF THE CONVICTION?**

## **STATEMENT OF FACTS**

On September 23, 2009, Curtis Hogan was indicted for sale of cocaine in Bolivar County on or about April 23, 2009. C.P. 3.

On November 20, 2009, Curtis Aster Hogan was tried for sale of cocaine before a Bolivar County Circuit Court jury, the Honorable Kenneth L. Thomas presiding. R. 1. Hogan was represented by Mr. Raymond Wong. R. 1.

Mr. Eric Frazure with the Mississippi Crime Laboratory in Batesville testified that he examined state's exhibit S-1. R. 7. Mr. Frazure determined by several scientific tests that this substance was cocaine, 1.2 grams. R. 9. He was cross examined about which tests he used, what procedures he followed, what quality control tests he and his laboratory had passed and who was his supervisor. R. 11-14.

Officer Joe Smith, a narcotics investigator with the Bolivar County Sheriff's office, testified that he was involved in setting up "a controlled buy" of cocaine. R. 16-17. A confidential informant named Mr. Michael Cox was the person with whom he was working. R. 18. The informant was searched and his vehicle, which was a motorcycle. R. 18-20.

Officer Smith testified that the informant was fitted with an audio and video camera. R. 18-19. Smith testified to hearing the informant receive a telephone call. Smith could only hear Cox's conversation on his receiving end of his cell phone. R. 19.

He heard Cox ask for some "hard." This was slang for crack cocaine. R. 20. He was speaking to someone referred to as "Apple." R. 22. Smith checked Cox's cell phone. It showed the call had come from telephone number, "662-719-6319." R. 19. Smith provided Cox with "\$100.00" for purchasing the alleged cocaine. R. 20.

Smith testified that when Cox returned to the post buy location, he was searched again. Cox

had a rock like substance which he believed to be cocaine. Smith collected this evidence and labeled it. R. 32. He did not seal the bag containing the evidence on site because the heat sealing equipment was left at this office. R. 37.

Smith also collected the audio and video equipment concealed on the informant. That equipment included a recorded tape made of the alleged sale of cocaine. R. 25. Smith testified that tape was downloaded to a computer. It was copied as "a DVD," meaning it contained not only moving visual images shown in real time, but also a continuous sound recording of everything that occurred.

This included Smith's conversation with Cox prior to the sale, Cox's receiving a phone call, the sound of Cox's motor cycle, and , of course, the sound of the suspect's and Cox's voices during the alleged sale. Smith testified that the DVD made from the tape had not been "changed or altered in any way." R. 25.

Officer Smith also testified that from the DVD images on the unaltered tape, he made still photographs of the alleged suspect, state's exhibit 2.

Officer Smith testified that Cox described the suspect as being "a Black male" with "corn rows" or braids in his hair. R. 31. He estimated his age as about thirty-five and his weight as about two hundred.

Officer Smith was cross examined about why he used this informant, and whether he was being paid for his cooperation. Smith testified that Cox was not paid for his assistance in setting up the controlled buy. R. 33-37. He was also cross examined about why he did not personally field test the substance, or heat seal it at the post buy site. On redirect, Smith testified that he did not have the equipment to heat seal the bag the suspected cocaine was contained in until he returned to his office. R. 37.

Mr. Cox testified that he worked with Officers Smith and Moore on the date in question. He and his motorcycle were searched . He was given "\$100.00." He received a call from Hogan whom he knew at that time only as "Apple." R. 39-40.

Apple informed him that he was in the nearby town of Alligator. Cox told "Apple" he wanted \$100.00 worth of "hard." This was slang for crack cocaine.

Mr. Cox was fitted with a concealed video and audio camera. This was prior to and in preparation of the alleged sell. R. 39. See state's exhibit 1 in manila envelop for DVD in container plastic box.

When inserted into a computer, it shows the images of the alleged cocaine purchase. Cox can be seen and heard on the DVD. Cox is seen going down a dirt road on his motorcycle to Alligator, Bolivar County. This along with the sounds of the transaction were on the DVD tape shown to the jury. R. 50. See state's exhibit 1, an audio and video DVD of the alleged cocaine purchase in manila envelop marked "Exhibits."

Cox testified that he did not see Apple at the place mentioned on the phone for the sale. To locate him, he called the same telephone number "662- 719-6319" from which he had previously been contacted. R.19 ; 42. He was told by the voice on the phone to go "around the corner from the railroad track in Alligator. " R. 43.

Mr. Cox testified that he met a man sitting in "a gray four door car." The suspect was still behind the steering wheel when Cox handed him "\$100.00." Apple handed him what looked like crack cocaine. R. 43.

Mr. Cox identified Hogan as the person from whom he received the telephone call in Officer Smith's presence. R. 39-40. Cox believed the substance he purchased for \$ 100.00 to be crack cocaine. R. 44. Cox told Smith that the "black male" suspect had his hair "in corn rows." R. 46.

Cox testified that "state's exhibit 2" was an accurate still photograph of the suspect. This was a photograph taken at the time he opened his car door. He then exchanged the \$100.00 given him for the alleged crack cocaine. R. 48. It was a four door gray car as shown in the photograph.

This still photograph was made from the DVD tape of the alleged cocaine purchase. It was also introduced into evidence and shown to the jury. R. 50. See state's exhibit 2 for still photograph of suspect, developed from video tape, state's exhibit 1.

Mr. Cox testified that he reviewed the DVD video/audio tape, exhibit 1, taken of the alleged cocaine sale in Alligator. He testified that it was true and "accurate as to what happened" that day. R. 50.

State's exhibit 2 was a still photograph. It was developed from the video portion of the DVD taken of the alleged cocaine sale. It shows the face of "a black male" with a "corn row" hair style. He is sitting in a four door gray car. State's exhibit 3 was a photograph of "a heat sealed plastic bag" containing "a rock substance believed to be cocaine."

This was the substance submitted to the Batesville Crime Laboratory for identification. It was tested scientifically and found to be cocaine. These exhibits along with the DVD make from the video on the informant are contained in the manila envelop marked "Exhibits."

Mr. Cox was cross examined about his pending narcotics violation charge. He was asked about his motivation for cooperating with law enforcement, and whether his legal insecurities influenced his testimony in this case. Mr. Cox admitted a pending drug charge against him, but "that did not change" in any way what he testified to before the jury. R. 56.

The trial court denied a motion for a direct verdict. R. 57-58.

After being advised of his right to testify, Mr. Hogan chose not to testify in his own behalf. R. 59.



Mr. Hogan was found guilty and given a sentence of twelve years with six years suspended in the custody of the Mississippi Department of Corrections. R. 65; 73.

The trial court denied Hogan's motion for new trial. C.P. 35-36.

From that conviction, Hogan, through counsel, filed notice of appeal. C.P. 43-46.

## SUMMARY OF ARGUMENT

1. There was credible, substantial partially corroborated evidence in support of Hogan's conviction. **McClain v. State**, 625 So. 2d 774, 778 (Miss. 1993). The informant identified Hogan as the person from whom he purchased cocaine of April 23, 2009. R. 40; 53. The alleged crack cocaine returned to law enforcement from the informant was identified by scientific tests as being cocaine. R. 6; 23; 44. The still photograph of the suspect's face in the car can be clearly seen. It shows "the black male" suspect's hair in braids or "corn rows." This was how Cox described him the day of the sale. R. 46. It also shows the suspect in "a gray car", as testified to by the informant. R. 43.

The informant, Mr. Cox, was corroborated by testimony from Officer Smith. Smith testified to hearing Cox ask someone on his cell phone for some "hard," slang for cocaine. R. 19-20. He testified that telephone number "662-719-6319" was used by someone who called Mr. Cox.

Mr. Cox testified he called this same telephone number in Alligator. This was necessary since he could not locate the suspect in the place previously mentioned for the sale. R. 42. After a call to that number, Cox testified he found the suspect, "Apple." He then purchased what appeared to him to be cocaine. R. 43.

Mr. Cox testified that the audio, video tape of the sale of apparent cocaine was "accurate as to what happened." R. 48. It was shown "on a screen" in the court room to the jury. R. 50- 51.

There was more than sufficient partially, corroborated testimony in support of Hogan's conviction. **Doby v. State**, 532 So. 2d 584, 591 (Miss. 1988). There was no "injustice" involved in denying his motion for a new trial. **Wetz v. State**, 503 So. 2d 803, 812 (Miss. 1987).

## **ARGUMENT**

### **PROPOSITION I**

#### **THERE WAS CREDIBLE, SUBSTANTIAL PARTIALLY CORROBORATED EVIDENCE IN SUPPORT OF THE VERDICT.**

Mr. Hogan argues that the jury's verdict was against the overwhelming weight of the evidence. He argues that while the video showed money actually being exchanged, it did not show any identifiable drugs being received by Cox. Hogan argues that the informant, Michael Cox's testimony, was inconsistent in some ways with the video shown to the jury. He also argues that Cox's own pending drug charge made his testimony suspect. Cox's description of the suspect was also different from Hogan's actual age, height, weight. Appellant's brief page 4-7.

To the contrary, the appellee would submit there was sufficient, credible, partially corroborated testimony in support of Hogan's conviction for sale of cocaine on April 23, 2009. Hogan was identified as by Cox, the informant, as the person from whom he purchased cocaine. R. 40; 52-53.

**Q. Mr. Cox, the person who you actually made that buy from, that you said a few minutes ago you identified that you passed the hundred dollars to him and he gave you the cocaine, is that person in the courtroom?**

**A. Yes, ma'am.**

**Mitchell: Your Honor, we would ask that the record reflect that this witness had identified the defendant as the person he bought cocaine from.**

**Court: For the second time, ordered.** R. 52-53. (Emphasis by appellee).

This identification came after the contents of a DVD, exhibit S-1, was shown on a screen to the jury. R.50- 51. During that testimony, Cox identified the man who could be seen exchanging something from inside his car for a \$100.00 as being Hogan. R. 51. At the time of the purchase,

Cox knew the seller as "Apple."

Q. Can you tell us what was on the screen right there, what was happening there?

A. I handed him the hundred dollars.

Q. **Who is it that you handed the hundred dollars to?**

A. **Mr. Hogan.** R. 51. (Emphasis by appellee).

Mr. Cox testified that the man who sold him the cocaine was "a black man" who had his hair in "corn rows" or braids. R. 46.

Q. **Will you tell us then what description you gave them-**

A. **I told them it was a Black male.**

Q. **What did you tell them about what his hair looked like?**

A. **I told them it was in corn rows.** R. 46. (Emphasis by appellee).

The jury was shown a photograph of a man sitting behind a steering wheel. It was a four door "gray car." The man sitting in the grey car had his hair in braids, or "corn rows," which the jury also observed. This was state's exhibit 2. This is in addition to their viewing images of the suspect on a screen in the court room. R. 50-51.

See state's exhibit 2 a photo taken from the tape, showing the suspect's braided hair. The man is sitting behind the steering wheel of "a gray car." R. 48. Cox testified that this photograph taken from the video recorder concealed on his person was "accurate as to what happened" at the alleged purchase of cocaine. R. 48.

Officer Joe Smith's testimony corroborated Mr. Cox's testimony. R. 16-38.

Officer Smith was present when he heard Mr. Cox receive a telephone call. R. 19. This was when he was being fitted with concealed audio and video equipment. Smith heard Cox request some "hard." R. 20. This was slang for crack cocaine. Smith also testified that by looking at Cox's cell

phone, he determined the incoming call came from telephone number, "662-719-6319." R. 19.

Officer Smith also corroborated Cox in testifying that he received what appeared to be crack cocaine. R. 22. This was when Cox returned from "the controlled buy." Mr. Cox was searched a second time along with his motorcycle. R. 22.

Officer Smith received the substance, labeled it, and returned it to his office. There is was placed in a plastic bag which was "heat sealed." R. 37. It was then taken to the Crime Laboratory in Batesville where it was tested scientifically for its chemical identity. It was identified by monitored scientific tests at the Crime Lab as being cocaine, 1.2 grams. R. 9.

On redirect while Mr. Cox admitted to having pending drug charges, he testified that these charges did not effect his testimony in the instant cause. Cox testified that he testified about what actually happened with Hogan on the date in question. R. 56.

**Q. The fact that you had been charged, did that change what you said took place that day?**

**A. No, ma'am.** R. 56. (Emphasis by appellee).

As to the inaccuracies of the description of Hogan, the record and the video indicates that the only contact Cox had with Apple was when he was sitting behind a steering wheel of "a gray car." R. 43. This would make it difficult to determine a person's weight and height. However, Cox described "the black male" as having a "corn row" hair style. This is accurately reflected by the images of the man in the car shown in State's exhibit 2. It was also corroborated by the testimony of both Officer Smith, who testified that this was the hair style the suspect had according to Cox. It was also the hair style of Hogan when he was arrested as well as at trial. R. 32.

Cox also testified that he was "in his little gray four door car." R. 43. This gray car can be seen on both the audio video tape and the still photograph of the suspect. See State's exhibit 1 and

2. In **McClain v. State**, 625 So. 2d 774, 778 (Miss. 1993), the Court stated that when the sufficiency of the evidence is challenged, the prosecution was entitled to have the evidence in support of its case taken as true together with all reasonable inferences. Any issue related to credibility or the weight of the evidence was for the jury to decide, not an appeal's court.

The three challenges by McClain (motion for directed verdict, request for peremptory instruction, and motion for JNOV) challenge the legal sufficiency of the evidence. Since each requires consideration of the evidence before the court when made, this Court properly reviews the ruling on the last occasion the challenge was made in the trial court. This occurred when the Circuit Court overruled McClain's motion for JNOV. **Wetz v. State**, 503 So. 2d 803, 807-08 (Miss. 1987). In appeals from an overruled motion for JNOV, the sufficiency of the evidence as a matter of law is viewed and tested in a light most favorable to the State. **Esparaza v. State**, 595 So. 2d 418, 426 (Miss. 1992); *Wetz* at 808; **Harveston v. State**, 493 So. 2d 365, 370 (Miss. 1986);...The credible evidence consistent with McClain's guilt must be accepted as true. **Spikes v. State**, 302 So. 2d 250, 251 (Miss. 1974). The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. *Wetz*, at 808, **Hammond v. State**, 465 So. 2d 1031, 1035 (Miss. 1985); *May* at 781. Matters regarding the weight and credibility of the evidence are to be resolved by the jury. **Neal v. State**, 451 So. 2d 743, 758 (Miss. 1984);.. We are authorized to reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty. *Wetz* at 808; *Harveston* at 370; **Fisher v. State**, 481 So. 2d 203, 212 (Miss. 1985).

When the evidence presented by the prosecution was taken as true with reasonable inferences, there was more than sufficient, credible partially corroborated evidence in support of Hogan's conviction for sale of cocaine. Hogan was identified by Mr. Cox as the person from whom he purchased \$100.00 worth of cocaine. R. 52-53. He testified that the person seen on the video receiving \$100.00 in exchange for the alleged cocaine was Mr. Hogan. R. 51-52. Cox described the suspects' hair style accurately as being in "corn rows" or braided. R. 46. Cox testified that state's exhibit 1 and 2 were "accurate" video images of the alleged sale of cocaine. R. 48-50. Cox testified that the man with the corn rows was also "in a gray four door car." R. 43. It can be seen on the video and on a still photograph of the suspect, state's exhibit 2. The jury viewed these exhibits

during the trial and in their deliberations. R. 50.

Officer Smith corroborated Cox in many particulars. He testified that Cox received a call from someone using telephone number “662-719-6319.” He heard Cox request crack cocaine. R. 19. Cox testified that he called this same number for instructions for where to meet the man with the alleged cocaine. R. 42-43.

He testified, and the video shows a black male with braids in his hair, who handed something to Cox in exchange for the money that can be seen on the video. R. 46.

In the instant cause, the trial court denied a motion for a directed verdict. R. 57-58. The court found the prosecution had presented sufficient evidence for establishing all the elements of sale of cocaine. There was credible, corroborated evidence from which it was reasonable to infer that on April 23, 2009 in Bolivar County, Hogan sold cocaine to informant, Cox.

After being advised of his rights, Hogan chose not to testify. R. 59. Therefore, there was no evidence contesting the testimony and supporting evidence presented by the prosecution.

In **Doby v. State**, 532 So. 2d 584, 591 (Miss. 1988), the Court stated that the “uncorroborated testimony of a single witness” was sufficient for supporting a conviction.

With this reasoning in mind, the Court holds that the testimony of Conner was legally sufficient to support Doby's conviction for the sale of cocaine. This Court recognizes the rule that persons may be found guilty on the uncorroborated testimony of a single witness. See **Ragland v. State**, 403 So. 2d 146 (Miss. 1981);..

In **Jones v. State**, 635 So. 2d 884, 887 (Miss. 1994), the Mississippi Supreme Court stated that a motion for a new trial should be denied unless doing so would result in an “unconscionable injustice.”

Our scope of review is well established regarding challenges to the weight of the evidence issue. Procedurally, such challenges contend that defendant's motion for new trial should have been granted. Miss. Unif. Crim. R. of Cir. Ct. Prac. 5.16. The decision to grant a new trial rests in the sound discretion of the trial court, and the

motion should not be granted except to prevent “an unconscionable injustice.” **Wetz v. State**, 503 So. 2d 803, 812 (Miss. 1987). We must consider all the evidence, not just that supporting the case for the prosecution, in the light most consistent with the verdict.” **Jackson v. State**, 580 So. 2d 1217, 1219 (Miss. 1991), and then reverse only on the basis of abuse of discretion.

The appellee would submit that the trial court did not abuse its discretion in denying peremptory instructions. R. 57-58. In the instant cause, the informant was corroborated not only by Officer Joe Smith, but also by the DVD which was an audio and video tape recording of the transaction, and by a photograph of the suspect. This was the man who allegedly sold something which looked like cocaine for \$100.00 to the informant. That substance was found by monitored scientific tests to be cocaine. R. 9 ; 46.

The record reflects that testimony from forensic expert, Mr. Frazure, Officer Smith and informant Cox provided evidence of a complete chain of custody. R. 7-9; 32; 44. There was no evidence indicating that the suspected cocaine had been “tampered with” or altered by anyone prior to it being tested in a monitored scientific laboratory.

Therefore, the appellee would submit there was no injustice involved in denying Hogan a motion for a new trial. C.P. 40.

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





CONCLUSION

Mr. Hogan's conviction should be affirmed for the reasons cited in this brief.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

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

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This the 3<sup>rd</sup> day of May, 2010.



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