

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JAMES EWING

APPELLANT

VS.

NO. 2010-KA-0251-SCT

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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PROCEDURAL HISTORY:

On January 21, 22, 2010, James Ewing, "Ewing" was tried for transfer of hydrocodone, a schedule III controlled substance, before a Calhoun County Circuit Court jury, the Honorable Robert W. Elliott presiding. R. 1. Ewing was found guilty. R. 149. He was given a fifteen year sentence with five years suspended, and a \$1,000.00 fine in the custody of the MDOC. R. 149-150.

From that conviction, Ewing appealed to the Supreme Court. C.P. 101.

ISSUES ON APPEAL

I.

**THERE WAS CREDIBLE, SUBSTANTIAL PARTIALLY
CORROBORATED EVIDENCE IN SUPPORT OF THE
JURY'S VERDICT.**

STATEMENT OF THE FACTS

On May 16, 2008 , Ewing was indicted for transfer or sale of, a schedule III controlled substance, hydrocodone, under M. C. A. Sect. 41-290117(a)(e)(3) on or about August 30, 2007. C.P. 6.

On January 21, 22, 2010, James Ewing was tried for transfer/sale of hydrocodone, a schedule III controlled substance, before a Calhoun County Circuit Court jury, the Honorable Robert W. Elliott presiding. R. 5. Ewing was represented by Mr. Kevin Howe. R. 5.

A stipulation was accepted for the record. Exhibit 1, the alleged six hydrocodone pills at issue, were determined by scientific tests, to be hydrocodone, a scheduled III controlled substance. R. 75.

Ms. Tina West testified that she was working undercover on behalf of the Calhoun County Sheriff's office. This was on August 30, 2007. Deputies Dean Poyner and Wayne Plunk searched her person and her vehicle. R. 79. They placed concealed audio and video equipment on her person. They provided her with \$20 to buy controlled substance narcotics.

Ms. West testified that the video/ audio recording made of the alleged drug purchase "fairly and accurately" portrayed what happened that day. R. 81. This DVD was admitted into evidence. R. 81.

Ms. West identified Ewing as the person from whom she purchased the six pills. R. 77-78. While she thought she was going to buy from Debra, Ewing's girl friend, West identified Ewing as the person from whom she purchased six pills. She paid \$20.00. R. 78.

Ms. West testified that she was a friend of Ms. Debra Cruchfield. Debra was the person seen on the video sitting in the driver's seat of a car in front of her apartment. Ms. West had not met Ewing but knew that he was Debra's live in "boyfriend." R. 77-78. Ms. West explained that she meet

Ewing , as shown on the DVD video, when he arrived at Debra's car. R. 77. He then let her inside the apartment.

A DVD with video and sound was played on a screen for the jury. R. 83-86; 109-114. On the video, a black male can be seen opening a door to an apartment. West followed him inside. She had been seen speaking to a couple in a car in front of the apartment. She was inquiring about how long she would have to wait for her pills. Twenty dollars could be seen in her hand. The woman in the driver's seat, used West's "pink" cell phone to call someone. She, Debra, then told Ms. West that someone was coming to give her the pills. See DVD computer display as contained in record.

Once inside the house, the black male can be seen turning toward West. She is heard saying something about getting four instead of six pills. R. 107.

Ms. West identified the black male shown with her inside the house as Ewing. She identified him as the person who gave her the six pills. She gave him the \$20. R. 78.

On cross examination, Ms. West admitted that she had pending charges against her for forging her husband's checks. R. 76; 93. She also made it clear that she neither gave \$20.00 to Debra nor received the six controlled substance pills from her. R. 91.

Deputy Dean Poynor testified that Ms. Tina West was fitted with a concealed video and audio recorder. R. 98-99. This was on August 30, 2007. She was given \$20 to purchase some controlled substance pills. When she returned, West gave him six pills. R. 99. They were labeled, and taken to the crime laboratory. They were tested and determined to be hydrocodone, a controlled substance. R. 100. Officer Poynor also collected the concealed video/audio recorder on Ms. West's person.

The trial court denied a motion for a directed verdict. R.101; 119.

Mr. Ewing testified in his own behalf. R. 103-118. Ewing testified that he was allegedly merely asked to open the door. He was asked to open it by his now deceased brother, Joe Ewing.

While Ms. Tina West was inside the house, she allegedly picked up some pills off a table. R. 106. Ewing testified that although he was present and spoke to West, that he did not give, or sell her any pills, nor receive any money. He testified that “Joe and Deb” received the money. R.106. According to West, Ms. West merely picked the pills up of a table in his presence.

Ewing admitted that his brother who was with Debra was deceased. Debra, who was seen in the car with Ms. West had been convicted of a felony and was imprisoned at the time of trial. R. 117.

The jury was given a jury instruction S-2 for acting in concert with others to accomplish a crime. C.P. 82.

Ewing was found guilty. R. 149. He was given a fifteen year sentence with five years suspended, and a \$1,000.00 fine in the custody of the MDOC. R. 149-150.

From that conviction, he appealed to the Supreme Court. C.P. 101.

SUMMARY OF THE ARGUMENT

1. The record reflects credible, substantial corroborated evidence in support of Mr. Ewings' conviction for transfer or sale of controlled substance, hydrocodone. Ms. Tina West testified that she bought \$20.00 worth of contraband from Ewing. R. 78; 80; 91. West testified that while she initially requested the pills from Debra, she actually received them from Ewing. Ewing received the \$20. R. 80; 91. She denied that Debra, Ewing's girl friend, received the money. R. 91. The pills received from Ewing were stipulated to be hydrocodone, a controlled substance for which one needs a medical prescription. R. 75.

The record reflects that Ewing admitted that he was seen on the video driving up in a white car. R. 108. He admitted that he was present when the pills were delivered to West. R. 109.

The appellee would submit there was eye witnesses testimony corroborated by DVD audio and video evidence sufficient for a conviction. When this evidence was taken as true, it could reasonable be inferred that Ewing sold or transferred the contraband. He did so in exchange for the \$20.00. The video shows money in West's hand, and it shows her with Ewing when she referred to the pills in her conversation. They were inside (as seen on the DVD) the house where Ewing admitted the pills were present. See DVD with audio and video of the alleged transfer or sell of controlled substance. **McClain v. State**, 625 So. 2d 774, 778 (Miss. 1993).

Mr. Ewing's uncorroborated testimony made his credibility a central issue for the jury to evaluate. His attempt to blame his imprisoned girl friend and deceased brother was not found credible by the jury. R. 149.

This court has found "the uncorroborated testimony" of a single witness sufficient for support of a narcotics violation conviction. **Doby v. State**, 532 So. 2d 584, 591 (Miss. 1988).

ARGUMENT

PROPOSITION I

THERE WAS CREDIBLE, SUBSTANTIAL PARTIALLY CORROBORATED EVIDENCE IN SUPPORT OF THE COURT'S DENIAL OF POST CONVICTION MOTIONS AND THE JURY'S VERDICT.

Ms. Ewing argues that there was insufficient evidence in support of his conviction. Ewing argues that while the video/audio tape of the alleged sale of controlled substance only shows him present with Ms. West, it does not shown any pills being transferred or any money actually going into his hands. In addition, he argues that the informant, Ms. West's testimony, is suspect. She testified in hope of having her own pending charges favorably treated by the prosecution. Appellant's brief page 1-6.

To the contrary, the record reflects credible, substantial partially corroborated evidence in support of the trial court's denial of a motion for a JNOV or a New Trial. R.101; 119 ; C.P. 99. This included not only the identification testimony of the informant, Ms. West, but also the video and audio tape which corroborated her as to the time, place, and persons present at the alleged sale.

This DVD recording also included corroboration that Ewing was present after being called by cell phone. He was seen on the DVD providing West with access to an apartment. This was where West admitted Ms. West received the pills. The audio portion of the DVD included corroboration as to actual dialogue that occurred first between West and Debra, and then with Ewing. This was after Ewing could be seen arriving with someone in a white car next to Debra's parked vehicle.

Ms. Tina West testified that on August 30, 2007 she was working undercover on behalf of the Calhoun County Sheriff's office. R. 76. Deputies Dean Poyner and Wayne Plunk searched her person and her vehicle. R. 79. They placed concealed audio and video equipment on her person.

They provided her with \$20 to buy controlled substance narcotics.

West testified that the video recording made of the alleged drug purchase “fairly and accurately” portrayed what happened the day of the alleged drug sale. R. 81. This DVD with sound and video was admitted into evidence. R. 81. It was played on a screen with sound for the jury. R. 83-86; 109-114. It was used during cross examination of Ewing.

Mr. West identified Ewing as the person from whom she purchased the six pills. R. 77-78; 91. While she thought she was going to buy from Ewing’s girl friend, Debra, she identified Ewing as the person from whom she exchanged \$20 for six pills. R. 78.

Ms. West testified that she was a friend of Ms. Debra Cruchfield. She did not know Ewing other than knowing that he was Debra’s live in boyfriend. R. 77-78.

Q. And so what happened?

A. I went to the apartment to buy some pills.

Q. And who did you go to buy them from?

A. I think I was supposed to buy them from Debra.

Q. Who did you buy them from?

A. From him.

Q. Who is him?

A. James Ewing.

Q. Do you see him in the courtroom?

A. Yes.

Q. Would you point him out to the jury?

A. (Witness indicating)

Stallings: Your Honor, I’d ask you to let the record reflect she has identified the

defendant, James Ewing. R. 77-78. (Emphasis by appellee).

...

Ms. West testified that she arrived at Debra's apartment. Debra was sitting in her car with another man. This was Ewing's brother, who was deceased at the time of trial. Debra can be seen calling someone. Ewing arrived with someone else in a white car. He let Ms. West in Debra's apartment. She got the pills from him. She testified that she gave him the money, and she left in her car. This was corroborated by the video shown to the jury.

Q. Just tell the jury what happened that day.

A. I pulled up and Debra was in the car and she used my phone to call James and he was on his way. He got there; we went in the apartment, and I got the pills and I left. (witness crying).

Q. **Who went in the apartment with you and gave you the pills?**

A. James.

Q. And who did you give the \$20.00 to?

A. I gave everything to Dean. (Deputy Dean Poyner.)

Q. No. I'm talking about you paid \$20 for the pills; is that right?

A. Yes.

Q. **Who did you give the 20 to?**

A. James Ewing. R. 80. (Emphasis by appellee).

On cross examination, West testified clearly and unequivocally that Ewing received the money for the pills, not Debra.

Q. Okay. Are you sure that you gave James money when you went in the house with him?

A. I gave him the money and I got the pills.

Q. **Are you sure you didn't give the money to Debra?**

A. I didn't give the money to Debra. I didn't give the money to Debra. R. 91.
(Emphasis by appellee).

While Ms. West was emotional during cross examination, her testimony was not impeached or contradicted as to what happened at the crime scene. R. 87-93. She admitted her pending forgery charge which was unrelated to the facts at issue in the instant cause.

On redirect, she was corroborated when her testimony was compared with the video and audio data displayed for the jury on the DVD. R. 93-95. This included her comment to Ewing about her having just received not six but four pills. R. 85. This can be clearly heard on the DVD audio. Ewing is seen smiling at her at that time.

Deputy Dean Poynor testified that Ms. Tina West was fitted with a concealed video and audio recorder. This was on August 30, 2007. She was given \$20 to purchase some controlled substance pills. When she returned, West gave him what was believed to be six contraband pills. They were labeled, and taken to the crime laboratory. They were tested and determined to be hydrocodone, a controlled substance. R. 75; 98-99.

The trial court denied Ewing's motions for a directed verdict based upon alleged insufficient credible evidence. R. 101; 119.

Mr. Ewing testified in his own behalf. R. 103-118. Ewing admitted to being present when the pills were alleged sold for \$20. However, he denied selling them, or receiving any money for the sale or exchange. He testified that he merely went to his girl friend's house to let Ms. West inside. Debra had allegedly misplaced her key.

Ewing testified that he was told by his deceased brother to open the door to the house, and "let her get the six pills that was in there." R. 113. When he and West went inside the house, she picked up some pills that were on a table. He testified that "Joe and Deb" received the money not

him.

On cross examination, Ewing was questioned about whether he arrived alone in the white car or not as he had just testified. R. 111. He reluctantly admitted there was another "brother" with him. R. 114. He was also questioned about which is seen in his right hand when he was with West was a pill bottle. See DVD computer display. While he claimed that it was not pills, something could be seen on the video in his hand at the time of the alleged transfer or sale.

(Portion of DVD shown to jury panel)

Q. Isn't this a pill bottle right here?

A. No, that's my key.

Q. Are you right handed or left handed?

A. Right handed.

Q. You don't deny being there, do you?

A. Yeah, I was there. R. 115.

Mr. Ewing admitted that his brother was deceased and Debra had been incarcerated at the time of trial. He nevertheless testified that his girl friend was the person who sold the drugs to West.

Q. Do you still consider her (Debra Cutchfield) your girlfriend?

A. Yeah.

Q. What is she in the pen for?

A. For selling pills.

Q. And you've known her for five years, lived with her, got a key to her apartment?

A. Uh-huh.

Q. She's a dope dealer? She sold pills, didn't she?

A. Yeah, but I didn't have anything to do with me.

Q. Well it looks to me like you were helping her sell pills?

A. No, I wasn't either. R. 117. (Emphasis by appellee).

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 testimony and evidence presented to the jury was taken as true with reasonable inferences, there was more than sufficient credible, partially corroborated evidence in support of the jury's verdict. It was also sufficient for the trial court's denial of post conviction motions.

The record reflects credible, substantial partially corroborated evidence in support of the trial court's denial of a motion for a JNOV or a New Trial. R.101; 119 ; C.P. 99. Ms. Tina West identified Mr. Ewing as the person from whom she purchased the pills. R. 78; 91.

In addition to the identification testimony of the informant, Ms. West, the video and +audio tape corroborated her as to the time, place, and persons present. It also corroborated her as to some of the actual dialogue at the alleged sale.

This DVD recording corroborated West by showing that Ewing was present at the crime scene. He arrived there after being called by Debra on West's "pink" cell phone, as seen on the DVD. R. 80. Mr. Ewing was seen on the DVD providing West with access to a house where she received six pills.

The audio portion of the DVD included corroboration as to actual dialogue that occurred first between West and Debra, and then with Ewing. This was after Ewing was seen arriving in a white car next to Debra's car. This included Ewing admitted to hearing West jokingly mentioned getting four pills instead of six. R. 107.

It was stipulated that the six pills were shown by scientific tests at the crime lab to be schedule III controlled substance for which one needs a medical prescription. R. 75.

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);..

The appellee would submit that we have shown sufficient credible, substantial evidence in support of the trial court's denial of all post conviction motions. In addition, there was sufficient evidence from which it could be reasonable inferred that there was no "injustice" involved in denying Ewing a new trial. **Jones v. State** , 635 So. 2d 884, 887 (Miss. 1994).

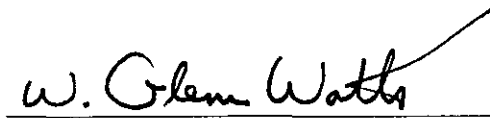
This issue is lacking in merit.

CONCLUSION

Mr. Ewings conviction should be affirmed for the reasons cited in this brief.
Respectfully submitted,

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CERTIFICATE OF SERVICE

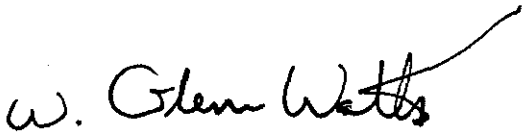
I, W. Glenn Watts, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 26th day of May, 2010.



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