

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-01013 COA**

**DON POSEY A/K/A DON CORNELIUS POSEY
A/K/A "NINO"**

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED,
PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	9/28/95
TRIAL JUDGE:	HON. ROBERT G. EVANS
COURT FROM WHICH APPEALED:	SIMPSON COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	JOHN E. JACKSON
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: DEIRDRE MCCRORY
DISTRICT ATTORNEY:	RICHARD WILEY WEBB
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	TRANSFER OF COCAINE WITHIN ONE THOUSAND (1,000) FEET OF SCHOOL PROPERTY; SENTENCED TO SERVE A TERM OF 12 YEARS IN THE MDOC
DISPOSITION:	AFFIRMED - 12/2/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	12/23/97

BEFORE THOMAS, P.J., HERRING, AND HINKEBEIN, JJ.

HINKEBEIN, J., FOR THE COURT:

Don Posey was convicted in the Simpson County Circuit Court for the sale of cocaine in violation of Mississippi Code Section 41-29-139 (a)(1) (Rev. 1993). Because Posey committed his offense within one thousand feet of an elementary school as prohibited by Miss. Code Ann. Section 41-29-142(1), Posey was sentenced to a term of twelve years in the custody of the Mississippi Department of Corrections. Aggrieved by his conviction, Posey appeals to this court on the following grounds:

**I. INCONSISTENCIES IN THE TESTIMONY OF THE STATE'S WITNESSES IN
CHIEF AMOUNT TO SUFFICIENT REASONABLE DOUBT TO WARRANT A
REVERSAL OF CONVICTION.**

II. A DIRECTED VERDICT IN FAVOR OF THE DEFENDANT SHOULD HAVE BEEN GRANTED.

Holding these assignments of error to be without merit, we affirm the judgment of the circuit court.

FACTS

In 1994, Posey, while standing on a Mendenhall street corner, sold cocaine to a paid confidential informant of the Simpson County Sheriff's Department. Deputy Jeff Herrin, who had previously wired the informant for sound, first listened as the two men discussed price and quantity. Herrin then heard Posey, whose voice he recognized, apologize for the quality of the cocaine and promise to provide a better product after meeting with his own source the next day. Thereafter, the informant turned the substance over to Herrin and described the location of the transaction -- 544 feet from an elementary school.

At trial, the prosecution presented the testimony of both the informant and Deputy Herrin. The informant recalled the exchange and identified Posey as the source of the cocaine. Deputy Herrin echoed that testimony, corroborating as many details as might reasonably be expected. Thereafter, the jury heard for themselves the taped conversation to which Herrin had listened. Finally, Charles Terry, a forensic chemist specializing in drug analysis, provided the foundation for admitting the State's exhibit #1, a manilla envelope containing the narcotics, into evidence. Terry identified the envelope by matching its case number notation to that of his laboratory work sheet. He recalled the safeguards employed by his laboratory with the aim of tampering prevention. He then explained the methods by which he examined the contents of the envelope and subsequently confirmed its contents to be cocaine. The trial court allowed the envelope into evidence despite the conspicuous absence of Terry's initials on the evidence tape sealing the package.

As the State rested, Posey made and the trial court denied his motion for a directed verdict. Thereafter, Posey proceeded with presenting his version of the events. He testified in his own behalf, simply denying having ever taken part in the recorded transaction. After claiming ignorance, Posey rested. Neither a renewed motion for directed verdict nor a request for a peremptory instruction followed. Nor did he, after his conviction, make a motion for either a new trial or, in the alternative, judgment notwithstanding the verdict.

ANALYSIS

On appeal, Posey claims first that the prosecution failed to present evidence sufficient to eliminate any reasonable doubts as to guilt. He supports his contention by characterizing the informant as an unemployed drug user driven by potential pecuniary gain. He also employs a chain of custody argument in his attempt to establish the existence of reasonable doubt, claiming that without Terry's initials on the evidence tape, the prosecution failed to prove that the substance he sold and the cocaine presented at trial were indeed one in the same. Posey then argues that the trial court erroneously denied the motion for directed verdict which he offered on that basis. In response, the State contends that although Posey claims to present this court with two assignments of error, in reality he merely uses different garments to clothe the same issue. The State then, rather than addressing Posey's concerns directly, alleges they are procedurally barred. We agree with both of the State's assertions.

Motions for directed verdict, requests for peremptory instructions, and motions for JNOV each challenge the legal sufficiency of the evidence. *Noe v. State*, 6616 So. 2d 298, 301 (Miss. 1993) (motion for directed verdict tests legal sufficiency of the evidence); *Strong v. State*, 600 So. 2d 199, 201 (Miss. 1992) (the trial judge is bound by the same law whether addressing a motion for directed verdict or addressing a request for a peremptory instruction); *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993) (motion for judgment of acquittal notwithstanding the verdict also tests legal sufficiency of the evidence). The trial court must consider all of the credible evidence consistent with the defendant's guilt. *McClain*, 625 So. 2d at 778. This Court is then authorized to reverse 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 v. State*, 503 So. 2d 803, 808 n.3 (Miss. 1987). However, before any such substantive determination may be made an accused must have first employed one of these procedural devices.

It is fundamental to the principles of appellate review that a trial judge may not be put in error on a matter which was not presented to him for decision. *Read v. State*, 430 So.2d 832, 838 (Miss. 1983). Therefore, failure to make a contemporaneous objection at trial waives the issue on appeal. *Ratliff v. State*, 313 So.2d 386, 388 (Miss.1975). Along these lines, when the defendant proceeds with his case after the state rests and the court denied the defendant's motion for a directed verdict, the defendant has waived the appeal of that directed verdict. *Holland v. State*, 656 So. 2d 1192, 1197 (Miss. 1995). Furthermore, appellants such as Posey are procedurally barred from raising before this court issues not listed in their motion for JNOV. *Pool v. State*, 483 So. 2d 331, 336 (Miss. 1986). And more specifically, the Mississippi Supreme Court has expressly held that in the absence of a renewal of the directed verdict, a request for a peremptory instruction, or a motion for a judgment notwithstanding the verdict, a defendant has waived the sufficiency error entirely on appeal. *Holland*, 483 So. 2d at 1197.

Here, when his motion for directed verdict was denied, Posey proceeded. Defense counsel then failed to renew his motion for a directed verdict at the close of Posey's case. The defense further failed to test the sufficiency of the evidence with either a request for a peremptory instruction or a motion for JNOV. These omissions deprived the trial judge of the opportunity to review the evidence and reexamine possible errors at trial. Posey is therefore barred from arguing reasonable doubt on appeal.

Despite the procedural bar, we nonetheless address the chain of custody issue that Posey intermingles with his insufficient evidence claim. An objection to the chain of custody is implicated when there is some "indication or reasonable inference of probable tampering with the evidence or substitution of the evidence." *Grady v. State*, 274 So. 2d 141, 143 (Miss. 1973). The accused bears the burden of establishing evidence of such irregularities. *Hemphill v. State*, 566 So. 2d 207, 208 (Miss. 1990). See also *Barnette v. State*, 478 So. 2d 800, 804 (Miss. 1985) (stating the presumption of regularity lies with public officers). Furthermore, our supreme court has often stated that issues involving the chain of custody of evidence are left to the sound discretion of the trial court, *Doby v. State*, 532 So. 2d 584, 588 (Miss. 1988), and that on appeal we should not "reverse the ruling except where this discretion has been 'so abused as to be prejudicial to the defendant.'" *Lambert v. State*, 462 So. 2d 308, 312 (Miss. 1984). In the present case, Posey has presented only a missing set of initials which, alone, does not support a reasonable inference of probable tampering. The trial court did not abuse its discretion in allowing the cocaine into evidence. Neither of Posey's assignments of error have

merit.

THE JUDGMENT OF THE SIMPSON COUNTY CIRCUIT COURT OF CONVICTION OF THE TRANSFER OF COCAINE WITHIN ONE THOUSAND FEET OF SCHOOL PROPERTY AND SENTENCE OF TWELVE YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS ARE ASSESSED AGAINST THE APPELLANT.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.