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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JERRY LEE JENKINS, III

APPELLANT

V.

NO. 2007-KA-0913-COA

FILED

STATE OF MISSISSIPPI

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APPELLEE

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MISSISSIPPI OFFICE OF INDIGENT APPEALS

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

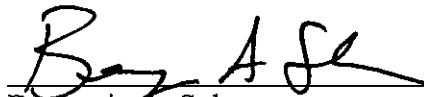
1. State of Mississippi
2. Jerry Lee Jenkins, III, Appellant
3. Honorable Forrest Allgood, District Attorney
4. Honorable Lee J. Howard, Circuit Court Judge

This the 7th day of December, 2007.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:



Benjamin A. Suber

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STATE OF MISSISSIPPI

APPELLEE

BRIEF OF THE APPELLANT

STATEMENT OF THE ISSUES

ISSUE NO. 1

THE TRIAL COURT ERRED IN DENYING JENKINS MOTION FOR DIRECTED VERDICT.

ISSUE NO. 2

THE TRIAL COURT ERRED IN DENYING JENKINS MOTION FOR A NEW TRIAL BECAUSE THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE

STATEMENT OF THE CASE

Jerry Lee Jenkins, III, pled guilty to the charge of Burglary on January 28, 2005. On post conviction relief on March 14, 2007, the trial court ordered a new trial after finding ineffectiveness of counsel during the plea proceedings. This appeal proceeds from the Circuit Court of Oktibbeha County, Mississippi, and a judgment of conviction of Burglary. Jerry Lee Jenkins, III was sentenced to sixteen (16) years in the custody of the Department of Corrections following a jury trial on May 2-3, 2007, Honorable Lee J. Howard, presiding. Jenkins presently incarcerated with the Mississippi Department of Corrections.

FACTS

This case arises out of a dispute between a boyfriend and a girlfriend. Yolanda Morgan [hereinafter Morgan] was attending Hinds Community College around 1999, 2000, where she met Jerry Jenkins [hereinafter Jenkins]. Tr.128. They started a relationship that continued on through the later part of 2003. Tr. 128-29.

In 2003, Jenkins and Morgan's relationship continued, even though they were living in different towns. Tr. 129. Jenkins was living in Hattiesburg, Mississippi, and Morgan was living in Starkville, Mississippi. *Id.* However during this long-distance relationship, Morgan would travel to Hattiesburg and stay with Jenkins at his apartment. Tr. 151. Jenkins would stay with Morgan when he went to Starkville to see her, and he had a key which allowed him full access to the apartment. Tr. 151, 177, 229, 239. When she came to stay with Jenkins, she either had a key or he would leave her a key so that she could access his apartment as she pleased. Tr. 153, 223.

Morgan and Jenkins continued to date and in March 2003, their relationship began to have problems as they got into a domestic dispute. Tr. 133. After their domestic dispute, Morgan was not talking to Jenkins for around a month. Tr. 133-34. However, they began to start talking again and were trying to work out their relationship. Tr. 134. Between March and September 2003, they mended their relationship and were again staying with each other. Tr. 134-35.

The story between Morgan and Jenkins begins to differ. According to Morgan, on September 21, 2003, she went to Atlanta for the weekend. Tr. 136. On the way back she contends that Jenkins called her constantly, and they were getting into a lot of arguments over the phone. Tr. 136. Morgan continued to state that once she was back in Starkville, she called Jenkins to let him know that she made it back safely. Tr. 137. She thought that she was calling him in Bolton, Mississippi, but he did not answer. Tr. 137-38. As she was unpacking, Jenkins called her and told her that he was in Jackson with his younger brother and that they were going to the movies. Tr. 138. During the course of this conversation, they began to discuss their relationship. Tr. 139. During the call with Jenkins, Morgan's friend and co-worker Donald Sharp called and told her that he needed to drop something off at her house. *Id.*

Morgan then switched back to talked to Jenkins, when Donald appeared at her house. Tr. 140. After Donald left she began to talk to Jenkins again, when Donald called back again and informed Morgan that someone was outside her house. Tr. 141-42.

Morgan began to look out of her house, but could not see anything. Tr. 142. As she was still on the phone with Jenkins, she began to ask him where he was located. *Id.* He told her that “you know where I’m at.” *Id.* She then heard her neighbor’s dog barking and could hear the echo of the dog barking through the phone. *Id.* She shut the door, locked it, and asked him again where he was. *Id.* He then responded, “I’m outside your house.” *Id.*

Morgan continued to testify that Jenkins was just wanting to talk to her, but she did not want to talk and asked him to leave. Tr. 143. She then told him that she was tired of this and could not take it anymore, then told him that the relationship was over. *Id.* She stated that she then started walking to her bedroom, when she heard a big crash behind her. Tr. 143-44. She started running to her bedroom, but before she could get the door closed, Jenkins was pushing on the door preventing her from shutting it. Tr. 144.

She further testified that once he was in the bedroom, he punched her in the face and kept hitting her once she fell to the ground. *Id.* She thought she blacked out and felt the pressure of his foot on her stomach. *Id.* As she tried to pull out her cell phone, Jenkins took it and ran out the door. *Id.* Morgan found a cell phone on her futon and called Donald and told him to call the police.

Jenkins version of the events that took place differ from that of Morgan. According to Jenkins, Morgan would come stay with him for weeks in Hattiesburg. Tr. 223. Morgan had a key to the apartment and the landlord knew she was staying there also. *Id.* When Morgan moved to Starkville, Jenkins was involved in moving her. Tr. 224. Jenkins was

introduced to the landlord as Morgan's significant other and was informed that Jenkins would be staying in the apartment also. *Id.*

Jenkins stated that he began to keep his personal belongings at the Starkville apartment and that he did move in. Tr. 225. Jenkins said that he had a drawer where he kept his pants, shirts and in the bathroom he had a toothbrush, toothpaste, deodorant, and shaving cream. Tr. 226.

On the night of the incident, Jenkins did go to the Starkville apartment. Tr. 228. Jenkins borrowed his brother's phone and he talked to Morgan numerous times, and she knew he was coming to Starkville. Tr. 239. When he first arrived at the apartment, he went to the back of the apartment to get some tools and some jack stands that he had kept behind the apartment. Tr. 228. After he put his tools up, Jenkins and Morgan were on the phone discussing their relationship. Tr. 236. Morgan was telling Jenkins that she did not want to breakup and she wanted him to come back next weekend. *Id.* He said that he was just going to get his things and then go, because he did not drive to Starkville to ponder their relationship for another week. *Id.* After they hung up the phone, Jenkins entered the apartment and sat on the couch. Tr. 237.

As Morgan was talking to Jenkins, her phone rang again and she began talking to both the guy on the phone and Jenkins. *Id.* Jenkins and Morgan got into an argument, then Morgan slapped Jenkins and he slapped her back. Tr. 237-38. Jenkins did not recall balling up his fists and punching her or kicking her. Tr. 238. Jenkins then left the apartment and

Morgan followed him outside asking him why he was leaving. Tr. 238. Jenkins was later arrested at a college in Warren County. Tr. 194.

SUMMARY OF THE ARGUMENT

The Appellant, Jerry Lee Jenkins, is entitled to have his case reversed and rendered or in the alternative, a new trial. Jenkins did not break into the apartment in Starkville. Jenkins was already in the apartment discussing his relationship with Morgan when the incident occurred. When a person enters the property with consent of the owner, he cannot be found guilty of burglary.

Evidence was also present to suggest that Jenkins was actually staying at the apartment in Starkville. Jenkins and Morgan were in a serious relationship. Jenkins stated that when he left school, the depth of their relationship allowed her to tell him that since he did not have anywhere to stay that he could move in with her. Jenkins therefore moved in to the apartment. Jenkins said that he had a drawer where he kept his pants, shirts and in the bathroom he had a toothbrush, toothpaste, deodorant, and shaving cream. The evidence was insufficient for a verdict of guilty and this Court should reverse and render his conviction of burglary.

The verdict was also against the overwhelming weight of the evidence. No proof was entered into evidence that linked Jenkins to the footprint located on the outside of the door. Jenkins stated that he had a key. Jenkins also had his personal belonging in the apartment. Morgan visited Barbara White and took her a box with Jenkins clothes and books. The

verdict was against the overwhelming weight of the evidence and this was reversible error and Jenkins is entitled to a new trial.

ARGUMENT

ISSUE NO. 1

THE TRIAL COURT ERRED IN DENYING JENKINS MOTION FOR DIRECTED VERDICT.

Jenkins moved for a directed verdict at the close of the State's case, which was denied by the trial court. Tr. 203-04, 299. Denial of a directed verdict challenges the legal sufficiency of the evidence supporting the guilty verdict. *Randolph v. State*, 852 So.2d 547, 554 (Miss. 2002); *Fair v. State*, 789 So.2d 818, 820 (Miss. 2001); *McClain v. State*, 625 So.2d 774, 778 (Miss. 1993). With regard to the issue of the legal sufficiency of the evidence, the Mississippi Supreme Court has held "that reversal can only occur when evidence of one of more of the elements of the charged offense is such that 'reasonable and fair-minded jurors could only find the accused not guilty.'" *Stewart v. State*, 909 So.2d 52, 56 (Miss. 2005); *Randolph*, 852 So.2d at 555; *Fair*, 789 So.2d at 820; *Wetz v. State*, 503 So.2d 803, 808 (Miss. 1987).

Mississippi Code Annotated provides that "[e]very person who shall be convicted of breaking and entering the dwelling house of another . . . and whether there shall be at the time some human being in such dwelling house or not, with the intent to commit some crime therein, shall be punished by imprisonment in the Penitentiary not less than three (3) years nor more than twenty-five years." **Miss. Code Ann.** Section 97-17-23 (Rev. 2000). The state must prove each element of the indicted offensive beyond a reasonable doubt. *Hobson*

v. State, 730 So.2d 20, 28 (Miss. 1998); *Heidel v. State*, 587 So.2d 835, 843 (Miss. 1991).

“There are two elements that must be proven in order to convict a person for the crime of burglary. These are (1) an unlawful breaking and entering, and (2) the intent to commit some crime once the entry has been gained.” *Harrison v. State*, 722 So.2d 681 (Miss. 1998), *Washington v. State*, 753 So.2d 475, 478 (Miss. App. 1999). In light of the testimony, the State did not prove all elements beyond a reasonable doubt. Jenkins testified that he did not break into the Starkville apartment. Tr. 237. He said that he entered the apartment and sat on the couch, where he did leave a cell phone. *Id.* The cell phone that Morgan used to call her friend Donald was laying by the futon. Tr. 146. The evidence would suggest that Jenkins was sitting on the futon or couch and the phone could have slipped out of his pocket. According to Morgan, Jenkins kicked in the living room door and he started coming after her. Tr. 144. If Jenkins did bust in the door how did the cell phone end up by the futon or couch?

Jenkins also testified that he kept numerous items at the Starkville apartment. Jenkins retrieved some tools and jack stands from the apartment that he had kept there on the night in question. Tr. 234-36. Jenkins stated that he began to keep his personal belongings at the Starkville apartment and that he did move in. Tr. 225. Jenkins said that he had a drawer where he kept his pants, shirts and in the bathroom he had a toothbrush, toothpaste, deodorant, and shaving cream. Tr. 226. Morgan even stated that he might have even had some compact discs at the apartment, because the they might have shared music. Tr. 152.

The statute is clear that burglary involves that breaking and entering the dwelling house of another. *Mitchell v. State*, 720 So.2d 492, 494 (Miss. App. 1998). Jenkins was not prohibited from entering his own home or where he stayed. Morgan did not get a restraining order keeping Jenkins away from her or the apartment in Starkville. Tr. 156. Jenkins stated that Morgan told him to go make himself a key. Tr. 229. Morgan even testified that she gave Jenkins a key to use at the apartment when he came into town. Tr. 177.

The Mississippi Supreme Court has stated that, “[i]t is not a part of the corpus delicti to show that the appellant did the breaking, but it was the criminal breaking without the consent of the owner . . . that constituted the corpus delicti.” *Mitchell*, 720 So.2d at 494 (quoting *Holderfield v. State*, 215 Miss. 564, 570 61 So.2d 385, 386 (1952). “When one enters with the consent of the owner, but commits a crime thereafter, his entry does not make him guilty of burglary.” *Id.* Morgan and Jenkins were in a relationship and Morgan stated that Jenkins did stay there with her. Tr. 151. Jenkins stated that he had even moved into the apartment also. Tr. 225. Barbara White confirmed Jenkins story by her testimony. She stated that Morgan came to her house in Vicksburg after the alleged incident. Tr. 210. Morgan brought White a cell phone, some of Jenkins clothes, and his books. Tr. 211. If Jenkins was living in the apartment or if he had consent to be inside the apartment, he can not be guilty of burglary.

Jenkins said that he was already in the house talking to Morgan about their relationship; however, if one believes Morgan’s version of the events that took place that

Jenkins was not inside the house, he should still be found not guilty because the apartment in Starkville could be considered his dwelling.

In *Washington*, the Mississippi Supreme Court held that “a person may simultaneously have two dwellings subject to burglary and sometimes reside with his family in one and sometimes in the other.” *Washington*, 753 So.2d at 477, *Gillum v. State*, 468 So.2d 856, 859 (Miss. 1985). “The intention of the dweller is the material consideration in determining whether a building may be characterized as a dwelling for purposes of the burglary statute.” *Id.* “A temporary absence does not destroy the character of a home as a dwelling if the dweller leaves with the intent to return.” *Id.* The Court in *Washington* found the home of Ms. Ingram to be a dwelling, even though she visited approximately five times each year. *Washington*, 753 So.2d at 476. The Court continued to stated that, “Ms. Ingram visited the home on a regular basis and there is no evidence that she did not intend to continue to do so. Her home is a dwelling as contemplated by the burglary statute.” *Washington*, 753 So.2d at 478.

Jenkins and Morgan were in a serious relationship. Jenkins stated that when he left school, the depth of their relationship allowed her to tell him that since he did not have anywhere to stay that he could move in with her. Tr. 225. Jenkins therefore moved in to the apartment. *Id.* Morgan testified that in the time period between March 2003 and September 2003, Jenkins had come to Starkville around four or five times to stay with her. Tr. 134. Whereas in *Washington*, Ms. Ingram stayed at the house approximately five times over the course of a year.

Additional information that was introduced into evidence is a moneygram that was sent to Morgan from Jenkins after this incident happened. Tr. 231-32. Jenkins sent Morgan \$200 because she did not have any money to pay rent. *Id.* Morgan said she did love Jenkins, and she did go to Barbara White's (Jenkins mom) house after this incident happened. Tr. 159, 165-66, 211. Morgan told Ms. White that she wanted to continue her relationship with Jenkins. Tr. 212.

The Court in *Turner* did say that it is the jury's job to determine the weight and credibility of the evidence presented. *Turner v. State*, 726 So.2d 117 (Miss. 1999). *See also Fair*, 789 So.2d at 821. No reasonable jury could have convicted Jenkins guilty of burglary looking at the weight and credibility of the evidence that was presented to the trial court. Jenkins did not break and enter the house. The incident that occurred was just a fight between a boyfriend and a girlfriend, not someone trying to break into the apartment to commit a crime. Jenkins did admit that he slapped Morgan, but Jenkins was already in the house and did not enter the house with the intent to commit a crime. T. 238.

Taking the evidence that was presented to the trial court, the elements of burglary were not proven beyond a reasonable doubt and this Court should reverse and render this case based on these facts.

ISSUE NO. 2

THE TRIAL COURT ERRED IN DENYING STEVEN'S MOTION FOR A NEW TRIAL BECAUSE THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

In trial counsel's Motion for Judgment of Acquittal Notwithstanding the Verdict (JNOV) or in the Alternative Motion for a New Trial, counsel specifically argued that the jury's verdict was against the overwhelming weight of the evidence. R.E. 13 The trial judge denied this motion. R.E. 15

In *Bush v. State*, the Mississippi Supreme Court set forth the standard of review as follows:

When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, we will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. *Herring v. State*, 691 So.2d 948, 957 (Miss.1997). We have stated that on a motion for new trial, the court sits as a thirteenth juror. The motion, however, is addressed to the discretion of the court, which should be exercised with caution, and the power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict. *Amiker v. Drugs For Less, Inc.*, 796 So.2d 942, 947 (Miss.2000). However, the evidence should be weighed in the light most favorable to the verdict. *Herring*, 691 So.2d at 957. A reversal on the grounds that the verdict was against the overwhelming weight of the evidence, "unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict." *McQueen v. State*, 423 So.2d 800, 803 (Miss.1982). Rather, as the "thirteenth juror," the court simply disagrees with the jury's resolution of the conflicting testimony. *Id.* This difference of opinion does not signify acquittal any more than a disagreement among the jurors themselves. *Id.* Instead, the proper remedy is to grant a new trial.

Bush v. State, 895 So.2d 836, 844 (Miss. 2005) (footnotes omitted).

In the present case, Steven is at a minimum entitled to a new trial as the verdict was clearly against the overwhelming weight of the evidence. According to the testimony of

Officer Shawn Ward, the inside of the door was cracked down the doorway. Tr. 184-85. No picture was submitted into evidence show the damage to the door. State's Exhibit 4 and 5 show the outside of the door shut, however the door appears to shut properly. The pictures do not show the crack in the door. According to Jenkins, the knob on the door would always stick, and often times a knife or screwdriver would have to be used to pry the lock open. R. 229. Also, the doorknob never really fit the door and when Jenkins would try to adjust it, the door would not even open. Tr. 230. Jenkins said he never used his foot to gain entry through the door. *Id.* Furthermore, Morgan had been gone on a trip the entire weekend and the door could have been kicked prior to her coming home. She came home later in the evening when it was dark.

Officer Ward also observed a footprint that was located on the outer door. Tr. 196. No evidence was offered to match the footprint on the door to that of Jenkins. *Id.* No one saw who put the footprint on the door. *Id.*

Jenkins contends that he began to keep his personal belongings at the Starkville apartment and that he did move in. Tr. 225. Jenkins said that he had a drawer where he kept his pants, shirts and in the bathroom he had a toothbrush, toothpaste, deodorant, and shaving cream. Tr. 226. Although Officer Ward stated he did not see any of Jenkins personal belongings in the apartment, he also stated that he was not looking for them anyway. Tr. 289-90. However, even if he would have seen a toothbrush on the counter, how would the officer know whether it was Morgan or Jenkins? Morgan had been on a trip and her toothbrush might still be in her bag. Also, Jenkins would stay with Morgan when he went to Starkville

to see her, and he had a key which allowed him full access to the apartment. Tr. 151, 177, 229, 239.

A moneygram receipt was introduced into evidence which was a receipt showing that Jenkins sent \$200 to Morgan after the incident. Tr. 231-32. Jenkins had sent Morgan \$200 because she did not have any money to pay rent. *Id.* Morgan said she did love Jenkins, and she went Barbara White's (Jenkins mom) house after this incident happened. Tr. 159, 165-66, 211. Morgan told Ms. White that she wanted to continue her relationship with Jenkins. Tr. 212.

It would be a great injustice for this conviction to stand in that no reasonable jury could convict Jenkins based on the testimony and the lack of any other type of evidence implicating Jenkins.

The verdict was clearly against the overwhelming weight of the evidence. Jenkins therefore respectfully asserts that the foregoing facts demonstrate that the verdict was against the overwhelming weight of the evidence, and the Court should reverse and remand for a new trial. To allow this verdict to stand would sanction an unconscionable injustice. *See Hawthorne v. State*, 883 So.2d 86 (Miss. 2004).

CONCLUSION

Jenkins contends that there was insufficient evidence that he broke into the apartment in Starkville. Jenkins suggests that the apartment could be considered his dwelling and that he was staying there with the consent of Morgan. The court should reverse and render his

conviction of burglary. Jenkins also assents that the verdict was against the overwhelming weight of the evidence, and therefore the Court should reverse and remand for a new trial.

Respectfully submitted,
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For Jerry Lee Jenkins, III, Appellant

BY:


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CERTIFICATE OF SERVICE

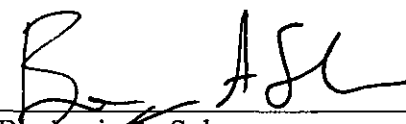
I, Benjamin A. Suber, Counsel for Jerry Lee Jenkins, III, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

Honorable Lee J. Howard
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This the 7th day of December, 2007.



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