IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

WHITZEY SANTAIZ WALKER — APPELLANT

VS. — NO. 2007-KA-1869-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

WHITZEY SANTAIZ WALKER prosecutes an appeal from his convictions of recidivism and burglary of a dwelling house.

After wrecking his automobile around 11:00 p.m. on Old Jackson Road in Warren County, an inebriated Walker, high after several nights of cocaine and hard liquor, approached the dwelling house of Sherwood and Melissa Lyons around 11:00 p.m., allegedly for the purpose of seeking assistance from the homeowners.

According to Melissa Lyons, Walker, after banging on her front door and upon being denied entry after Lyons closed the door, either crashed or dove though a living room window, stood erect, and placed Melissa in further fear by briskly approaching her with his hands in the air in a menacing manner.

Melissa's husband, Sherwood, intervened, and no actual physical assault took place.

Walker was later indicted for burglary with the intent to commit assault and convicted

following a trial by jury.

A single issue is raised on appeal to this Court.

"The trial court erred in failing to grant the motion for judgment notwithstanding the verdict, as there was insufficient evidence to sustain a guilty verdict." (Brief of the Appellant at 3)

Walker claims his conviction should be reversed and the defendant discharged because the evidence was insufficient to prove he " . . . had the requisite intent to commit an assault when he entered the Lyons['s] home . . ." (Brief of the Appellant at 4)

We respectfully submit the evidence, considered in toto, was sufficient to prove the defendant broke and entered the dwelling house of Melissa Lyons with the intent to " . . . attempt by physical menace to put [Lyons] in fear of imminent serious bodily harm." (C.P. at 25)

STATEMENT OF FACTS

WHITZEY SANTAIZ WALKER, a thirty-nine (39) year old African-American male, twice convicted felon, and married resident of Vicksburg (R. 167, 175; C.P. at 52), prosecutes a criminal appeal from the Circuit Court of Warren County, Mississippi, Isadore W. Patrick, Jr., Circuit Judge, presiding. Walker was convicted of burglary of a dwelling house following a trial by jury conducted on August 27-28, 2007.

Following a sentence enhancement proceeding conducted on October 12, 2007, pursuant to Miss.Code Ann. §99-19-81, and in the wake of a presentence investigation and report (R. 238-42), Walker was adjudicated guilty of recidivism and sentenced as a habitual offender to serve a term of twenty-five (25) years in the custody of the MDOC. (C.P. at 48, 51)

The State produced three (3) witnesses during its case-in-chief, including **(1) Melissa Lyons**, the intended victim, who made a positive in-court identification of Walker as the nighttime intruder. (R. 69-70)

Melissa is a 35 year resident of a home located near the intersection of Culkin Road and Old Jackson Road in Vicksburg where she resides with her husband, Sherwood. (R. 65)

During the nighttime hours of July 16, 2006, Melissa was awakened by her Boston terrier who sleeps with Melissa and her husband. Melissa heard some "banging" on her porch. She did not know at the time if it was against her door, window or the porch.

"I just heard banging. It could have been anywhere." (R. 79)

Melissa's version of ensuing events is found in the following colloquy:

> Q. [BY PROSECUTOR BONNER:] Tell me what happened that night.
>
> A. It was about 11:00. I was almost asleep and the dog started growling and making this noise. I heard all this bumping going on the front porch. My bedroom, my master bedroom is behind my living room. So I came across - - my children live next door - - in a trailer next door. And I thought something was wrong. I have two labs. I thought they may have run an armadillo up in my porch before running against the door. I didn't know what it was. I just jumped up. And then the dog was acting up. Went to the door. And like an idiot, I opened it completely opened, just like that (Indicating).
>
> Q. What did you see?
>
> A. And I saw that fellow over there (Indicating).
>
> BY MR. BONNER: Your Honor, we would like for the record to reflect that she's identified the defendant, Mr. Walker.
>
> BY THE COURT: The record will so reflect.
>
> (THE WITNESS IDENTIFIED THE DEFENDANT.)
>
> A. He was standing at my front porch. Here's my door when you open the door. I have two windows here. My porch goes out this way. And I had two big chairs right here (Indicating). Well, he was pulling this chair back. He was messing with this window, my further window (Indicating) He was about ten feet from me. He, you know, raised up and looked at me. He said something about my house.

Coming in my house or something about my house. I thought he said: "I'm coming in your house." And I said: "Oh, hell, no." And I slammed that door. He ran toward me. I'm fairly good size. I pushed - - and I was scared to death. I pushed the door shut, locked it and started screaming for my husband, who I thought was asleep. I took two steps from that door, I took maybe two, maybe three steps. I had this little table here at the time. I had a little table that I did my little craft work on close to the window. He came through that window, just I don't know how he did it. He came down, and he stood up. And he was coming across to me, and he must have been three feet from me - -

Q. Let me stop you. Was the window opened?

A. No. No. The window was not opened. The window was not opened. Let me get, kind of - -

Q. Get your bearings.

A. Yeah. When I was walking, I was yelling for my husband, and I was trying to run. And he came through that window. We got new windows. Okay. You pull them out. You can clean them, and you can push them back in. Don't buy those kind. He hit that window, and came though it, and he stood up. And he was coming across the room toward me. He had his hands up. And all I know is if my husband would not have been there, I would be gone. Really - - It was the scariest thing I've ever seen. (R. 67-68)

* * * * * *

Q. Tell me what happened.

A. I screamed. I think I said: "Sherwood, you better get in here." You know, I was screaming it over and over.

Q. Who's Sherwood?

A. Sherwood is my husband. I said: "Get in here. Get in here," you know. Before I got too far, he was right on me. And I said: "Get out of my house. Get out of my house." I had my hands up.

Q. You're talking about two different he's. You need to clarify for the record.

A. Sherwood was in the bedroom. I was yelling for him to come out. I couldn't see him, because I was watching this one coming though, Mr. Walker (Indicating). You know, I had my eyes there, and I was like: "Get out of my house. Get out of my house." And he was coming steady for me.

Q. Tell me what happened.

A. The next thing I see, Sherwood hits him with his hand, knocks him down, grabs a chair, and I'm like running around in circles. I'm like, looking for a phone, looking for a gun. I didn't know what to do. I didn't even cut the lights on. I was so upset. You know, Sherwood had him. They were wrestling. He had him with the chair. It was just awful. I ran to the phone. I grabbed a phone. Oh, they knocked over all the lighting, the tables. It was terrible. I got a phone and called 911. That was a big confusion, because they couldn't find my house. It was just confusion. And they wrestled around on the floor awhile. I made it to the bedroom, got a gun, got a phone, ran outside to stop the officers. And finally, I think I talked to 911 twice maybe three times. We had to call each other back, because I had to stop what I was doing and find - - get - - you know, find a gun, and you know, trying to help. I wasn't very much help. (R. 69-70)

* * * * * *

Q. (By Mr. Bonner) Can you identify this [photograph], please?

A. (Reviewing). Yes, That's the door jam. Where when he hit the door, it broke. It split.

Q. That's your door?

A. That's my front door. That's the crack in it (Indicating). (R. 71

* * * * * *

Q. Now, I'm referring to State's Exhibit Number 4. Which is a photograph that you've identified as being your door frame; is that correct?

A. That's right.

Q. All right. And for the record, was that there earlier (Indicating)?

A. (Reviewing). No, sir.

Q. That's what happened when he hit it?

A. Yes, sir. (R. 72)

During cross-examination Melissa testified on no fewer than three additional occasions that after banging on her door, she understood the defendant to say, "I'm coming in your house." (R. 81, 82, 83)

Q. [BY DEFENSE COUNSEL:] And that's what he told you, isn't it, that he needed help?

A. No. He did not. He did not say: "help me." He didn't say: "Call 911." He didn't say: "I need help." He said something, "I'm coming in your house." (R. 81)

* * * * * *

Q. And you shut the door?

A. I slammed the door against him. He was coming at me. (R. 81)

* * * * * *

Q. Now what did he look like when you saw him? What was his demeanor?

A. Well, he looked like he does there. Standing up, big-eyed, had his hands coming like that (Indicating). (R. 85)

* * * * * *

Q. Okay. What happened after you told him to get out of your house?

A. He didn't. He was steadily coming toward me.

Q. When you say steadily coming toward you - -

A. Walking toward you.

Q. Let me walk, and you tell me if I'm coming fast - -

A. Well, not really walking. He was like coming fast. It was seconds. You don't even want to - - it's seconds. We're talking seconds here.

Q. So he walked toward you for about two seconds?

A. He was coming toward me. He was like this far from me by the time my husband stopped - - maybe three feet (Indicating).

Q. When he was walking toward you, where was his hands?

A. In the air. (R. 88)

* * * * * *

Q. Okay. All right. I want to get this straight. At no time, you never were hit by Whitzey. He never threatened you in anyway? He never touched you?

A. The presence of him running toward me like he did, scared me to death, that was threatening to me, not to you, but to me. I'm a woman. (R. 93-94)

* * * * * *

Q. What I'm saying is that as far as you're concerned the only thing he ever did toward you in a threatening or menacing manner, is when he walked toward you in the one or two steps that you mentioned right before Sherwood grabbed him; is that correct or incorrect?

A. No. That's not correct. When I opened the door, and he said he was coming in my house, that was threatening. I shut the door, and he came through my house, that was threatening. And when he ran toward me, that was threatening. It was threatening. I call that threatening, and any woman in my position would have. (R. 94)

* * * * * *

Q. (By Mr. Campbell) Are you aware that he was having car

trouble or was in a car wreck that day?

A. He didn't tell me that. I mean, when I opened the door, he could have said: "Call 911. Call the police. Call a tow truck." He didn't say that.

Q. Are you sure you didn't slam the door in his face so fast he didn't have time to say it?

A. I'm positive.

Q. You were not aware that he had been in a car wreck?

A. No.

Q. Okay. If you had been aware of that - -

A. I would have gave him the telephone, call 911. All he had to do was ring the doorbell and knock on the door normally or said: "I need help." When I opened the door, if he said: "I need help." He would have gotten help. I wouldn't turn anybody away.

Q. From the time he knocked on the door and you first saw him, until the time you slammed the door on him, how long are we talking about?

A. Seconds.

Q. Seconds. Seconds. When you slammed the door, was he still trying to say something to you?

A. Un-hnh (Indicating no). He was rushing me.

Q. Was he rushing you - -

A. Rushing me. No, rushing. Bang. I slammed the door and held it against him and locked my door. I had to push my door shut.

Q. I understand.

A. I don't think you do.

Q. Well, I mean, you pushed your door shut. It's not - -

A. No. The door is easy to open and shut. **I had to push it**

against body weight. He was coming in my house. (R. 96-97) [emphasis ours]

Melissa made a positive in-court identification of Walker as the nighttime intruder. (R. 67)

Sherwood Lyons, Melissa's husband, eventually subdued Walker who, according to Melissa, was fighting back. (R. 90)

(2) Sherwood Lyons, Melissa's husband, testified he was sound asleep when he was awaken by their barking dog. After Melissa went to the front door to check on matters he heard her screaming, "Hell, no" and "Get [in] here." (R. 108)

Sherwood's description of the bizarre events is quoted as follows:

> Q. [BY PROSECUTOR BONNER:] Tell me what was going on that night.
>
> A. Well, we had watched the late news, and we went to sleep. I was working shift work, and the little dog started barking and raising cane, right before mid-night, 11:00 or something. And I was sound asleep, and I asked Melissa to go check and see what that pounding was. You know, somebody might have been - - I thought the kids were coming in and out or something. And she went to the front door, and I heard her screaming, you know: "Hell, no." And she started screaming: "Get here." And when I jumped up out of the bed, and got to the door of my bedroom which was right outside the living room. The door from the living room goes into the bedroom. And I looked across there, and this guy had dove through our window and was climbing up like that going toward Melissa (indicating). And the room is about 24 foot long. It's a pretty big room. He was probably about eight foot from the other wall, so - - **He was coming at Melissa.** And Melissa's legs go to rubbing when she gets real frightened, **and she was telling him, to get back, get back. And he was rushing at her,** and I ran over there, and knocked him down on the ground. I couldn't even tell who he was or what. And, you know, put my foot on him and restrained him. Told Melissa to call 9 – screamed at her and told her to call 911. And she went in there, and I heard her call them and stuff. And it seemed like forever before the police got there, but you know, it probably wasn't, but it seemed like it. And they finally came and cut the lights on, and you know, I couldn't believe this guy was an older guy. I thought it was a kid, because there was kids been going up [and] down the road. And it

was an older guy, and he broke in on us. You know, I'm glad the police came on and got there and stuff, and it was blood everywhere, where he dove through my widow. And I was worried about that. (R. 108-09) [emphasis ours]

* * * * * *

A. You know, he dove through that window. You know, I could see him climbing up, you know, when I started running toward him, because he was running toward Melissa. And I ran and got, you know, straight down on him, you know. It infuriated me. (R. 110)

* * * * * *

A. That's the window that he came in here. And I seen the curtains come up, and we had a couch across here, which is about eight to ten foot from that wall out here. And he was coming at her there, and I got him right at the end of that couch, you know (Indicating). (R. 111)

* * * * * *

A. I was - - well, I'm going to tell you the truth. I was enraged to be honest with you. Because there's no excuse for that. Somebody breaking into my house and coming at my wife like that. And I work shift work, and automatically I thought protect my wife, and that's what I did. (R. 112)

* * * * * *

A. No. I figure he was coming to rob my wife and stuff, to rob our house and do damage to my wife to be honest with you, that's what I thought, because she was the one that he was coming at. Do you understand? (R. 115)

(3) John Elfer, a patrol officer with the Warren County Sheriff's Department, testified he responded to a possible burglary in progress near the intersection of Culkin and Old Jackson Road. (R. 122)

When he arrived he placed the black male, who refused to comply with the officers' commands, in custody. (R. 123)

Q. [BY PROSECUTOR BONNER:] Did he give you any trouble?

A. He refused to comply with our commands. He was told to turn over, place his hands behind his back. The normal operations that we go through to try to place someone in handcuffs. He was kicking. I don't remember him saying anything. But we had to use force, myself and the other officer, to get the handcuffs on him, get him on his stomach. And then he wouldn't stand up for us, we had to physically take him outside. (R. 123)

At the close of the State's case-in-chief, the defendant moved for a directed verdict of acquittal on the ground the state had failed to prove an intent to commit assault, i.e., "[s]he never indicates that he committed any assault." (R. 133)

The trial judge overruled the motion with the following comments made incidental to his ruling:

BY THE COURT: * * * The jury determines whether or not there was intent to commit an assault. And if they do find that, that's a jury question, then they can return a verdict of guilty on the issue of burglary because then you would have the two prongs of burglary completed. But that's a jury question. It's not for the Court to determine that. And that can only be determined through the facts of the case.

As I said before, it did not have to be an aggravated assault. It could have been a simple assault. And as you know, simple assault carries when someone makes a threatening gesture toward someone, and that person feels that they are in imminent danger to that person.

The Court must take as true all the statements given by Ms. Lyons. Now, the jury does not have to take that as true in their decision at the end of the case. But at this point in time, the Court must take as true all of the statements as to Ms. Lyons, as to what she felt, that she felt threatened, and what happened on that night.

Therefore, the Court finds that the Motion for Directed Verdict should fail because there are jury questions as to whether or not this was assault or intent to assault - - not actual assault but the intent to assault. That's a jury question. (R. 136-37)

After being advised of his right to testify or not, **Whitzey Walker**, the thirty-nine (39) year old defendant, elected to testify in his own behalf. (R. 167-188)

Walker first produced his wife, **Veronica Walker**, who testified about the damage done to her husband's automobile. (R. 161)

Veronica attested to the fact her husband's automobile had been wrecked, and he had spent three to four days in the River Region Hospital. (R. 161-62, 164)

Outside the hearing and presence of the jury, the prosecution informed Judge Patrick that Walker was not in the hospital for treatment of any injuries received in the accident but "because of his cocaine problem." (R. 164-65)

Walker himself testified his mother had recently died, he and Veronica "had a real bad argument," he left the house for four or five days, he started back drinking and getting high, and that on the night of July 16, 2006, he was " . . . just driving, crying and drunk." (R. 168)

> " * * * I'm drunk and I'm high, and I'm just crying. So out of the middle of no where, bam, bam, and somebody was pushing my car from the back. So the whole back end of my car is smashed in, and the door was jammed." (R. 169)

After extricating himself from his wrecked motor vehicle, Walker went to a brick home where he knocked on the door.

> "So I knock on the door, boom, boom, boom, boom, boom, boom. So I ain't expect - - I didn't know who would come to the door. So the lady, Ms. Lyons, she came to the door. I said: "Ma'am," I said, "I had a car wreck." I say "Somebody ran me off the road. I had a real bad car accident." I said: "Would you call an ambulance and a tow service for me?" She said, "no." She closed the door. I'm drunk. I'm high. I hadn't been home. I haven't had no sleep, zero sleep, at all for four days of straight drinking, no rest, no sleep, no nothing. So and I turned around. I turn around. I say, bam, my back was against a window. I don't remember being in no house, and my legs was like this here outside, I mean, right there in the windowsill (Indicating). It was a brick windowsill, and right there in the

> windowsill, just like this here, like this here, laid out (Indicating). I passed completely out. I woke up two or three days later in the hospital, not knowing where I am I didn't know nothing. I don't remember nothing. But waking up two to three days later. * * * " (R. 171-72)

Walker denied breaking into the home of Melissa and Sherwood Lyons. He testified: "I didn't assault nobody." (R. 172) ""[T]hey're lying on me." (R. 172) "I passed out." (R. 172) "I fell on the window on the front porch." (R. 173) "I was smoking cocaine." (R. 175, 186)

Walker denied he was ever in the Lyons's living room. (R. 187)

At the close of all the evidence, Walker's renewed motion for a directed verdict was denied. (R. 192)

Following the reading of jury instructions and the closing argument of counsel, the jury retired to deliberate at a time not reflected by the record. Reaching a verdict was not without some difficulty.

The jury sent two (2) notes to the circuit judge seeking additional guidance on the issue of intent at the time of the breaking and entry. (R. 218-223, 223; C.P. at 37-38) More guidance was necessary even after that. (R. 229-235) But "all's well that ends well." The discussions ended with the judge and both litigants agreeing to the granting of a supplemental jury instruction, C-5, which reads, in its entirety, as follows:

> If you find from the evidence that there was a breaking and entering of the dwelling at 670 Culkin Road; and if you further find that there was an intent to commit a crime inside the dwelling, at the time of the breaking and entering, then you shall find the defendant guilty of burglary.
>
> If you find from the evidence that the defendant did not have the intent to commit a crime inside the dwelling at the time of the breaking and entering, then you shall find the defendant not guilty of burglary. (R. 235-36)

It can't get any more definite than that.

Jury instruction S-1, the State's substantive charge, required the jury to find beyond a reasonable doubt that Walker broke and entered "with the intent . . . to assault Melissa Lyons." (C.P. at 28; appellee''s exhibit A, attached)

Jury instruction C-3 defined the offense of assault. (C.P. at 25; appellee's exhibit B, attached)

At some point after the granting of C-5, the jury returned with the following verdict: "We, the jury, find the defendant guilty of burglary of a dwelling as charged in the indictment." (R. 237

A poll of the jury, individually by name, reflected this verdict was unanimous. (R. 237-38)

Following a sentence-enhancement hearing conducted six (6) weeks post-trial on October 12, 2007, the trial judge adjudicated Walker a habitual offender and sentenced him to serve twenty-five (25) years without the benefit of probation or parole. (R. 240-42)

On or about October 22, 2007, Walker filed a motion for judgment notwithstanding the verdict which was overruled the same day. (C.P. at 56-57)

SUMMARY OF THE ARGUMENT

In his closing argument to the jury, the State's attorney pointed out that the statute defining the offense of assault says that a person is guilty of assault if he " . . . attempts by physical menace to put another in fear of immanent [sic] serious bodily harm. And, ladies and gentlemen, that is exactly what Melissa Lyons said happened to her." (R. 215)

We agree.

The jury was properly instructed via the S-1, C-3, and the C-5 supplemental instruction. *See* appellee's exhibits, A, B, and C.

Accepting as true all evidence favorable to the State and disregarding evidence favorable to

Walker, it is clear the evidence was sufficient to support the jury's finding that Walker was guilty of burglary of a dwelling house with the underlying intent to assault by physical menace.

Proof of Walker's intent to assault by attempting by physical menace to put Melissa Lyons in fear of imminent serious bodily harm was supplied both directly and by reasonable inferences drawn from all the evidence.

He did and she was.

ARGUMENT

THE VERDICT OF THE JURY WAS SUPPORTED BY EVIDENCE LEGALLY SUFFICIENT TO SUPPORT WALKER'S CONVICTION OF HOUSE BURGLARY, EVEN IF BARELY.

In this appeal from a conviction of burglary of an occupied dwelling house the intent of the intruder at the time of the breaking and entry is the focal point of the appeal.

Walker claims the trial judge erred in denying his motion for judgment of acquittal notwithstanding the verdict because there was insufficient evidence of his intent to commit the crime of assault upon its occupants once inside. Walker states that "[h]is behavior was more consistent with a drunk, accident victim that had stumbled in the window and was reaching for help in the dark than that of a person attempting to physically harm a random stranger." (Brief of the Appellant at 4)

Accordingly, Walker suggests he can be guilty of no crime greater than trespass.

This is a legitimate argument. The issue of Walker's intent at the time of his breaking and entry apparently caused the jury some concern.

Nevertheless, in the end, the jury was properly instructed with respect to the issue of intent, and the testimony from both Melissa and Sherwood Lyons supports the verdict returned.

"Weight" and "sufficiency" of the evidence are not synonymous. "When determining whether the evidence was sufficient, the critical inquiry is whether the evidence is of such quality that reasonable and fairminded jurors in the exercise of fair and impartial judgment might reach different conclusions." **Gilmer v. State,** 955 So.2d 829, 833 (¶7) (Miss 2007)

We have meticulously quoted in our statement of facts the testimony which we feel fully supports the verdict rightfully returned by the jury. We respectfully submit the trial judge was eminently correct when he held the grade of the offense was a jury issue.

Walker received jury instruction D-7authorizing the jury to find him guilty of the lesser included offense of misdemeanor trespass. (C.P. at 33) It rejected this theory, as was its prerogative.

Our burglary statute reads as follows:

> Every person who shall be convicted of breaking and entering the dwelling house or inner door of such dwelling house of another, whether armed with a deadly weapon or not, and whether there shall be at the time some human being in such dwelling house or not, with 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 (25) years.

The word "crime" as used in the burglary statute, includes misdemeanors as well as felonies. **Newburn v. State,** 205 So.2d 260, 268 (Miss. 1967). The intent crime must be named and described in the indictment. **Id,** 205 So.2d at 263. *See also* **Quang Thanh Tran v. State,** 962 So.2d 1237 (Miss. 2007).

The indictment returned in this case alleged, *inter alia*, that Walker " . . . did willfully, unlawfully, feloniously, and burglariously break and enter the dwelling house or inner door of such dwelling house of Sherwood and Melissa Lyons . . . with the intent of the said . . . Walker to assault the occupants of the home in violation of Miss.Code Ann. Sec. 97-17-23 . . ." (C.P. at 4)

Our assault statute, Miss.Code Ann. §97-3-7(1) defines simple assault as follows:

> (1) A person is guilty of simple assault if he (a) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another, or (b) negligently causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm; or **(c) attempts by physical menace to put another in fear of imminent serious bodily harm**; . . . [emphasis supplied]

The jury was properly instructed via the S-1, C-3, and the supplemental C-5 instructions. *See* appellees exhibits A, B, and C, attached.

Melissa Lyons, to be sure, testified quite clearly she felt threatened after Walker banged on her door, told her he was coming inside her house, then dove through her closed glass window, stood up and advanced toward her at a brisk pace with his hands in the air. A reasonable and fairminded juror could have found Walker's behavior to be quite intimidating to say the least. Walker was only three (3) feet away from Melissa when her husband intervened.

A reasonable, fairminded, hypothetical juror could have also inferred that Walker broke into the Sherwood's home to intimidate and assault even if only by physical menace.

First, Walker told Melissa he was coming inside her house. (R. 67, 81, 82, 83)

Second, Walker created a noise when he struck or pounded the door with a force strong enough to split the door jam from top to bottom. (R. 71-72; state's exhibit 4)

Third, once Melissa, with a great deal of effort, shut the door and locked it, Walker, after apparently moving some outdoor furniture, crashed through the glass window. (R. 68, 77-80)

Fourth, Walker stood up after coming through the window and approached Melissa briskly with his hands in the air. (R. 68, 85-86, 88)

Fifth, Melissa testified she was scared to death (R. 93-94) and felt threatened. (R. 106-07)

Sixth, Sherwood intervened as Walker was " . . . coming at her there." (R. 111-12)

It appears to us there was sufficient evidence to support the verdict, even if barely. Whether Walker entered the house by accident after having passed out following several days and nights of cocaine and intoxicants or entered it intentionally with an accompanying intent to intimate and do harm to the occupants was a question for the jury not the judge pre-verdict (directed verdict) or post-verdict (judgment notwithstanding the verdict).

It is elementary that all proof need not be direct, and the jury may draw any reasonable inferences from all the evidence in the case. **Campbell v. State,** 278 So.2d 420 (Miss. 1973); **McLelland v. State,** 204 So.2d 158 (Miss. 1967). Put another way, a jury, as fact finder, is entitled to consider not only facts testified to by the witnesses but all inferences that may be reasonably and logically deduced from the facts in evidence. **Pryor v. State,** 349 So.2d 1063 (Miss. 1977). Juries are allowed to draw rational inferences from a defendant's conduct. **Millender v. State,** 734 So.2d 225 (Ct.App.Miss. 1999).

Intent, like any other element of a criminal offense, may be proven by circumstantial evidence. **Williams v. State,** 445 So.2d 798, 808 (Miss. 1884); **Stinson v. State,** 375 So.2d 235, 236 (Miss. 1979). *See also* **Berry v. State,** 754 So.2d 539 (Ct.App.Miss. 1999), reh denied, cert denied.

"Requests for a directed verdict and motions JNOV implicate sufficiency of evidence." **Franklin v. State**, 676 So.2d 287, 288 (Miss. 1996). "This Court must review the trial court's finding regarding sufficiency of the evidence at the time the Motion for JNOV was overruled." **Holloman v. State**, 656 So.2d 1134, 1142 (Miss. 1995), citing **Wetz v. State**, 503 So.2d 830, 868-68 (Miss. 1987).

In judging the legal sufficiency, as opposed to the weight, of the evidence on a motion for

a directed verdict or request for peremptory instruction or motion for judgment notwithstanding the verdict, the trial judge is required to accept as true all of the evidence that is favorable to the State, including all reasonable inferences that may be drawn therefrom, and to *disregard* evidence favorable to the defendant. **Yates v. State**, 685 So.2d 715, 718 (Miss. 1996); **Ellis v. State**, 667 So.2d 599, 612 (Miss. 1995); **Hart v. State,** 637 So.2d 1329, 1340 (Miss. 1994); **Edwards v. State,** 615 So.2d 590, 594 (Miss. 1993); **Clemons v. State,** 460 So.2d 835, 839 (Miss. 1984); **Forbes v. State**, 437 So.2d 59, 60 (Miss. 1983); **Bullock v. State**, 391 So.2d 601 (Miss. 1980); **Boyd v. State,** 754 So.2d 586, (Ct.App.Miss. 2000).

If under this standard, sufficient evidence to support the jury's verdict of guilty exists, the motion for a directed verdict and request for peremptory instruction or JNOV should be overruled. **Brown v. State**, 556 So.2d 338 (Miss. 1990); **Davis v. State**, 530 So.2d 694 (Miss. 1988). A finding that the evidence is insufficient results in a discharge of the defendant. **May v. State**, 460 So.2d 778, 781 (Miss. 1984).

Where a defendant has made post-trial motions assailing the sufficiency of the evidence, " . . . the trial court must consider all of the evidence - not just the evidence which supports the State's case - in the light most favorable to the State." **Winters v. State,** 473 So.2d 452, 459 (Miss. 1985). The evidence which supports the case of the state must be taken as true, and the state must be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. **Ross v. State,** 954 So.2d 968 (Miss. 2007); **McClain v. State**, 625 So.2d 774 (Miss. 1993); **Young v. State,** 981 So.2d 308 (Ct.App.Miss. 2007). This includes the defendant's evidence, if any, which must be construed in a light most favorable to the prosecution's theory of the case.

What was Walker's intent at the time he broke and entered?

Our position on this issue can be summarized in only three (3) words: "classic jury issue." A reasonable, fairminded, hypothetical jury could have found that Walker's intent was to assault, and he attempted to do so by physical menace.

The trial judge was eminently correct when he made the following observations in denying Walker's request for a directed verdict:

> BY THE COURT: * * * The jury determines whether or not there was intent to commit an assault. And if they do find that, that's a jury question, then they can return a verdict of guilty on the issue of burglary because then you would have the two prongs of burglary completed. But that's a jury question. It's not for the Court to determine that. And that can only be determined through the facts of the case.
>
> As I said before, it did not have to be an aggravated assault. It could have been a simple assault. And as you know, simple assault carries when someone makes a threatening gesture toward someone, and that person feels that they are in imminent danger to that person.
>
> The Court must take as true all the statements given by Ms. Lyons. Now, the jury does not have to take that as true in their decision at the end of the case. But at this point in time, the Court must take as true all of the statements as to Ms. Lyons, as to what she felt, that she felt threatened, and what happened on that night.
>
> Therefore, the Court finds that the Motion for Directed Verdict should fail because there are jury questions as to whether or not this was assault or intent to assault - - not actual assault but the intent to assault. That's a jury question. (R. 136-37)

In **Newburn v. State**, 205 So.2d 260, 265 (Miss. 1967), this Court stated:

> "Intent is a state of mind existing at the time a person commits an offense. If intent required definite and substantive proof, it would be almost impossible to convict, absent facts disclosing a culmination of the intent. The mind of an alleged offender, however, may be read from his acts, conduct, and inferences fairly deducible from all the circumstances."

In **Shanklin v. State**, 290 So.2d 625, 627 (Miss. 1974), this Court further opined:

> Intent to do an act or commit a crime is also a question of fact to be gleaned by the jury from the facts shown in each case. The intent to commit a crime or to do an act by a free agent can be determined only by the act itself, surrounding circumstances, and expressions made by the actor with reference to his intent. [citations omitted]

See also **Sherron v. State,** 959 So.2d 30 (Ct.App.Miss. 2006), reh denied, cert denied 958 So.2d 1232 (2007).

In determining the question of Walker's intent, a jury was entitled to consider Walker's exclamation that he was going to come into her home.

In addition to this, a reasonable, fairminded, hypothetical juror could have accepted Walker's admission he was present at the time and place testified about but rejected his claim he passed out sans any intent to enter the dwelling or to assault its occupants. Walker remembered everything taking place prior to his bizarre entry and claimed at trial he had no intent of assaulting anyone. Yet his actions spoke louder than his words.

Accepting this evidence as true, together with all reasonable inferences flowing sweetly therefrom, and disregarding any evidence favorable to Walker, it is clear the evidence was sufficient to support a conviction for burglary of a dwelling house with the underlying intent to assault its occupants.

Walker, however, suggests he was guilty of no crime greater than trespass because "[t]he intent to commit a crime therein must co-exist with the physical entry". (Brief of the Appellant at 5)

A properly instructed jury decided this question adversely to Walker's position. *See* appellee's exhibits A, B, and C, attached.

We reiterate. "Intent to do an act or commit a crime is . . . a question of fact to be gleaned by the jury from the facts shown in each case." **Shanklin v. State,** *supra*, 290 So.2d at 627.

It was a jury issue, and their verdict returned in the wake of proper instructions was supported by the evidence.

CONCLUSION

Appellee respectfully submits that no reversible error took place during the trial of this cause and that the judgments of conviction of burglary of a dwelling house and recidivism, as well as the twenty-five (25) year sentence imposed by the trial court, should be forthwith affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: _____

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IN THE CIRCUIT COURT OF WARREN COUNTY, MISSISSIPPI
NINTH CIRCUIT JUDICIAL DISTRICT

STATE OF MISSISSIPPI

VS. NO. 060292CRP

WHITZEY SANTAIZ WALKER DEFENDANT

JURY INSTRUCTION

The Court instructs the Jury that the Defendant, Whitzey Santaiz Walker, is charged with the crime of burglary of a dwelling in the Indictment.

If you find from the evidence beyond a reasonable doubt that:

1. that Whitzey Santaiz Walker, on or about July 16, 2006 in Warren County, Mississippi,

2. did break and enter the dwelling house of Sherwood and Melissa Lyons located at 670 Culkin Road, Vicksburg, Mississippi,

3. with the intent of Whitzey Santaiz Walker to assault Melissa Lyons,

then you shall find Whitzey Santaiz Walker guilty of burglary of a dwelling.

If the State has failed to prove any one of the above listed elements beyond a reasonable doubt, then you shall find Whitzey Santaiz Walker, not guilty of burglary of a dwelling.

GIVEN AND FILED

AUG 2 8 2007

SHELLY ASHLEY-PALMERTREE, CIRCUIT CLERK

BY _____ D.C.

S 1

EXHIBIT A

IN THE CIRCUIT COURT OF WARREN COUNTY., MISSISSIPPI

STATE OF MISSISSIPPI

VS. CASE NO. -6,0292-CR-P

WHITZEY SANTAIZ WALKER

JURY INSTRUCTION NO. C-3

The Court instructs the Jury that a person is guilty of assault if he (a) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or (b) negligently causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm; or attempts by physical menace to put another in fear of imminent serious bodily harm.

GIVEN AND FILED

AUG 2 8 2007

SHELLY ASHLEY-PALMERTREE, CIRCUIT CLERK

BY _____ D.C.

given

EXHIBIT

C3

IN THE CIRCUIT COURT OF WARREN COUNTY., MISSISSIPPI

STATE OF MISSISSIPPI

VS. CASE NO. -6,0292-CR-P

WHITZEY SANTAIZ WALKER

JURY INSTRUCTION NO. C-5

If you find from the evidence that there was a breaking and entering of the dwelling at 670 Culkin Road; and if you further find that there was an intent to commit a crime inside the dwelling, at the time of the breaking and entering, then you shall find the defendant guilty of burglary.

If you find from the evidence that the defendant did not have the intent to commit a crime inside the dwelling at the time of the breaking and entering, then you shall find the defendant not guilty of burglary.

GIVEN AND FILED

AUG 2 8 2007

SHELLY ASHLEY PALMERTREE, CIRCUIT CLERK

BY_____D.C.

EXHIBIT

C

CERTIFICATE OF SERVICE

I, Billy L. Gore, 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 Isadore W. Patrick, Jr.
Circuit Court Judge, District 9
Post Office Box 351
Vicksburg, MS 39181

Honorable Richard Smith
District Attorney, District 9
Post Office Box 648
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Attorney At Law
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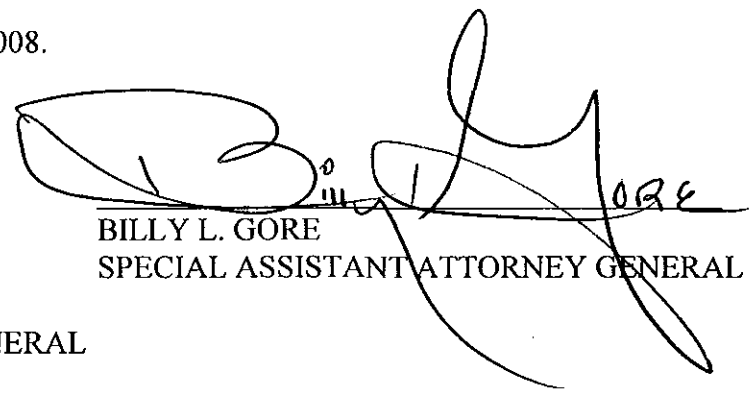
This the 3rd day of October, 2008.



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