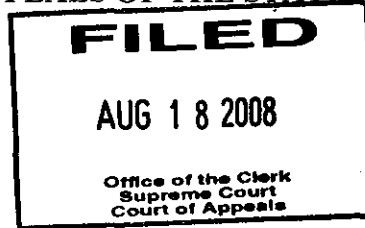


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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

WHITZEY SANTAIZ WALKER



APPELLANT

V.

NO. 2007-KA-1869-COA

STATE OF MISSISSIPPI

APPELLEE

---

BRIEF OF THE APPELLANT

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

**WHITZEY SANTAIZ WALKER**

**APPELLANT**

**V.**

**NO. 2007-KA-1869-COA**

**STATE OF MISSISSIPPI**

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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.

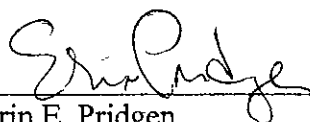
1. State of Mississippi
2. Whitzey Santaiz Walker, Appellant
3. Honorable G. Gilmore Martin, District Attorney
4. Honorable Isadore W. Patrick, Circuit Court Judge

This the 18<sup>th</sup> day of August, 2008.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:



Erin E. Pridgen

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

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**BRIEF OF THE APPELLANT**

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**STATEMENT OF ISSUES**

**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.**

**STATEMENT OF THE CASE**

This appeal proceeds from the Circuit Court of Warren County, Mississippi, where Whitzey Santaiz Walker was convicted of burglary of a dwelling. The Honorable Isadore W. Patrick, Jr, Circuit Court Judge, presided over the two-day jury trial that began on August 27, 2007. Following the trial, Walker was sentenced as a habitual offender to serve twenty- five years under the supervision of the Mississippi Department of Corrections. Walker is currently incarcerated with the Mississippi Department of Corrections.

**FACTS**

On the night of July 16, 2006, Whitzey Walker crashed his Chevrolet Malibu on Old Jackson Road, in Vicksburg, Mississippi. [Tr. 125, 169]. Whitzey, who was driving under the influence of

alcohol and drugs, had recently experienced the loss of his mother and an argument with his wife. [Tr. 169, 175-76; Defense Exhibits 1 & 2] After freeing himself from the wrecked car, Whitzey walked down the road in search of help. [Tr. 170] Shortly afterward, Whitzey arrived at the home of Sherwood and Melissa Lyons. [Tr. 171]

There was conflicting testimony presented at trial as to what happened after Walker arrived at the home. According to Melissa Lyons, she woke up about 11:00p.m. to a banging noise on her front porch. [Tr. 67, 79] She was afraid that something had happened to her children that lived next door. [Tr. 80]. Without turning on the porch light, Melissa opened the door and saw Whitzey, whom she did not know. [Tr. 67]. According to Whitzey, he informed Melissa that he had been in a wreck and that he needed her to call the ambulance and tow truck. [Tr. 171]. However, Melissa testified that she only thought Whitzey said, "I'm coming in your house." [Tr. 67]. Melissa slammed and locked the door in Whitzey's face. [Tr. 68]

Whitzey testified that, after Melissa slammed the door, he remembered falling back on the window of the house and passing out. [Tr. 171] He did not remember regaining consciousness for about three days. According to Melissa, however, Whitzey dove through the home's window to gain entrance into the house. [Tr. 68]

There was no light on in this front room at the time. [Tr. 70, 95]. Sherwood testified that, by the time his wife slammed the door, he had come into the front room to inquire about the commotion. [Tr. 109]. Sherwood saw Whitzey come through the window and stand up. According to Sherwood, he recalled seeing Whitzey advance toward his wife, but he knocked Whitzey down with one punch and restrained him until the police arrived. [Tr. 109].

Officer John Elfer, a patrolman with the Warren County Sheriff's Department, was one of

the officers that arrived to the scene that night. [Tr. 121-22]. Officer Elfer testified that, when he arrived, he witnessed Sherwood on top of Whitzey, restraining him. [Tr. 123]. There was no evidence presented that Whitzey had any weapons or burglary tools that evening.

### **SUMMARY OF THE CASE**

The trial court committed reversible error in denying the motion for JNOV. The State failed to sufficiently prove the requisite showing of assault in the burglary conviction. Absent this showing, Whitzie could only be found guilty of the lesser included offense of trespass.

### **ARGUMENT**

#### **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.**

Challenges to the legal sufficiency of evidence require review under the light most favorable to the verdict. *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993). The credible evidence consistent with the verdict must be accepted as true. *Id.* However, reversal is required when the facts and inferences drawn from the evidence indicate that, as to one or more of the elements of the charged offense, reasonable and fair-minded jurors could only find the accused not guilty. *Coleman v. State*, 926 So. 2d 205, 208 (¶9) (Miss. 2007).

Whitzey was charged with burglary of a dwelling, with the intent to assault the occupants of the home, in violation of Mississippi Code Annotated Section 97-17-23 (Rev. 2006). [R.E. 2] Section 97-17-23 reads, in pertinent part, 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. . . **with intent** to commit some crime therein, shall be punished by imprisonment. . . not less than three(3) years nor more than twenty-five (25) years.  
(*Emphasis added*)

Likewise, “assault” is defined by Section 97-3-7 of the Mississippi Code Annotated (Supp. 2007). Section 97-3-7 reads, in pertinent part, 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....

Burglary requires both an unlawful breaking and entering, as well as an intent to commit a crime therein. Miss. Code Ann. §97-17-23 (Rev. 2006). The State is required to prove each element of the burglary. *Newburn v. State*, 205 So. 2d 260, 263 (Miss. 1967). The State failed to sufficiently prove that Whitzey had the requisite intent to commit an assault when he entered the Lyons home on the evening of August 16<sup>th</sup>.

The State relied on the testimonies of Melissa and Sherwood Lyons to establish the intent requirement. Melissa testified that Whitzey told her he was coming into the house, and after diving through the window, he moved toward her with his hands raised. [Tr. 68-70] However, Whitzey never made any verbal threats to the Lyons and he never physically assaulted the couple. [Tr. 86, 111]. Whitzey made no direct threats or statements that he ever intended to hurt the Lyons or put them in fear of serious bodily harm. His 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.

Absent direct testimony affirmatively showing there was an intent to commit a crime, the intent is inferred by the acts and declarations of the defendant, along with the facts and circumstances at the time. *Cortez v. State*, 876 So. 2d 1026, 1030 (¶12) (Miss. Ct. App. 2004). Whitzey testified that he was involved in a car wreck and sought assistance from a stranger’s home



in the middle of the night. [Tr. 171] There was no evidence presented that he planned to enter the home or that he intended on to hurt the unknown occupants in any way, or to put them in fear of bodily danger.

Even if the Court were to accept the position that Whitzie feloniously entered the home to commit an assault, the State failed to establish that the intent was formed upon entering the home, as opposed to after Whitzie was inside the home. "The intent to commit a crime therein must co-exist with the physical entry." *Davis v. State*, 611 So. 2d 906, 911 (Miss. 1992).

Absent the required simultaneous intent, Whitzie could only be guilty of trespass. Trespass is the underlying basis for every burglary charge. *Harper v. State*, 478 So. 2d 1017, 1021 (Miss. 1985).

### CONCLUSION

Whitzie Walker's burglary conviction is based on insufficient evidence as the State failed to prove the requisite showing of intent to commit the crime of assault. Walker request that this honorable Court reverse and render this matter.

Respectfully Submitted,  
MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: Erin Pridgen  
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**CERTIFICATE OF SERVICE**

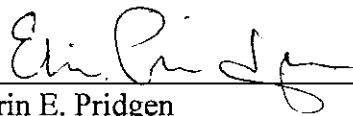
I, Erin E. Pridgen, Counsel for Whitzey Santaiz Walker, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

Honorable Isadore W. Patrick  
Circuit Court Judge  
Vicksburg, MS 39181

Honorable G. Gilmore Martin  
District Attorney, District 9  
Post Office Box 648  
Vicksburg, MS 39181

Honorable Jim Hood  
Attorney General  
Post Office Box 220  
Jackson, MS 39205-0220

This the 18<sup>th</sup> day of August, 2008.

  
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