IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

LAPRIEST CORTEEZES MCMILLAN — APPELLANT

VS. — NO. 2007-KA-1999-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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PROCEDURAL HISTORY:

On October 9, 2007, LaPriest C. McMillan, "McMillan" was tried for business burglary as an habitual offender before a Scott County jury, the Honorable Marcus Gordan presiding. R. 1. McMillan was found guilty and given a seven year sentence in the custody of the MDOC. C.P. 5. From that conviction and sentence, he appealed to the Mississippi Supreme Court. C. P. 23.

ISSUES ON APPEAL

I.

WAS THE INDICTMENT DEFECTIVE?

II.

WAS THERE CREDIBLE, SUBSTANTIAL EVIDENCE IN SUPPORT OF THE CONVICTION?

STATEMENT OF THE FACTS

On July 31, 2006 , McMillan was indicted by a Scott County Grand jury for business burglary on or about April 10, 2006 as an M. C. A. §99-19-81 habitual offender. C.P. 1. Due to human and/or computer scanning error, page 2 of the indictment was left out of the record filed in this cause. Accompanying this brief is a "Motion To Supplement,"requesting permission to add a certified copy of the second page of the aforesaid indictment. This page is captioned , "page two of two pages, Lapriest Cortezees McMillan, Scott County, July /August 2006."

That document contains a statement of McMillan's alleged two previous convictions. They would qualify him for being an "Habitual Offender" as stated on page one of the Court Papers included in the record. C.P. 1. Page two states with factual specificity the two prior convictions in Forrest and Jackson County which qualify McMillan under M C A § 99-19-81 for habitual offender status.

This requested supplementation of the record would , in the Appellee's opinion, be relevant, if not dispositive, for resolving McMillan's first issue concerning his alleged improper indictment as an "habitual offender."

On October 9,2007 , McMillan was tried for business burglary before a Scott County jury, the Honorable Marcus Gordan presiding. R. 1. McMillan was represented by Mr. James E. Smith, III.

Mr. Michael Sanders and Ms. Stephanie Niven ran Emergystat ambulance service. R. 14-30. It was near Weems mental health center. R. 16. Sanders and Niven testified that on the night of the alleged burglary they observed a truck back up to a storage shed. This was the shed behind Weems mental health center. R. 14-30. This was around 11:00 in the evening. The truck did not stop and park in the front of the building as was normal for visitors or employees.

Ms. Niven testified to seeing the door to the truck open. She also saw someone carrying something toward the rear of the truck. R. 27-28. Mr. Sanders called 911 to report the suspicious activity next door.

Officer Joey Hall with the Forest Police Department testified that he went to Weems health center. This was in response to a call. He found a truck backed up near a storage shed. The truck contained two fans and a grill. There was a hammer on top of the grill. See State's exhibit 1. When questioned, the suspect said the items belonged to him. R. 34. The door to the shed was open. R. 35.

Mr. Teont Boyd, a mental health center employee, came to the scene. He identified the items in the truck as belonging to the mental health center. They had been stored in the shed. The shed was normally kept locked. R. 41. Boyd identified McMillan as the person found with the property from the shed in his truck. R. 43.

Officer Will Jones testified that the door to the storage shed showed signs of having been pried open. R. 57. See defense exhibit 5 showing the door knob handle along with the door frame with evidence of having been pried open.

At the conclusion of the prosecution's case, the trial court denied a motion for a directed verdict. R. 60.

See State's exhibit 1 for a photograph of the grill and two fans found in McMillan's backed up truck. A hammer can be seen on top of the grill. This is where Officer Hall found the hammer. R. 37. Defense exhibits 1 and 2 are photographs of the outside of the storage shed. Exhibit 1 shows the Emergystat Ambulance. Exhibits 3, 4 and 5 show the door to the storage shed along with pry marks on the door. All exhibits are contained in manila envelop marked "Exhibit."

McMillan testified in his own defense. R. 59-64. He testified that he found the grill and two fans outside the shed. He testified that he put them in his truck. R. 62. This was when police officers

confronted him, questioned him, investigated and then arrested him for burglary. McMillan admitted that he intended to sell the items in order to gain money needed for drugs. R. 65.

Jury instruction D-7 for petit larceny was granted. R.67 ; C.P. 11.

Mr. McMillan was found guilty and given a seven year sentence in the custody of the MDOC. C. P. 5. From that conviction and sentence, he appealed to the Mississippi Supreme Court. C. P. 23.

SUMMARY OF THE ARGUMENT

1. The record reflects that page 2 of the indictment against McMillan was through human or electronic error not included in the record. It was not included with the other pages in the court papers volume. Page one of the indictment was included. C.P. 1. A "Motion to Supplement" the record was filed to include this second page of the indictment in the record.

This second page includes a listing of McMillan's two prior convictions which qualified him for enhanced sentencing under M. C. A. §99-19-81. They were a 1988 conviction for forgery in Forrest County and a 1994 conviction for burglary in Jackson County.

The record reflects that at his sentencing McMillan admitted to having some four prior convictions including those enumerated on page 2 of the indictment. R. 82-84. He did not dispute the fact that he had prior convictions for forgery in Forrest County, and burglary in Jackson County as stated on page two of the indictment. **Clark v. State** , 503 So. 2d 277, 280 (Miss. 1987).

Therefore, the Appellee would submit that this issue is lacking in merit.

2. The record reflects there was sufficient, credible corroborated evidence in support of McMillan's conviction. There was testimony indicating that McMillan was found at the mental health center's storage shed. R. 43. This was around 11:00 at night. He had property he had been observed loading into his pick up truck. This property was identified as having been stored in the shed. R. 36. That property belonged to the Weems Memorial mental health center. R. 36.

There was testimony from Mr. Boyd, an employee, that the door to the shed had been locked prior to the close of business. R. 41. There was also testimony and a photograph showing pry marks on the door frame. It was locked only with the door knob prong and door latch slot .R. 57. McMillan had a hammer and other tools in his possession. R. 37.

McMillan's testimony of supposedly finding the property outside the shed created a factual

issue the jury resolved in favor of the prosecution. R. 62. McMillan was given jury instruction D-7 in support of his testimony. It was an instruction for petit larceny. C.P. 11.

The Appellee would submit on a motion for a new trial McMillan is not entitled to give himself the benefit of favorable inferences consistent with his innocence. **Noe v. State**, 616 So. 2d 298, 302 (Miss. 1993). Rather the prosecution is entitled to reasonable inferences from the testimony and evidence consistent with his guilt.

ARGUMENT

PROPOSITION I

THE RECORD REFLECTS THE INDICTMENT WAS CORRECT IN FORM AND SUBSTANCE.

Mr. McMillan believes that his habitual offender burglary indictment was defective. He believes that it was defective because it did not allegedly contain the particular prior convictions which provided the basis for his M. C. A. §99-19-81 habitual offender status. Appellant's brief page 2-3.

To the contrary, the record reflects that the indictment included on page one of the court papers is entitled "Indictment." It also includes the words "Burglary of Storage Building, Habitual Offender," along with the statement: "page one of two pages." C.P. 1.

However, there is no second page of that indictment as one would expect from the caption on page one. Included with this brief is a "Motion to Supplement." It requests permission to include "a certified copy" by the Scott County Circuit Court of a page that states as follows, "Page two of two pages, Lapriest Cortezees McMillan, Scott County July/August 2006." This motion to supplement the record requests that this certified second page of the indictment against McMillian be included in the record of this cause. According to Circuit Clerk Joe Riggs through human error it was not properly scanned into the record made for the court papers.

Should this certified page two of the indictment be included, the Appellee would submit that this would resolve issue one raised by McMillan in his brief. He claimed that he was improperly indicted as an habitual offender because there was no listing of the two prior convictions which would qualify him for enhanced sentencing. Appellant's brief page 1-2.

As can be seen on the certified copy of page two of the indictment, two previous convictions

against McMillan are included. They are a conviction on December 16, 1988 in Forest County for the crime of forgery in which McMillan received a three year sentence. In addition, McMillan was convicted in Jackson County on August 3, 1994 of the crime of burglary of a dwelling for which he was given a six year sentence. These two prior convictions allegedly qualified McMillan for enhanced punishment under M. C. A. §99-19-81.

The record also reflects that at the sentencing hearing, McMillan admitted to having four prior convictions. This included the December 16, 1988 Forest County conviction and the August 3, 1994 Jackson County conviction. R. 82-84.

The Appellee would submit that should the motion to supplement the record be accepted the issue concerning the alleged improper habitual offender indictment should be resolved.

In addition, even without the supplement, the record indicates that McMillan admitted to having the two prior convictions included on page two of his indictment which was inadvertently left out of the record R. 82.

In **Clark v. State** , 503 So. 2d 277, 280 (Miss. 1987), this Court stated there is a presumption that a trial court's judgement is correct. The burden is upon an appellant to prove otherwise.

> We have held, "There is a presumption that the judgment of the trial court is correct, and the burden is on the appellant to demonstrate some reversible error to this Court." **Branch v. State**, 347 So. 2d 957, 958 (Miss. 1977). 'It is the duty of counsel to make more than an assertion, they should state reasons for their propositions, and cite authorities in their support...' **Johnson v. State**, 154 Miss. 512, 122 So. 529 (1929).

The Appellee would submit that this issue is therefore lacking in merit.

PROPOSITION II

THE RECORD REFLECTS THAT THE TRIAL COURT CORRECTLY DENIED PEREMPTORY INSTRUCTIONS AND A MOTION FOR A NEW TRIAL.

McMillan believes that there was insufficient evidence in support of his conviction for burglary. He believes that there was insufficient evidence for establishing that any breaking and entering into the Weems Memorial Health Center storage shed occurred. He believes the testimony of Mr. Boyd from the health center was contradictory about whether the shed door was locked or not. McMillan testified that he did not break into the shed. Rather he allegedly found the grill and fans outside and then placed them in his truck. McMillan believes that his testimony plus that of Boyd about not remembering locking the door should cast doubt upon the validity of his conviction. Appellant's brief page 3-5.

The record reflects that McMillan was given jury instruction D-7. R. 67; C.P. 11. This was a petit larceny instruction consistent with his testimony. He testified that he found the property outside the shed and put it in his truck without breaking and entering the shed. R. 62.

The Appellee would submit that there was record evidence that the grill and fans were the property of Weems Memorial Health Center. R. 36. That property was found in the back of McMillan's truck. See State's exhibit 1 for photograph of grill and two fans found in the truck. There was "a hammer" on top of them. R. 37. When confronted about the property, Officer Hall testified that McMillan claimed the missing property belonged to him. R. 34.

Q. **Did you make any inquiries as to the BBQ grill or fans?**

A. **I asked him who-or, where did he get it or–or if it was his or not. He advised it was his–it was his –all his stuff in the back of the truck.** (Emphasis by Appellee).

Officer Joey Hall testified that a Weems employee came to the scene. He identified the fan

and grill as being the property of Weems Memorial. This property belonging to the mental health center was stored in the storage shed. The door to the shed normally locked was open at the time of Officer Hall's arrival.

Q. **And–uh–was any indication as to who was the owner of the items?**

A. **Uh-he advised that-uh- the grill and the fans that was in the back of the pickup truck belonged to Weems Mental Health.**

Q. **Now, did you learn where the fans or the grill had been located prior to it being in the truck?**

A. **They was–they was located, or stored, in the shed.** R. 36.(Emphasis by Appellee).

There was testimony from Mr. Boyd that the door to the shed where the property was kept was "always locked" at the close of business. This would include the day of the burglary. R. 41-42.

Q. Uh-can you tell us, to your own personal knowledge would the shed have been locked?

A. Yes, sir. It would.

Q. **And at that time of day is it always locked?**

A. **Yes, sir.**

Q. **And who did this grill and fans, who did that belong to?**

A. **Uh-Weems Mental Health**. R. 41-42. (Emphasis by Appellee).

Mr. Boyd testified that when the building was not being used, the door to the shed was kept locked. He also testified to seeing pry marks on the metal door on the shed. These marks were not there prior to the evening of the burglary.

Q. **And had these pry marks been there before the evening of the burglary?**

A. **Not to my knowledge, sir.**

...

Q. **And would it have been locked prior to that time, or that burglary, you being called out there that night?**

A. **Yes, sir.** R. 45. (Emphasis by Appellee).

There was testimony and photographic evidence that the door to the shed which was locked by use of the door knob prong in the door latch space had been pried open with some type of metallic object. R. 57.

Q. Okay. When you arrived there, what did you find at Weems Mental Health?

A. I was informed that the -uh-storage building behind the actual building to Weems Mental Health was the one that was broken into. **When I looked at the building I did see that there was a, you know, metal door that opens to the outside, and I looked around it and saw where it appears that something had been used to pry the door open.** R. 57. (Emphasis by Appellee).

McMillan was identified as the person found with the aforesaid private property in his truck in the early morning hours. R. 43.

Therefore, the Appellee would submit that there was sufficient credible evidence for establishing all the elements of burglary. There was evidence of a breaking and entering. There was evidence of a taking and removal of the property from the storage shed to the back of McMillan's truck. R. 34-36. There was identification of McMillan as the person who had the private property in the back of his truck. R. 43. There was testimony that McMillan initially told law enforcement that the property belonged to him. R. 34.

The trial court denied a motion for a directed verdict. R. 59-60. The Court found there was sufficient evidence for inferring that all the elements of burglary including breaking and entering had been established. There was testimony from which it could be inferred that a breaking and entering had occurred along with the removal of Weems Memorial's property from their shed into McMillan's truck. R. 34-36. This removal was preparatory for removal from the premises and a sale for the

recovery of drug money. R. 65..

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 this 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).

The Appellee would submit that when the evidence cited above was taken as true together with reasonable inferences there was more than sufficient credible evidence for denying all peremptory instructions. The property found in McMillan's truck was identified as the property of the mental health center. The property was contained inside a locked storage shed at the close of business. McMillan was found with the property in his possession. R. 34. There was corroborated evidence that the door to the shed had been pried open with some metal object. R. 57. McMillan had a hammer and other metal objects in his truck . R. 37. McMillan admitted that he had intended to sell the property in order to support his drug addiction. R. 65.

McMillan's testimony about not breaking and entering the shed created a conflict in the evidence the jury was responsible for resolving. R. 62. McMillan was given a jury instruction for larceny based upon his testimony. C.P. 11. The jury did not find his unsubstantiated claim to be credible, given the testimony and evidence before them. R. 79.

Testimony from Michael Sanders and Stephanie Niven indicated that they observed a truck backing up to the storage shed. R. 14-30. Their ambulance service was near Weems mental health center. R. 16. It did not stop and park in the front of the building. This was around 11:00 in the evening. Ms. Niven saw the door to the truck open. She also saw someone carrying something toward the rear of the truck. R. 27-28. Mr. Sanders called the Forest Police Department.

Officer Boyd testified that McMillan initially told him that the grill and fans belonged to him. R. 34.

This testimony would conflict with McMillan's claim of allegedly unexpectedly finding property and loading it in his truck. R. 62. He backed up to the shed at night and shortly thereafter was seen moving items into the back of his truck. When questioned, he claimed the property contained inside the locked actually belonged to him. R. 34. He admitted that he was planning on selling the property to gain drug money for his habit. R. 65.

In addition, while Mr Boyd stated that he did not remember locking the door prior to the burglary, this was in answer to a question about whether "he" locked the door at that time. See page 46 of the transcript. Boyd had previously testified that the door is "always locked" when not in use. And testified that it would have been locked at the end of business on the day in which the burglary occurred. R. 42-45.

Boyd is not entitled to give himself the benefit of inferences consistent with his innocence on his motions for peremptory instructions.

In **Noe v. State**, 616 So. 2d 298, 302 (Miss. 1993), this Court stated that when the sufficiency of the evidence is challenged that the evidence favorable to the State must be accepted as true with all reasonable inferences and evidence favorable to the defendant should be disregarded.

The Appellee would submit that this issue is lacking in merit.

CONCLUSION

McMillan's burglary 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 31st day of July, 2008.

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