

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

HILLIE FULGHAM

APPELLANT

VS.

NO. 2007-KA-2257-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

**BY: LISA L. BLOUNT
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [REDACTED]**

**OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680**

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
FACTS	2
SUMMARY OF THE ARGUMENT	4
<u>ARGUMENT</u>	5
PROPOSITION I: THERE IS LEGALLY SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT.	5
PROPOSITION II: THE COURT PROPERLY REFUSED INSTRUCTION D-11.	8
PROPOSITION III: THE EVIDENCE SUPPORTS THE JURY'S VERDICT.	9
CONCLUSION	11

TABLE OF AUTHORITIES

STATE CASES

DeLoach v. State, 977 So.2d 400 (Miss.App.2008)	8
Davis v. State, 980 So.2d 951 (Miss.App.2007)	6
Dudley v. State, 719 So.2d 180, 182 (Miss.1998)	9
Goldman v. State, 741 So.2d 949, ¶13 (Miss.App.1999)	7
Griffin v. State, 607 So.2d 1197, 1201 (Miss.1992)	9
Haynes v. State, 744 So.2d 751 (Miss.App. 1999)	5
Langston v. State, 791 So.2d 273, 280 (Miss.Ct.App.2001)	9
May v. State, 460 So.2d 778, 780 (Miss.1984)	7
Stewart v. State, 760 So2d 810 (Miss.App.2000)	6
Templeton v. State, 725 So.2d 764 (Miss.1998)	5
Wall v. State, 718 So.2d 1107 (Miss.1998)	7
Wilkerson v. State, 42 So.2d 745 (1949)	7

STATE STATUTES

Mississippi Code Annotated section 97-17-33	5
Mississippi Code Annotated section 97-17-33 (Rev.2000)	10
Mississippi Code Annotated section 99-18-81	3

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

HILLIE FULGHAM

APPELLANT

VS.

NO. 2007-KA-2257-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Oktibbeha County, Mississippi, where Hillie Fulgham was convicted of business burglary and sentenced as a habitual offender, Honorable Lee J. Howard presiding.

ISSUES

- I. WHETHER THE COURT SHOULD HAVE GRANTED A DIRECTED VERDICT OF ACQUITTAL?
- II. DID THE TRIAL COURT WRONGFULLY DENY A DEFENSE THEORY INSTRUCTION?
- III. WHETHER THE VERDICT IS CONTRARY TO THE SUFFICIENCY AND WEIGHT OF THE EVIDENCE?

FACTS

The night of November 9, 2004, someone stole a side of beef and boxes of meat from the cooler in Garner's Meat Processing in Sturgis, Mississippi. (T 91-93). Dennis Garner, owner of Garner's Meat Processing customarily left the back door of his business unlocked at night so customers returning late from hunting could leave their deer in the kill floor to be processed. (T 90).

The building housing Garner's Meat was divided into three sections, the cutting room in the front of the building, the walk-in cooler in the middle and the kill floor in the rear of the building. (T90-91). The front door of the building locked when closed, Gardner customarily locked the door from the cooler to the cutting room and left the doors from the kill floor to the cooler and the rear door closed but unlocked (T 91).

Garner testified that on the morning of November 10, 2004, he discovered the door between the cutting room and the cooler open, and also the rear door. (T 90-91). Worried about losing customers, Garner did not immediately report the theft. (T 94).

Approximately a month later, Christopher Jones confessed to Garner's father and offered to pay for the stolen meat. Jones implicated Jason Mann and Hillie Fulgham. (T 94; 110). The grand jury indicted all three for business burglary. (CP 4).

At Fulgham's trial, Jones testified that on the night of the burglary the trio had been drinking heavily. He drove Mann's truck and dropped Mann and Fulgham off at the front of Garner's building with the purpose of stealing meat. (T 104-05). He saw them walk along the side of the building to the back. (T 105). He drove a distance down the road, turned around and went back to Garner's Meats. (T 106) Mann and Fulgham were standing in front of the store with boxes of meat. (T 106-07). They loaded the meat in the back of the truck. Jones drove down the road again and returned for another load of meat. This process occurred two or three times. (T 115-22). The trio

then took the meat to Fulgham's house. (T 108). Jones testified that he plead guilty to business burglary, and received two years in the Mississippi Department of Corrections and five years post-release supervision. (T 115).

Mann's testimony corroborated Jones' testimony. Mann also testified "the door was locked. I remember rattling on the door and hearing it shake." (T 120). Mann was still awaiting trial on the business burglary charge, when he testified against Fulgham. (T 125). Jones and Mann both testified the prosecution had not made any deals with them in exchange for their testimony. (T 102, 117).

After the prosecution presented its case in chief, Fulgham made a motion for a directed verdict which the trial court denied. (T 166). Fulgham then testified in his own defense. Fulgham denied being present at Garner's Meats the night of the burglary and denied any involvement whatsoever in the crime. (T 168-69).

The trial court allowed the State to amend the indictment to charge Fulgham as a habitual offender under Mississippi Code Annotated section 99-18-81. (CP 34, 62). On October 18, 2007, the jury returned a guilty verdict for business burglary. (CP 63). Judge Howard sentenced Fulgham to the maximum of seven years incarceration and a \$10,000 fine. (CP 69). After the denial of post-trial motions, Fulgham appealed.(CP 77-79).

SUMMARY OF THE ARGUMENT

Fulgham's claim that the State failed to prove the elements of business burglary is contrary to the record. The State provided legally sufficient evidence to support the jury's verdict. The trial court properly refused proffered Jury Instruction D-11. Finally, the weight of the evidence against Fulgham demonstrates that sufficient proof was offered by the State for the jury to find him guilty of burglary of a business.

ARGUMENT

PROPOSITION I: THERE IS LEGALLY SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT.

In his first assignment of error, Fulgham argues that his business burglary conviction was not supported by the evidence given that, he contends, there was no evidence of an actual or constructive “breaking.” Defendant contends that the State failed to prove that the means of gaining entry to Garner’s Meats constituted a breaking, an element of business burglary. Defendant asserts in his brief that because Garner left his building open “to the public” for customers to leave deer for processing defendant had implied permission to enter the premises after closing. Fulgham claims the state’s theory was of “constructive breaking” and the State failed to properly instruct the jury. (Appellee’s brief 3).

The crime of burglary has two essential elements: “the unlawful breaking and entering and the intent to commit some crime once entry has been gained.” *Haynes v. State*, 744 So.2d 751 (Miss.App. 1999). To support a burglary conviction, the State is required to prove that defendant broke and entered into the building with intent to steal or commit a felony. Miss. Code Ann. § 97-17-33.

Haynes v. State, id. is instructive for the proposition of “constructive breaking.” This court held that a defendant was properly convicted of business burglary when he entered a store as a customer, hid in the bathroom until closing and then attempted to steal items therein. Also in *Templeton v. State*, 725 So.2d 764 (Miss.1998) this Court held that

... where Templeton admits that he intended to commit a burglary upon entering the house, the fact that he may have been invited in the house becomes irrelevant because... there was clearly a constructive breaking. We hold that constructive breaking is present where the invitation is gained by deceit, pretense, or fraud. Inasmuch as an owner would not knowingly grant someone permission to enter his house with the intent to commit the crime of burglary ... Templeton’s entry was

obviously gained by deceit, pretense or fraudulent means...

Templeton, at 767.

Garner testified he left part of his building unlocked for hunters who were his “customers” to leave deer for processing. (T. 90). There was no evidence that Mann, Jones or Fulgham were customers leaving deer to be processed, so when they entered the building after closing, with intent to steal meat, it was a constructive breaking.

Defendant now asserts Jury Instruction S-5 states the wrong standard; defendant admits he is procedurally barred from raising this issue. (Appellee’s brief 4).

Instruction S-5 reads:

The Court instructs the Jury that whether the general public was “invited” to enter the “killing floor” portion of Garner’s Meat Market is irrelevant if the Defendant entered the premises with the intent to steal.

Therefore, if you find from the evidence in this case, beyond a reasonable doubt, that the Defendant, Hillie Fulgham, used some effort to enter Garner’s Meat Market, and at the time of that entry he had the unlawful intent to steal, then his act was “breaking” in the eyes of the law. (CP 48).

When Judge Howard asked if he had any objections to S-5, defense counsel responded “Your Honor, I think a lot of effort was made into coming up with this instruction. We don’t have a problem with it. I think it states it as best as we can.” (T 216). Accordingly, Fulgham waived any appellate review of Jury Instruction S-5 by not objecting to it at trial. *Stewart v. State*, 760 So2d 810 (Miss.App.2000).

The State contends that reading S-5 with S- 2 and S-3, the jury was properly instructed as to the elements of the crime. Jury instructions are to be read together and taken as a whole with no one instruction taken out of context. *Davis v. State*, 980 So.2d 951 (Miss.App.2007).

Defendant also argues that there was no proof that Fulgham even entered Garner’s Meat Processing. The State contends that one could infer from Jones’ and Mann’s testimony that

Fulgham entered the building and stole meat. (T 104-08 and 120-25). The State also contends that even if Fulgham did not enter the building, Mann admitted he did. (T 120-25) There was sufficient evidence that the defendant aided and assisted Mann and Jones in the business “burglary and is then a principal to the burglary and is criminally responsible for the act.” (S-4 at CP 47). *Wilkerson v. State*, 42 So.2d 745 (1949).

In considering a motion for a directed verdict, the trial judge is required to accept as true all of the evidence favorable to the State, including any reasonable inferences that may be drawn therefrom. *Wall v. State*, 718 So.2d 1107(¶ 15) (Miss.1998). The State contends that there was credible evidence upon which a jury could find Fulgham broke into and entered Garner’s Meat Processing with the intent to steal meat. A motion for a directed verdict is properly denied when credible evidence could lead reasonable jurors to return the verdict. *Goldman v. State*, 741 So.2d 949,¶13 (Miss.App.1999) citing *May v. State*, 460 So.2d 778, 780 (Miss.1984). Therefore, this issue is without merit.

PROPOSITION II: THE COURT PROPERLY REFUSED INSTRUCTION D-11.

Fulgham argues in his second assignment of error that proffered jury instruction D-11 embodied his theory of the case, and reversible error resulted from the court's refusal of the instruction. The State contends Judge Howard correctly ruled D-11 was an incomplete statement of the law and in conflict with S-5. (T 217-18). Instruction D-11 reads:

The Court further instructs the jury that if you find from the evidence that the Defendant, Hillie Fulgham, did not break and enter a certain building called and being Garner's Meat Company, the property of Dennis Garner, in Oktibbeha County, Mississippi, but that Hillie Fulgham, as a member of the general public, had the express or implied consent of Dennis Garner to enter the said property, then you shall find him not guilty of burglary. (CP 61).

Although a defendant has the right to have an instruction given which presents his theory of the case, a trial judge will not be held in error for refusing to give a requested jury instruction that incorrectly states the law, is already sufficiently addressed in the instructions, or is without an evidentiary foundation. *Deloach v. State*, 977 So.2d 400 (Miss.App.2008).

The State also asserts Fulgham's entire defense was that he was not present when the burglary occurred. (T169, 233). The trial court did not commit reversible error in refusing Fulgham's D-11 instruction which acquitted Fulgham if the jury found he had consent to enter Garner's property.

PROPOSITION III: THE EVIDENCE SUPPORTS THE JURY'S VERDICT.

Fulgham contends that the jury's verdict was contrary to the overwhelming weight of the evidence because there was no evidence of a constructive or actual breaking. The standard of review in determining whether a jury verdict is against the overwhelming weight of the evidence is well settled. "[T]his Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial." *Dudley v. State*, 719 So.2d 180, 182(¶ 8) (Miss.1998). On review, the State is given "the benefit of all favorable inferences that may reasonably be drawn from the evidence." *Griffin v. State*, 607 So.2d 1197, 1201 (Miss.1992). "Only in those cases where the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal." *Dudley*, 719 So.2d at 182 (¶ 8). "This Court does not have the task of re-weighing the facts in each case to, in effect, go behind the jury to detect whether the testimony and evidence they chose to believe was or was not the most credible." *Langston v. State*, 791 So.2d 273, 280 (¶ 14) (Miss.Ct.App.2001).

Considering the evidence presented in the light most favorable to the State, there was sufficient evidence to support the jury's verdict. The State presented evidence that the owner of Garner's Meats arrived at his business on the morning of November 10, 2004, found doors opened that he closed the night before, and discovered a side of beef and boxes of meat missing. (T 88-94). Garner testified he left part of his building unlocked for hunters who were his "customers" to leave deer for processing. (T. 90). Mann and Jones both testified they went with Fulgham to Garner's to steal meat; Fulgham and Mann exited the truck and went to the rear of the building. Mann testified to rattling the closed door of the building and that he and Fulgham loaded meat onto the truck after Jones circled back several times. Jones also testified that each time he circled down the road and

came back to Garner's, Fulgham was standing in front of the building with more meat to be loaded.

Judging these facts most favorable to the State, a reasonable juror could find that Fulgham was guilty beyond a reasonable doubt. The weight of the evidence against Fulgham demonstrates that sufficient proof was offered by the State for the jury to find him guilty of burglary of a business pursuant to Mississippi Code Annotated section 97-17-33 (Rev.2000). This issue is without merit.

CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal, the State would ask this reviewing court to deny Hillie Fulgham's request for an acquittal, or alternatively, a new trial; and to affirm the jury's conviction for business burglary.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: Lisa L. Blount
LISA L. BLOUNT
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR [REDACTED]

CERTIFICATE OF SERVICE

I, Lisa L. Blount, 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 Lee J. Howard
Circuit Court Judge
Post Office Box 1344
Starkville, MS 39760

Honorable Forrest Allgood
District Attorney
Post Office Box 1044
Columbus, MS 39759

George T. Holmes, Esquire
Attorney At Law
301 North Lamar Street, Suite 210
Jackson, MS 39201

This the 8th day of December, 2008.



LISA L. BLOUNT
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

