IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2007-KA-02257-COA

HILLIE FULGHAM — APPELLANT

V.

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT

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. Hillie Fulgham

THIS 5th day of September, 2008.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Hillie Fulgham

By: George T. Holmes
George T. Holmes, Staff Attorney

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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 an habitual offender under MCA §99-19- 81 (1972), to seven (7) years without parole following a jury trial conducted October 17, 2007, Honorable Lee J. Howard, Circuit Judge, presiding. Fulgham is presently incarcerated with the Mississippi Department of Corrections.

FACTS

As a convenience to himself and his customers, back in 2004, Dennis Garner, owner of Garner's Meat Processing in Sturgis, always left the back door of his business open overnight during deer seasons so hunters returning late with deer to butcher, could leave their field-dressed kill in the cooler. [T. 88-90]. On the night of November 9-10, 2004, someone, probably more than one person, came in and helped themselves to a side

of beef and various packages of meat products totaling about $900 worth. [T. 91-93].

Garner did not report the incident hoping that the thieves would be revealed eventually in the small town and he did not want his customers to become concerned about leaving deer with him for processing. [T.94].

Garner's building was an old dairy farm which had divided into three sections, the front retail and cutting room, the center cooler and freezer, and the back which he called the "kill floor". [T. 89, 91]. Mr. Garner would lock the front, and the entry from the cooler to the front, but leave the back kill floor open and along with the entry from the kill floor to the cooler area. *Id.*

After about two months, an individual named Christopher Jones called Mr. Garner's father and confessed to stealing the meat, apologized and offered to pay for his part. [T. 94]. Jones said that he, Jason Mann and Hillie Fulgham were involved in the theft. [T. 95, 103-08]. Jones said the trio had been drinking heavily and that he dropped Mann and Fulgham off at Garner's building and circled around while Mann and Fulgham went in and stole the meat. *Id.* Mann testified and confirmed some details and conflicted others, but again implicated all three with Jones dropping the Mann and Fulgham off and circling back several times. [T. 115-22]. Neither Mann nor Jones said they were testifying in exchange for any offer from the state. [T. 102, 117].

Fulgham denied any involvement. [T. 168-69]. Fulgham was living out of state and it took two years for his arrest to be effected, hence the delay. [T.169-77].

SUMMARY OF THE ARGUMENT

The trial court should have granted a directed verdict. A defense theory instruction was wrongfully denied and the verdict was not supported by the weight of the evidence.

ARGUMENT

ISSUE NO. 1: WHETHER THE COURT SHOULD HAVE GRANTED A DIRECTED VERDICT OF ACQUITTAL?

Under the business burglary indictment in this case, the State was required to prove that the defendants broke and entered Garner's with the intent to steal or commit a felony. Miss. Code Ann. § 97-17-33 (Rev.1994). "Breaking" is defined as "any act or force, however, slight, 'employed to effect an entrance through any usual or unusual place of ingress, whether open, partly open, or closed.'" *Smith v. State*, 499 So.2d 750, 752 (Miss.1986).

Since Mr. Garner left his business open, the state's theory was this was a case of "constructive breaking". As explained in *Genry v. State,* 767 So.2d 302, 309-10 (¶21)(Miss. Ct. App. 2000), "[t]he Mississippi Supreme Court has embraced the concept of 'constructive breaking' which occurs when an accused's entry into the questioned premises was gained by his use of threat, deceit, fraud or trickery." See *Templeton v. State*, 725 So.2d 764 (¶ 6) (Miss.1998), and *Haynes v. State*, 744 So.2d 751,(Miss.1999). [Defendant's entry of store with "request to use the restroom was in fact a subterfuge to stay in the store unlawfully past its closing hour in order to commit larceny."].

However, in the present case there was no evidence of "threat, deceit, fraud ... trickery" or "subterfuge". The state, in effect, admits this flaw during the jury instruction process in tendering S-5 where there was no mention of the above prerequisites just the defendants' alleged entry to Garner's with "with the intent to steal" which would constitute the requisite "breaking". [T. 216-17, R. 48].[1]

It follows that, accepting all of the state's evidence as true, there was no proof of a constructive breaking. Moreover, there was no testimony that Hillie Fulgham even went into Garner's Meat Processing.

Christopher Jones testified that he dropped Fulgham and Mann off and then drove away only to circle back several times and picked up meat. [T.105]. Jones did not see Fulgham go in, and did not see Fulgham come out.

Jason Mann said that he did not remember ever going in the store, all he remembered was putting meat in the back of the truck. [T. 120] . Mann never said Hillie Fulgham went in the store either.

There was no evidence of a breaking by Fulgham either direct or constructive. If there was no breaking there was no business burglary.

In *Holderfield v. State*, 215 Miss. 564, 61 So.2d 385, 386 (1952),Holderfield was charged with business burglary and larceny. The business had "the sum of $46 ...taken

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[1] S-5 states the wrong standard, see *Holderfield v. State*, 215 Miss. 564, 61 So.2d 385, 386 (1952), but any claim of error would be subject to procedural bar. *Holderfield* nevertheless controls and requires reversal as shown *infra*.

from a juke box and cigarette machine which had been forcibly opened." Entry to the business "was made by raising a window." However, the business owner "testified that he had known [Holderfield] for a number of years, and that "he had given [Holderfield] a key to the building" and "that [Holderfield]had the right to enter the building at any time day or night by raising the window 'if he had the key'"; but "did not have ...permission to enter the place and break open the music box and cigarette machine and take the money."

In finding that a jury instruction, similar to S-5 here was flawed, the *Holderfield* court ruled,

> 'Except in cases of constructive breaking where an entry is effected by fraud or intimidation, ..., there can be no breaking, and therefore there is no burglary where the occupant of a house, or an agent or servant having authority, expressly or impliedly invites or consents to the entry. The fact that one who enters with the consent of the owner commits a larceny after the entry does not make him guilty of a burglary.' [Citations omitted]. *Id.*

Since there was no proof of constructive breaking, there is no legal way Hillie Fulgham could be found guilty of burglary. *Jefferson v. State,* 977 So.2d 431, 437 (Miss. Ct. App.2008). Considering a motion for directed verdict, if the evidence and reasonable inferences therefrom "point in favor of the defendant on any element of the offense with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty," the single remedy for an appellate court to reverse and render. *Edwards v. State*, 469 So.2d 68, 70 (Miss.1985). That is what Hillie Fulgham is respectfully requesting under this issue.

ISSUE NO. 2: DID THE TRIAL COURT WRONGFULLY DENY A DEFENSE THEORY INSTRUCTION?

To deal with the contingency of the evidence failing to establish proof of intent to steal upon entry to Garners, the defense offered D-11, which stated:

> 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.

The court denied D-11 on the basis that it conflicted with S-5. [T. 217]. The appellant's position is that the instructions did not conflict and the trial court's denial of D-11, circumvented appellant's right to have the jury instructed on a theory of defense. Criminal defendants are entitled to jury instructions embodying their theories of defense if the same have a factual basis. *Welch v. State*, 566 So.2d 680, 684 (Miss. 1990). Failure to afford the same constitutes reversible error. *Id.*

In *Chinn v. State* 958 So.2d 1223 (Miss. 2007), the Court made it clear that "every accused has a fundamental right to have [his] theory of the case presented to a jury, even if the evidence is minimal. The trial court's denial of the accident instruction in *Chinn* was determined to be a denial of a fundamental right requiring reversal. *Id.*

According to *O'Bryant v. State*, 530 So. 2d 129, 133 (Miss. 1988):

> It is, of course, an absolute right of an accused to have every lawful defense he asserts, even though based on meager evidence and highly unlikely to be

submitted as a factual issue to be determined by the jury under proper instructions of the court. This court will never permit an accused to be denied this fundamental right.

A new trial is the requested relief, in the alternative to an acquittal.

ISSUE NO. 3: WHETHER THE VERDICT IS CONTRARY TO THE SUFFICIENCY AND WEIGHT OF THE EVIDENCE?

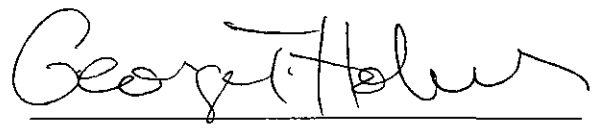
Since there was no evidence of constructive or actual breaking as stated previously, the jury verdict is contrary to the evidence. *Jefferson v. State,* 977 So.2d 431, 437 (Miss. Ct. App.2008). [Personal property taken from a carport and open shed" there was no breaking and entering involved in the open carport ... no proof of any unlawful breaking and entering," hence, no burglary.] A reversal is required on a motion for judgment of acquittal notwithstanding the verdict or for new trial challenging the weight of the evidence when the trial court abuses its discretion in denying the motion. *Sheffield v. State*, 749 So.2d 123, 127 (¶15) (Miss.1999). An acquittal is requested, or alternatively, a new trial.

CONCLUSION

Hillie Fulgham is entitled to have his conviction reversed and rendered. Alternatively, he is entitled to a new trial.

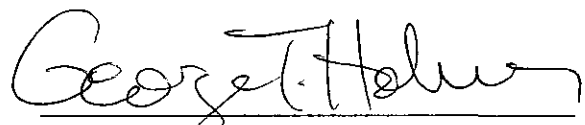
Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Hillie Fulgham, Appellant

By: 
George T. Holmes, Staff Attorney

CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 5th day of September, 2008, mailed a true and correct copy of the above and foregoing Brief Of Appellant to Hon. Lee J. Howard, Circuit Judge, P. O. Box 1344, Starkville MS 39760, and to Hon. Forrest Allgood. Dist. Atty. , P. O. Box 1044, Columbus MS 39703, and to Hon. Charles Maris, Assistant Attorney General, P. O. Box 220, Jackson MS 39205 all by U. S. Mail, first class postage prepaid.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