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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ROY RODERICK RILEY, JR. — APPELLANT

VS. — NO. 2007-KM-0953

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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VERSUS — NO. 2007-KM-0953-COA

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STATEMENT OF THE CASE

Procedural History

Roy Roderick Riley, Jr., a/k/a Roy Rogers Riley, was convicted in the Circuit Court of Forrest County on a charge of burglary of a vehicle and was sentenced as an habitual offender to a term of seven years in the custody of the Mississippi Department of Corrections. (C.P.31-32) Aggrieved by the judgment rendered against him, Riley has perfected an appeal to this Court.

Substantive Facts

Jerry Boyte testified that he and his wife Pamela resided on Carnes Road in Forrest County. Mrs. Boyte owned a 2000 Nissan Sentra which was used as the "family vehicle." (T.51-52)

At approximately 9:30 p.m. on March 21, 2006, Mr. and Mrs. Boyte were "sitting in the living room watching television" when they heard their dog barking. Mr. Boyte "went

to the door and looked around ... " When he looked to his right, he saw "that someone had the passenger's side door open leaning inside" of the family car. Mr. Boyte went back through the kitchen and into his living room, picked up his pistol and went back outside. The individual was still on the scene, but "he had come around the car and was in the driver's side at that time." According to Mr. Boyte, the man "was sitting in the seat with one foot in the car. One foot was still outside of the car." Mr. Boyte pointed his gun at the intruder and told him to "get out." In Mr. Boyte's words, "I had to get a hold of him and manually pull him out. He refused and said, no, he was taking the car."[1] Mr. Boyte "got him by the arm and forced him to the ground." (T.52-56)

Having observed that the interloper was unarmed, Mr. Boyte told his wife to come out. When she did, he gave her the pistol "to get it out of the action" and held the man "on the ground for a little while." Meanwhile, Mrs. Boyte was talking on the telephone with the 911 dispatcher, who told her that "it would take a little while because there was no deputy south of Hattiesburg at that time." At her husband's request, Mrs. Boyte handed him a hope which Mr. Boyte used to tie Riley's hands behind his back. (T.56)

Mrs. Boyte corroborated her husband's testimony. She testified further that no one had permission to enter the car that night. The vehicle was unlocked, but she had not left the keys inside it. It was parked in the spot at which she "always" parked it. (T.63-68)

Deputy Tim Eubanks of the Forrest County Sheriff's Department arrived at the scene some 15 to 20 minutes after he was dispatched. When asked to describe the

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[1]Mr. Boyte identified this man as the defendant. (T.55)

access from Carnes Road to the Boytes' property, Deputy Eubanks testified, "You have to go down a pretty lengthy drive– it's not lighted– until you get to the residence." When the officer arrived there, he saw Mr. and Mrs. Boyte "and the suspect lying on the ground tied up ... " Deputy Eubanks "secured the premises" and "handucuffed the suspect at that point." When the deputy "picked him up off the ground, " Riley "lunged towards the victim, Mr. Jerry Boyte." Deputy Eubanks "grabbed him [Riley] by the arm," and Riley stumbled and fell down, hitting the corner of the patrol car." (T.70-74)

Deputy Eubanks did not retrieve anything from Riley's person that might have come from the car. (T.76) Mrs. Boyte had testified that nothing was missing from the vehicle. (T.68)

Captain Glen Moore of the Forrest County Sheriff's Department was dispatched to the Boytes' residence to assist Deputy Eubanks. When Captain Moore arrived, Riley "was handcuffed and was standing up against the patrol car." Captain Moore did not retried any stolen merchandise from Riley. (T.78-83)

Riley testified that at the time of this incident, he did not have a permanent residence, but was "staying with Joe [Argue]" off Carnes Road. On the day in question, Riley, Argue and a third man "named Kirby" consumed beer and whiskey, and tension ensued. The upshot was that Riley believed he was about to be left "out ... in the cold." After Riley "got upset about it," Argue in fact told Riley that he "had to leave." (T.95-96)

Intending to make a telephone call, Riley began walking toward the Kangaroo store off Highway 49. When he approached the Boytes' house, he "saw a car" that he thought belonged to one of his friends. Riley "proceed to the car, ... walked up to the driver's side and got in ... and sat there" feeling confused and scared. Having realized that he had

consumed "a little too much" alcohol, he was afraid that "somebody was going to run over" him. He denied that he stole anything, or attempted or intended to steal any property from the car. (T.96-97)

The jury was authorized to find the defendant guilty of the lesser offense of trespass, but returned a verdict of guilty of burglary of a vehicle. (C.P.28, 30)

SUMMARY OF THE ARGUMENT

Riley's challenges to the sufficiency of the evidence undergirding his conviction are without merit and should be denied.

PROPOSITION:

RILEY'S CHALLENGES TO THE SUFFICIENCY OF THE EVIDENCE UNDERGIRDING HIS CONVICTION SHOULD BE DENIED

The sole issue presented on this appeal is "whether the trial court committed reversible error in denying Riley's motion for a directed verdict and motion for j.n.o.v. where the evidence was insufficient to prove two of the elements of burglary of an automobile beyond a reasonable doubt." (Brief for Appellant 1) To prevail, he must satisfy the rigorous standard of review set out below:

> In reviewing the sufficiency of the evidence, the standard of review is quite limited. *Clayton v. State*, 652 So.2d 720, 724 (Miss.1995). All of the evidence is to be considered in the light most consistent with the verdict. *Id.* The prosecution is given the benefit of "all favorable inferences that may reasonably be drawn from the evidence." *Id.* This Court will not reverse unless the evidence with respect to one or more of the elements of the offense charged is such that reasonable and fairminded jurors could only find the accused not guilty. *McClain v. State*, 625 So.2d 774, 778 (Miss.1993).
>
> *Brown v. State*, 796 So.2d 223, 225 (Miss.2001).

Riley stands convicted of burglary of an automobile, defined as follows by MISS.CODE ANN. § 97-17-33(1) (1972) (as amended):

> Every person who shall be convicted of breaking and entering, in the day or night, any shop, store, booth, tent, warehouse, or other building or private room or office therein, water vessel, commercial or pleasure craft, ship, steamboat, flatboat, railroad car, automobile, truck or trailer in which any goods, merchandise, equipment or valuable thing shall be kept for use, sale, deposit, or transportation, with intent to steal therein, or to commit any felony, or who shall be convicted of breaking and entering in the day or night time, any building within the curtilage of a dwelling house, not joined to, immediately connected with or forming a part thereof, shall be guilty of burglary, and imprisoned in the penitentiary not more than seven (7) years.

Riley argues specifically, first, that "[b]urglary of an automobile requires a showing of valuable items contained within the car," and that the state failed to prove this fact. (Brief for Appellant 5) The state counters that this specific challenge is procedurally barred by Riley's failure to bring it to the attention of the trial court. When the prosecution rested after presentation of its case in chief, defense counsel moved for a directed verdict "based on the fact that the State has wholly failed to meet its burden of proof, failing to show any form of intent, which is required by the statute for auto burglary, which is a specific intent crime." (T.86-87) Defense counsel added nothing to this ground when she renewed her

motion at the close of the defendant's case.[2] (T.112)

"A motion for a directed verdict on the grounds that the state has failed to make out a prima facie case must state specifically wherein the state has failed to make out a prima facie case." *Banks v. State*, 394 So.2d 875, 877 (Miss.1981). Because this specific ground was never presented below, it cannot be raised for the first time on appeal. *Foster v. State*, 928 So.2d 873, 881 (Miss.2005); *Davis v. State*, 866 So.2d 1107, 1113 (Miss.App.2003); *Harrison v. State*, 534 So.2d 175, 181 (Miss.1988); *Christian v. State*, 456 So.2d 729, 734 (Miss.1984); Accord, *Moore v. State*, 958 So.2d 824, 831 (Miss.2007). The state respectfully submits that because Riley did not bring his first specific challenge to the attention of the trial court, he cannot be heard to do so at this juncture.

Solely in the alternative, without conceding the necessity of doing so, the state submits that the evidence and the reasonable inferences therefrom would support a finding that Mrs. Boyte's car contained items kept for use. While the state failed to introduce an inventory of the vehicle, it did present proof that the defendant was sitting on a car seat when Mr. Boyte apprehended him. At the very least, that seat was an item kept for use. Testimony that the car was used as the family vehicle and was parked in its regular parking

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[2]Indeed, during her closing argument, defense counsel stated in pertinent part,

> I don't know what she kept in her car. The part of the indictment that says she kept valuable things in there for use, sale, deposit, I don't know what she kept in her car, but I know how much stuff I keep in my car, you know, so I'm not disputing that either.
>
> (T.130)

spot would support a reasonable inference that it also contained a steering wheel, a gear shift, and brake and accelerator pedals; otherwise, the automobile could not have been driven. The proof and reasonable inferences thus showed that the car was not an empty shell but that it contained at least some items kept for use.[3]

Finally, Riley renews the argument made at trial: that the prosecution failed to prove that he possessed an intent to steal. At the outset, the state submits that the elements of the crime charged "are unlawful breaking and entering of an automobile with the intent to steal ... " *Qualls v. State*, 947 So.2d 365, 374 (Miss.App.2007). "Intent is a state of mind seldom susceptible of direct proof absent a confession." *Harrison v. State*, 722 So.2d 681, 685 (Miss.1998), quoting *Williams v. State*, 512 So.2d 666, 669 (Miss.1987). It "may be inferred from the time and manner in which entry was made and the conduct of the accused after entry," *Id.*; otherwise, "the burglar caught without boot might escape the penalties of the law." *Cortez v. State*, 876 So.2d 1026, 1030 (Miss.App.2003), citing *Dixon v. State*, 240 So.2d 289, 290 (Miss.1970). Accord, *Brown v. State,* 799 So.2d 870, 872 (Miss. 2001).

The state contends that during initial closing argument, the assistant district attorney aptly summarized the evidence upon which the jury could find an intent to steal. That argument is set out below:

> So the question is the last thing. Roy Roger Riley intended to take, steal and carry away personal property

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[3]Again, the fact that defense counsel expressly declined to contest this point would indicate that it is not a matter of speculation but one of common sense and knowledge that working vehicles contain at least basic equipment.

> therein. And that goes back to intent. So let's say this. You have really two options. You can believe that he walked down the road past five or six or eight houses looking for the Kangaroo station through a lane or a driveway that's been described as a thousand feet long, dark, 9:30 at night and he sees not a house with the lights on but he sees a very dark-colored car. And he says, That's my friend's car. Is that's believable to you, then it's trespass. That's the bottom line.
>
> If you believe Jerry Boyte, that the dog was barking like crazy, that would have alerted somebody that was honest and sincere to then do what, go to the house and knock on the door and say, Is that my friend's car? But did he do that? He didn't even stop. He hurried around the car and got in the driver's side. Does this sound like somebody who is honest, or does it sound like somebody that wants to steal something?
>
> (T.124)

During final closing, the District Attorney argued as follows, in pertinent part:

> Now, what did Jerry Boyte testify? The first time he saw him, what side of the car was he on? He was on the passenger's side of the vehicle. The door was open and this guy was leaning in there. Was he looking for his friend? Did he do like he told you from the stand, that he was just tired and wanted to sit down? No. He's done what I've done a hundred times when I get in on the right side of a car and they've got that console in there and I want something out of it and I just can't quite reach to get that thing up to where I can get it so what do I do? Here I go. I walk around to the other side of the car where I can see what's over there. So he opens the door.
>
> Now, the testimony is that the door wasn't shut. He wasn't sitting in there. He had it open and one foot on the ground. What does that tell you? Was he waiting for his friend or was he going to see what he could get out of that side of the car and make his getaway?
>
> (T.139)

The state submits the evidence summarized in the foregoing arguments, and the reasonable inferences flowing therefrom, support a conclusion that the defendant had the intent to steal when he committed the breaking and entering, and that he was apprehended

CERTIFICATE OF SERVICE

I, Deirdre McCrory, 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 9th day of January, 2008.

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