

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MELVIN ALESICH

APPELLANT

VS.

NO. 2008-KA-0875-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF ISSUES

- I. JURY INSTRUCTION S-1 DID NOT AMEND THE BURGLARY INDICTMENT**
- II. THE JURY'S VERDICT IS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.**

STATEMENT OF FACTS

On August 10, 1996 at approximately 4:00 a.m., Eva Stephens awoke to find an intruder climbing through her bedroom window. T. 74, 78. Eva screamed and recognized the intruder as Melvin Alesich, a brief acquaintance. T. 74, 75. Alesich lunged toward Eva and landed on her and her two-year-old daughter who was also in the bed. T. 74. Alesich tried to cover Eva's mouth as she and her daughter screamed, waking Eva's two other children. T. 74. Alesich ultimately let go of Eva, punched her in the face, and fled out of the window through which he had entered. T. 75. Eva called 911 and identified Alesich as her attacker. T. 75. Eva also told the dispatcher that Alesich drove a yellow truck. T. 76.

Gulfport Police Officer Christopher Parish responded to the burglary call. T. 91. When Parish arrived at Eva's home, he noticed that the area above her left eye was red and beginning to swell. T. 129. Detective Claud Guinn also testified that Evan's face was bruised and swollen when she came in to give a statement. T. 118. Eva again identified the intruder to Parish as Alesich. T. 92. Another officer, Lynette Woodard, who had been advised by dispatch that Alesich drove a yellow truck, patrolled the area near the victim's home. T. 106. When Woodard spotted a yellow Ford truck, she called the tag number into dispatch. T. 106. The truck was registered to Alesich. T. 106. Alesich came from behind a house and approached his truck. T. 109. As Woodard handcuffed Alesich, he stated that he was only trying to get Eva's attention. T. 110.

Alesich was tried and convicted by a Harrison County Circuit Court jury for house burglary.

SUMMARY OF ARGUMENT

Jury instruction S-1 sufficiently explained the elements of burglary to the jury, as the instruction substantially tracked the language of the burglary statute. Instruction S-1 did not amend the indictment. When read with instruction S-5, the jury was informed that the crime to be committed therein was larceny.

The jury's verdict is not against the weight of the evidence. Only one set of facts was presented to the jury. The jury was not asked to resolve conflicting testimony. The jury obviously found the State's witnesses to be credible, as evidenced by the verdict.

ARGUMENT

I. JURY INSTRUCTION S-1 DID NOT AMEND THE BURGLARY INDICTMENT

Alesich claims that jury instruction S-1 effectively amended the indictment because the indictment specified that the crime intended to be committed in the victim's home was larceny, whereas the jury instruction did not specify the crime to be committed therein. Rather, the jury instruction informed the jury that if it found beyond a reasonable doubt that after Alesich broke and entered the victim's home he "intended once inside this dwelling to commit some crime therein," that it must find the defendant guilty. C.P. 35.

The burglary statute which Alesich was charged with violating defines burglary as ". . . breaking and entering the dwelling house or inner door of such dwelling house of another, whether armed with a deadly weapon or not, and whether there shall be at the time some human being in such dwelling house or not, with intent to commit some crime therein" Miss. Code Ann. 97-17-23 (Rev. 1996). Our reviewing courts have repeatedly held that a jury instruction on the elements of the offense is sufficient when it tracks the language of the applicable statute. The instruction in question substantially tracks the language of the burglary statute, and is wholly sufficient.

Alesich claims that the instruction effectively amended the indictment because his original defense was that he had no intent to steal personal property, but the instruction forced him to change his defense strategy. This argument is disingenuous, as Alesich fails to even articulate why his original defense was no longer applicable due to the given instruction. Further, it is clear from the record that Alesich's defense was that he did not even break and enter the victim's home, a defense that was still applicable and still pursued after the granting of instruction S-1. T. 68, 158, 159, 160, 162.

Further, jury instructions are to be read as a whole. *Milano v. State*, 790 So.2d 179, 184(¶

14) (Miss.2001). “When so read, if the instructions fairly announce the law of the case and create no injustice, no reversible error will be found.” *Id.* (quoting *Coleman v. State*, 697 So.2d 777, 782 (Miss. 1997)). Instruction S-5 states, “The Court instructs the Jury that if there is a breaking and entering a dwelling at night, accompanied by flight when discovered, an inference may be made that the object of the breaking and entering was theft, even though nothing was taken.” C.P. 39. When read together with S-1, there can be no argument that the jury instructions amended the indictment. Accordingly, the appellant’s first assignment of error must fail.

II. THE JURY'S VERDICT IS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

A reviewing court will not disturb a jury's verdict unless it is so contrary to the weight of the evidence that allowing the verdict to stand would sanction an unconscionable injustice. *Bush v. State*, 895 So.2d 836, 844 (¶18) (Miss. 2005). Upon review, the evidence will be examined in the light most favorable to the verdict. *Id.* Alesich claims that only the victim's testimony proved that he was in her house. Our reviewing courts have repeatedly held that the uncorroborated testimony of a single witness is sufficient to support a jury's verdict. *Cousar v. State*, 855 So.2d 993, 998 (¶16) (Miss. 2003). Eva's testimony, however, was not uncorroborated. Two witnesses testified that part of Eva's face was starting to bruise and swell, confirming her story that Alesich punched her before he fled. Additionally, Alesich was arrested near the victim's home shortly after the burglary, when his yellow truck was spotted. Most importantly, Alesich effectively admitted to the burglary when he stated that he was only trying to get Eva's attention. The jury was also shown a picture of the window through which Alesich entered. Exhibit S-2. Eva testified that her screen had been nailed down. T. 82. The appellant claims that no person could have fit through the opening depicted in the pictures. However, it is an elementary principle that matters regarding credibility of the evidence presented are to be resolved solely by the jury. *McClain v. State*, 625 So.2d 774, 778 (Miss. 1993).

There can be no serious claim that the verdict is against the weight of the evidence. The verdict is entirely consistent with the evidence. The jury was presented with only one account of the burglary, and it clearly found that the State's witnesses were credible. As such, the appellant's second assignment of error is without merit.

CONCLUSION

For the foregoing reasons, the State asks this honorable Court to affirm Alesich's conviction and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

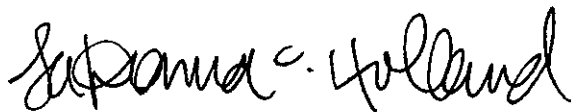
I, La Donna C. Holland, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 17th day of October, 2008.



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