

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

TERRY WALKER

APPELLANT

VS.

NO. 2009-KA-1229-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

**BY: W. GLENN WATTS
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**

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PROCEDURAL HISTORY:

On June 25, 2009, Terry Walker, "Walker," was tried for burglary of a building before a Monroe County Circuit Court jury, the Honorable Thomas Gardner presiding. R. 1. Walker was found guilty and given a seven year sentence with two years suspended. R. 167; 171.

Walker filed a motion for a new trial, which was denied. C.P. 58-60.

From that denial of relief, Walker filed notice of appeal to the Supreme Court. C.P. 63.

ISSUES ON APPEAL

I.

**WAS THERE CREDIBLE SUBSTANTIAL EVIDENCE IN
SUPPORT OF THE DENIAL OF POST CONVICTION
MOTIONS?**

STATEMENT OF THE FACTS

In April, 2009, Walker was indicted for the burglary of the Junior Food Mart in Aberdeen, Monroe County. This was for breaking, entering with intent to take cigarettes, and money on or about February 19, 2009. C.P. 8.

On June 25, 2009, Walker was tried for burglary of a building before a Monroe County Circuit Court jury, the Honorable Thomas J. Gardner presiding. R. 1. Walker was represented by Monroe County public defender, Ms. Luanne S. Thompson. R.1.

Officer Tommy Edwards was a patrol officer with the Aberdeen Police Department. R. 52. He testified that he responded to a burglary call on or about February 18-19, 2009. R. 52-53. This was for the Junior Food Mart in Aberdeen. Edwards found the front glass door "had been busted in on the bottom part." R. 54. A concrete block was inside the store on the floor. Some cigarette packs which had been pulled off the shelves were also on the floor. R. 54. .

When the store manager arrived, Edwards obtained the store "surveillance video." It was a video tape taken of the interior of the store. After reviewing the tape, Edwards identified images of the person shown inside the store as being Walker. R. 55-56. Edwards was acquainted with Walker from previously seeing him in the community in and around Aberdeen. R. 56. Edwards identified Walker in the court room as the person he recognized on the audio tape from the store. R. 56.

The store manager, Ms. Dimple Cungious, found a Marlboro cardboard box missing from the store along with cigarettes. R. 46 . She testified that state's exhibit 3, the Marlboro box, found behind Walker's house, was the same box seen on the surveillance video being removed from the store. R. 49. The box had the store's unique identification number on it, which was "264044." R. 48-49.

Officer Quinell Shumpert also with the Aberdeen Police department testified that he reviewed the Junior food Mart video tape. He also identified Walker in the court room as the person he recognized on the tape as being Walker. R. 60. He recognized him from his experiences with him in the community. Shumpert obtained a search warrant for Walker's mother's house. This was where Walker was known to be staying at the time. R. 60-61.

Officer Shumpert testified that exhibit 3, a Marlboro cardboard box, was found behind the house near a trash can. R. 61. He testified that this looked like the same box that had been taken from the Junior Food Mart. R. 62. Shumpert also testified to seeing the suspect on the "surveillance video" leaving with the stolen goods. R. 65. His "face" was visible when he was on his knees inside the store. R. 66.

Officer Shumpert, an investigator with the Aberdeen police department, identified exhibit 4 as being a t-shirt found on the bed where Walker slept. Shumpert testified that it was looked like the shirt observed on the Junior Food Mart video tape. R. 63. See manila envelop marked "Exhibits" which contains photographs introduced into evidence from the crime scene and Walker's bedroom. Photographic exhibit 2a, 2b and 2c show images of a t-shirt with a distinctive design. It was found spread out on Walker's bed. R. 62.

Photographic exhibit 2d through 2g show images of the Marlboro box which contained cigarettes seen on the video tape being taken from the store. R. 42. Photographic exhibit 2h show an image of an empty coin roll contained inside this same Marlboro box. R. 81.

The trial court denied a motion for a directed verdict. R. 87-88.

Ms. Rosie Mae Walker, the defendant's mother, testified on his behalf. R. 92-106. She testified that Walker came home around 11:00. R. 93-94. This was on the night of the burglary. He was asleep in the morning when she left around eight. She testified that two "black" police officers

talked to her. This was about the box found behind her house. She denied knowing anything about this box.

On cross examination, she admitted that she had given more than one account of when she alleged went to bed. R. 98. R. 97-106.

Mr. Walker testified in his own behalf. R. 123-135. He testified that he did not burglarize the store. However, Walker admitted that the t-shirt shown in photographic exhibits 2A, 2B and 2C was in his possession. This was the t-shirt shown on his bed at his mother's house where he was sleeping. R. 134.

In rebuttal by the prosecution, Officer John Lay testified that the officers who talked with Ms. Rosie Walker were not black but "both white." R. 138. Lay was an investigator with the Monroe County Sheriff's Office. R. 136-140. He and Officer Knight were the investigators who spoke with Walker's mother during their investigation. R. 138.

Walker was found guilty and given a seven year sentence with two years suspended. R. 167; 171.

Walker filed a motion for a new trial, which was denied. C.P. 58-60.

From that denial of relief, Walker filed notice of appeal to the Supreme Court. C.P. 63.

SUMMARY OF ARGUMENT

The record reflects there was credible, partially corroborated testimony in support of Walker's conviction. This included the identification of Walker in the court room as being the same person whose image was seen on the video tape. This was the surveillance tape taken by the security cameras inside the Junior Food Mart. R.56-58; 60. The t-shirt found on his bed looked like the one seen on the video tape from the Junior Food Mart. R. 62;65. The person wearing it was seen crawling on the floor. R. 66. There was testimony indicating that his "face" was visible. This was when he was down on his knees inside the store. The jury viewed the video tape which supplemented the testimony of the store manager, and law enforcement witnesses involved in the investigation. R. 64.

This crawler with his "face" toward the camera could be seen entering the store through the hole made in the broken out lower portion of the front glass door. The suspect on the video also had "a mild limp" Walker. R. 75. The cardboard box found near a trash can behind the house where Walker was staying was identified as "the same box" shown being removed from inside the Junior Food Mart the night of the burglary. R. 49; 84. The box had the unique store commercial code, which was "264044," imprinted on its side. R. 48-49. It could be seen being removed with goods from the store by the suspect on the security video tape. R. 49-50.

This was more than sufficient, credible, corroborated evidence in support of the trial court's denial of a motion for a new trial. **McClain v. State**, 625 So. 2d 774, 778 (Miss. 1993).

ARGUMENT

PROPOSITION I

THERE WAS CREDIBLE, SUBSTANTIAL EVIDENCE IN SUPPORT OF THE TRIAL COURT'S DENIAL OF A MOTION FOR A NEW TRIAL.

Walker argues that he is entitled to a new trial. He argues there was insufficient evidence in support of his conviction. He complains that there were no fingerprints of other kinds of scientific evidence linking him to the burglary of the Junior Food Mart. Since Walker was allegedly employed at Cooper Tire, he argues that he had no reason to burglarize the store. He believes the cigarette box and t-shirt were not directly linked to him. He argues there was no proof that he took any cigarettes or any other goods removed from the inside of the store. Appellant's brief page 5-8.

To the contrary, the record indicates there was credible, partially corroborated evidence in support of Walker's conviction and the trial court's denial of a directed verdict and a new trial. R. 88-89; C.P. 60. This evidence included corroborated identification of Walker as being the person seen on the Junior Food Mart video tape inside the store on the night of the burglary. R. 56 ; 60. The jury viewed the video tape which supplemented the testimony of Officers Edwards, Shumpert and Knight. R. 64.

Officer Edwards testified to being acquainted with Walker. He was familiar with him based upon "seeing the subject around town and around the neighborhood." R. 56. Edwards worked in security in the area when not active on the police force. He identified Walker in the court room as the person whose image he recognized on the Junior Food Mart security tape. R. 56. This video was made the night the glass door was shattered and cigarettes and other items removed.

Q. And were you able to identify anybody in watching the tape?

A. Yes, I was.

Q. And how were you able to do that?

A. Just from seeing the subject around town and around the neighborhood where I work off duty as security.

Q. So you were familiar with the individual on the tape from the neighborhood?

A. Yes.

Q. And who was that individual?

A. Terry Walker. (Emphasis by appellee).R. 55-56.

Major Shumpert also identified Walker in the courtroom as being the person whose image he saw on the Junior Food Mart video tape. R. 60. Shumpert was familiar with Walker from direct personal involvement with him in the Aberdeen neighborhood..

Q. And in that tape, were you able to recognize anybody?

A. Yes, sir.

Q. How were you able to recognize somebody in that tape?

A. Because I had dealt with that person prior.

Q. You were familiar with his characteristics?

A. Yes, sir. R. 60. (Emphasis by appellee).

On cross examination, Major Shumpert testified that you could see the suspect's "face." This was when he was down on his knees inside the store. At this point he looked up toward the security camera.

Q. So, Major Shumpert, at what point in that video did you identify my client?

A. When he looked up. When he was down on his knees on the floor, and he up, you can see his face. R. 65-66. (Emphasis by appellee).

Ms. Dimple Cungious, the Junior Food Mart store manager, testified for the prosecution. R.

45-52. Ms. Cungious testified that exhibit 3, the Marlboro box, was a box taken from her store the night of the robbery. It was identifiable by "264044," a unique store numerical code on the box. R. 48. The box also had empty coin rolls left in it. It was last seen under the cash register on the premises of the store with this coin roll.

Q. Do you recognize this box? (Exhibit 3, the Marlboro box as shown in photographic exhibits 2d, 2e, 2g, and 2h.)

A. Yes.

Q. Where did it come from?

A. From the store.

Q. And how do you know it's from the store?

A. It's a box we use to store coin wrappers. We had it beneath the counter of the register. R. 46-47. (Emphasis by appellee).

Ms. Dimple Cungious also testified to seeing this same box "being stolen" on the security camera video tape. This was on the video tape, showing the box being taken from under the counter to the outside the store by the suspect.

Q. Okay. Thank you. Did you happen to watch the videotape from this evening, or not this evening but from February 19th?

A. Yes.

Q. And did you see the box being stolen?

A. Yes.

Q. And that's the box, as you stated, that was stolen, that came from the Junior Food Mart?

A. Correct. R. 49-50. (Emphasis by appellee).

Major Shumpert testified that the Marlboro cigarette box, Exhibit 3, identified by the store

manager, was found behind Walker's house. R. 61. No one would answer when they knocked on the door, so they took the box, and went for a search warrant.

Major Shumpert testified that the box had the store label number on it. These labels could be seen on the video tape. The video tape had previously been played for the jury. R. 64.

Q. Was the box you recovered from the defendant's residence a Marlboro box?

A. Yes, sir. (Emphasis by appellee). R. 64.

Shumbert also testified that he saw the suspect leave the store "with the stolen goods."

Q. And which is--did we not see the suspect leave the store with the stolen goods?

A. Yes, sir. R. 65. (Emphasis by appellee)

This testimony cited above supplemented by the video, and other exhibits was sufficient for providing evidence in support of each of the elements required for a conviction for burglary of a building. There was evidence sufficient for showing that a breaking and entering of the Junior Food Mart had occurred. There was corroborated testimony identifying Walker as the person whose face could be seen on the store's security video camera. R. 56; 60. He was seen inside the store. He entered through the broke glass door. Walker also had "a mild limp" like that exhibited the by suspect shown in the video. R. 75.

And there was testimony indicating that the suspect on the video could be seen removing a Marlboro store box with cigarettes he had placed inside. They were moved from the store's shelves to the Marlboro box for removal. R. 46; 65.. That box with the store label code on it was found at Walker's residence. R. 64.

The appellee would submit that this was sufficient for satisfying all the elements of breaking and entering a store with intent to remove goods contained inside for commercial sale. The trial court therefore properly denied a motion for a directed verdict. R. 88-89.

While Walker, his mother and friend testified in his behalf, this merely created a conflict in the facts that the jury resolved in favor of the prosecution. R. 89-135. While Walker attempted an alibi defense, his mother admitted on cross examination that she had given more than one account of when she went to bed. R. 98-99. Ms. Walker also accused the police of "trying to frame her son." 104. She also knew nothing about any Marlboro box being at her house. R. 104.

In rebuttal of Ms. Walker, Officer Lay testified that she did not testify truthfully when she claimed to have spoken to two black police officers. He and his partner who spoke to her were white. R. 138.

In addition, Walker admitted that he left his friend's house and visited with his mother in order "to borrow some money" on the night in question. R. 124. In other words, he admitted to needing money the night of the burglary.

He also admitted to having a t-shirt on his bed which was the same type t-shirt seen on the security video tape. R. 134-135. There was testimony indicating that it could be seen on the video tape shown to the jury. It was shown being worn by the suspect crawling around inside the Junior Food Mart. R. 64-65.

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 an appeal's 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).

When the testimony, photographic and video evidence was taken as true with reasonable inferences, there was more than sufficient, credible substantial evidence in support of the trial court's denial of a new trial. C.P. 60

As shown with cites to the record, Walker was identified by two experienced police officers as the person whose image was shown on the video tape they reviewed the night of the burglary. R. 56-58; 60. They both were acquainted with Walker from their previous experiences with him in the community.

The video images of the suspect showed a t-shirt with a distinctive design on it. R. 62-63. Walker admitted he had one of these distinctive t-shirts on his bed. R. 65; 134. The box shown on the video being removed from the Junior Food Mart was found near the garbage can behind Walker's mother's house. R. 46; 61. It still had a coin roll inside the box. The store manager testified that this box was the same one kept in the store near the cash register. R. 46-49. Cigarettes from the store were seen being removed from the store by the suspect. R. 65. See photographic exhibit 2h in manila envelop.

In **Doby v. State**, 532 So. 2d 584, 591 (Miss. 1988) , the Court stated that uncorroborated testimony of a single witness to a crime was sufficient for supporting a conviction.

With this reasoning in mind, the Court holds that the testimony of Conner was legally sufficient to support Doby's conviction for the sale of cocaine. This Court recognizes the rule that persons may be found guilty on the uncorroborated testimony of a single witness. See **Ragland v. State**, 403 So. 2d 146 (Miss. 1981);..

In **Jones v. State**, 635 So. 2d 884, 887 (Miss. 1994), the Mississippi Supreme Court stated that a motion for a new trial should be denied unless doing so would result in an “unconscionable injustice.”

Our scope of review is well established regarding challenges to the weight of the evidence issue. Procedurally, such challenges contend that defendant's motion for new trial should have been granted. Miss. Unif. Crim. R. of Cir. Ct. Prac. 5.16. The decision to grant a new trial rests in the sound discretion of the trial court, and the motion should not be granted except to prevent “an unconscionable injustice.” **Wetz v. State**, 503 So. 2d 803, 812 (Miss. 1987). We must consider all the evidence, not just that supporting the case for the prosecution, in the light most consistent with the verdict.” **Jackson v. State**, 580 So. 2d 1217, 1219 (Miss. 1991), and then reverse only on the basis of abuse of discretion.

The appellee would submit that based upon the cites to the record, the exhibits, and the video which supplemented the prosecution's testimony, there was no evidence indicating any abuse of discretion in denying a motion for a new trial. The prosecution presented more than sufficient, credible evidence in support of all the elements of burglary of a building.

Testimony by Walker, his mother and friend, created a conflict in the evidence which the jury resolved in the prosecution's favor. The jury found, with ample record support, that corroborated testimony by the prosecution was more credible, when viewed in context of all the evidence, than the inconsistent testimony of Walker and his friends.

The appellee would submit there was more than sufficient, credible corroborated evidence in support of the trial court's denial of a new trial.


CONCLUSION

Walker's conviction should be affirmed for the reasons cited in this brief.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY:


W. GLENN WATTS
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

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:

Honorable Thomas J. Gardner, III
Circuit Court Judge
Post Office Drawer 1100
Tupelo, MS 38802

Honorable John R. Young
District Attorney
Post Office Box 212
Corinth, MS 38834

Benjamin A. Suber, Esquire
Attorney at Law
301 North Lamar Street, Suite 210
Jackson, MS 39201

This the 2nd day of February, 2010.



W. GLENN WATTS
SPECIAL ASSISTANT ATTORNEY GENERAL

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