

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**TERRY WALKER**

**APPELLANT**

**V.**

**NO. 2009-KA-1229-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

**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.

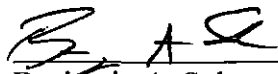
1. State of Mississippi
2. Terry Walker, Appellant
3. Honorable John R. Young, District Attorney
4. Honorable Thomas A. Gardner, III, Circuit Court Judge

This the 5<sup>th</sup> day of January, 2010.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:



Benjamin A. Suber  
COUNSEL FOR APPELLANT

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## TABLE OF AUTHORITIES

### STATE CASES

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*McQueen v. State*, 423 So.2d 800, 803 (Miss.1982)

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**TERRY WALKER a/k/a**

**APPELLANT**

**BELLY WALKER**

**V.**

**NO. 2009-KA-01229-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

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**BRIEF OF THE APPELLANT**

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**STATEMENT OF THE ISSUE**

**THE TRIAL COURT ERRED IN DENYING TERRY WALKER'S  
MOTION FOR A NEW TRIAL BECAUSE THE VERDICT WAS  
AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE..**

**STATEMENT OF THE CASE**

This appeal proceeds from the Circuit Court of Monroe County, Mississippi, and a judgment of conviction for the crime of burglary and larceny of a building. Walker was sentenced by the Court to serve a term of seven (7) years in the custody of the Department of Corrections with two (2) years of said sentence suspended. Walker shall be placed under Post-Release Supervision upon the release from the term of incarceration. Walker

was found guilty following a jury trial on June 25, 2009, Honorable Thomas J. Gardner, III, presiding. Terry Walker is presently incarcerated with the Mississippi Department of Corrections.

### **FACTS**

On or around the early morning hours of February 19, 2009, Officer Tommy Edwards (Edwards) responded to a burglary call at the Junior Food Mart in Aberdeen, Mississippi. Tr. 53. When Edwards got to the Junior Food Mart, he noticed the front glass door had been busted out on the bottom of the door. Tr. 54. Edwards entered the store and noticed a concrete block laying on the floor. *Id.* Edwards checked the entire building and no one else was inside the building. *Id.* Edwards went behind the counter and noticed that cigarette packs were laying on the floor where they allegedly fell when they were pulled off the counter. *Id.* Edwards then found a number and called the store manager. *Id.*

Edwards waited on the scene until someone that worked at the store showed up at the store. Tr. 54-55. Once the store clerk arrived, Edwards asked the clerk if the store had a video camera. Tr. 55. At this point the clerk and Edwards reviewed the video tape. *Id.* In reviewing the tape, Edwards was able to identify Terry Walker (Walker) as the individual on the tape. Tr. 55-56. Edwards testified that he recognized the person on the video from seeing him around town and around the neighborhood. Tr. 56. Edwards did testify on cross-examination that nothing was found at the scene of the crime linking Walker to the crime. Tr. 57.

Dimple Cungious (Dimple), the store manager, testified that a box was taken from the store that was used to store coin wrappers. Tr. 47. Dimple continued to state that the box that was taken from the store contained a label on the box identifying what store the box was going to when it was delivered. Tr. 48. Dimple claimed that no other store would have a label with that same number on the box that was delivered, and that the number the identification number for the Junior Food Mart in Aberdeen. *Id.*

Quinnell Shumpert (Shumpert), a investigator with the Aberdeen Police Department, began to investigate the alleged burglary at the Junior Food Mart Store. Tr. 59. Shumpert during his investigation viewed the surveillance tape. Tr. 60. After viewing the surveillance tape, Shumpert recognized the individual on the tape and identified Walker. *Id.*

After viewing the surveillance tape and identifying Walker, Shumpert obtained a search warrant. *Id.* The search warrant issued was for Walker's mother's house, where Walker had been residing. *Id.* Shumpert found a box matching the description of the box taken from the Junior Food Mart Store behind the Walker house sitting by a trash can. Tr. 61.

Shumpert also recovered a shirt from inside the house that appeared to be a shirt similar to the one that the person was wearing that alleged broke into the Junior Food Mart. Tr. 63. However, Shumpert stated that he was told that the shirts can be bought at the BP in Aberdeen. Tr. 68.

Sampson Everett (Sampson) testified on behalf of Walker that Walker was playing cards at his house until 10:30 pm or 11:00 pm on February 18, 2009. Tr. 90. Sampson stated that Walker left his house with Cedric (Ced) Collins. Tr. 90-91.

Rosie Mae Walker (Rosie) testified for her son Walker. Tr. 92. Rosie stated that on February 18, 2009, at or around 11:00 pm, Walker came home with a friend named Ced, and Walker took a bath. Tr. 93. After the bath Walker went to bed. Tr. 94. Rosie stated that she stayed up for a while and Walker was asleep. *Id.* She continued to state that when she woke up the next morning at 6:00 am, Walker was still in bed asleep. Tr. 94-95.

Tyrone Walker (Tyrone) also testified for his brother Walker. Tr. 108. Tyrone lives behind Rosie and Walker. Tyrone stated that he did not see a box behind the house of Rosie. Tr. 115, 121.

Walker testified on his own behalf. Tr. 123. Walker told the court that on February 18, 2009, that he was over at Sampson's house, playing cards. Tr. 124. Walker was over at Sampson's house from around 3:00 pm to 11:00 pm, except a few minutes when Walker went to see his mother to get some money. *Id.* Walker stated that he left Sampson's house around 11:00 pm with Ced. *Id.* Ced dropped him off at his mother's house. *Id.*

Walker continued to tell the court that after he got home, he took a bath and then relaxed and fell asleep. Tr. 125. Walker stated that his mom, Rosie, was up moving furniture. *Id.*

Walker who was gainfully employed with Cooper Tire, declared that he had no reason to break into the Junior Food Mart in Aberdeen. Tr.126. He told the court that he did not break into the store. Tr.126.

### **SUMMARY OF THE ARGUMENT**

The verdict was also against the overwhelming weight of the evidence. Walker is entitled to a reversal of his case and a remand for a new trial. The evidence presented did not warrant a verdict of guilty. No scientific or physical evidence was presented at trial linking Walker to the alleged burglary on the night in question. The only evidence identifying Walker came from Officers Edwards and Shumpert. The verdict was against the overwhelming weight of the evidence and this was reversible error. Terry Walker is entitled to a new trial.

### **ARGUMENT**

#### **ISSUE**

**THE TRIAL COURT ERRED IN DENYING TERRY WALKER'S MOTION FOR A NEW TRIAL BECAUSE THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.**

“When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, we will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice.” *Bush v. State*, 895 So.2d 836, 844 (Miss. 2005)(citing *Herring v. State*, 691 So.2d 948, 957 (Miss.1997)). In reviewing such claims, the Court



“sits as a thirteenth juror.” *Bush v. State*, 895 So.2d 836, 844 (Miss. 2005)(citing *Amiker v. Drugs For Less, Inc.*, 796 So.2d 942, 947 (Miss.2000)(footnote omitted)).

“[T]he evidence should be weighed in the light most favorable to the verdict.” *Herring*, 691 So.2d at 957. “A reversal on the grounds that the verdict was against the overwhelming weight of the evidence, ‘unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict.’” *Bush v. State*, 895 So.2d 836, 844 (Miss. 2005)(quoting *McQueen v. State*, 423 So.2d 800, 803 (Miss.1982)). It means that “as the ‘thirteenth juror,’ the court simply disagrees with the jury’s resolution of the conflicting testimony,” and “the proper remedy is to grant a new trial.” *Bush v. State*, 895 So.2d 836, 844 (Miss. 2005)(quoting *McQueen v. State*, 423 So.2d 800, 803 (Miss.1982)(footnote omitted)).

In the present case, the Appellant is at a minimum entitled to a new trial as the verdict was clearly against the overwhelming weight of the evidence. In the case *sub judice*, the evidence did not link Walker as the person that threw the concrete brick through the window at the Junior Food Mart and took cigarettes from behind the counter.

The testimony of Shumpert and Edwards identified Walker as the individual that broke into the store. However, Shumpert testified that he was able to identify Walker as the individual even though the person was crawling on the ground. Tr. 74. Edwards stated that there was no evidence linking Walker to the crime, other than the video tape. Tr. 56. No evidence was presented to the court that Walker was in fact the individual that appeared on the video tape in the store.

In addition, Edwards did not find anything else at the scene that would connect Walker to the crime. Tr. 57. He did not see any footprints, nor did he take any finger prints. *Id.* Shumpert stated that he did not take any finger prints off of the box that he supposedly found behind the Walker house. Tr. 66.

Officer Curtis Knight (Knight), who is an investigator with the Monroe County Sheriff's Department, assisted in executing the search warrant on the Walker house. Tr. 78. Knight stated that he and Shumpert located a box behind the Walker house. Tr. 80. Instead of photographing the box at its current location, Shumpert picked up the box and placed it in his truck. Tr. 80. Knight continued to state that he eventually went back and photographed the box the was found behind the house. Tr 84. He photographed the box after it was placed inside of Shumpert's truck. *Id.*

No finger prints were taken on the box. Knight indicated on cross-examination that he would have taken finger prints on the box. Tr. 86. He also said that he did not know why the other officers did not take finger prints.

Furthermore, no evidence from the t-shirt was linked to the Junior Food Mart store. The t-shirt was found inside the Walker house. If the t-shirt was widely available in Aberdeen, then some connection should be made connecting the shirt to Walker and the Junior Food Mart. No connection was made.

Moreover, Rosie, Walker's mother stated that Walker came home around 11:00 pm on the night of February 18, 2009. She stated that when she went to bed he was asleep and when she woke up the next morning that he was still in bed asleep. Tr. 93-95.

Sampson verified Walker's store that Walker left his house around 11:00 pm to go home.  
Tr. 90.

It would be an injustice for this conviction to stand in that no reasonable jury could convict Walker based on the testimony of the witnesses, the identification, and the lack of any other type of physical evidence implicating Walker.

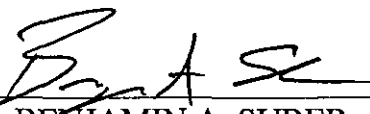

The verdict was against the overwhelming weight of the evidence. Terry Walker therefore respectfully asserts that the foregoing facts demonstrate that the verdict was against the overwhelming weight of the evidence, and the Court should reverse and remand for a new trial.

#### CONCLUSION

Terry Walker entitled to have his conviction of burglary reversed and remanded for a new trial.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS  
For Terry Walker, Appellant

BY:   
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## CERTIFICATE OF SERVICE

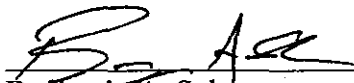
I, Benjamin A. Suber, Counsel for Terry Walker, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

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Circuit Court Judge  
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Honorable John R. Young  
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This the 5<sup>th</sup> day of January, 2010.

  
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