IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

HUDSON EDGET — APPELLANT

VS. — NO. 2009-KA-1527-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

The focal point in this criminal appeal is upon the sufficiency and weight of the evidence used to convict Hudson Edget, a non-testifying defendant, of attempted burglary of a dwelling house with the intent to rape its female occupant.

HUDSON EDGET, a twenty-nine (29) year old never married African-American male and resident of Grenada (C.P. at 27, 106), prosecutes a criminal appeal from the Circuit Court of Grenada County, Mississippi, C. E. Morgan III, Circuit Judge, presiding.

Edget, following an indictment returned on July 3, 2008, was convicted of attempted burglary with the felonious intent to rape as well as recidivism charged under Miss.Code Ann. §99-19-81. (R. 221, 228; C.P. at 103, 104-05)

The indictment, omitting its formal parts, alleged that HUDSON EDGET

> " . . . on or about April 5, 2008[,] . . . did willfully, unlawfully, and feloniously attempt to break and enter the dwelling house of Linda Townes, located at 116 Lynn Street, Grenada, Mississippi, by trying

> to force his way into the house against her will and trying to remove a screen from a window to effect entry, with the wilful, unlawful, and felonious intent to rape the said Linda Townes, but was prevented from committing said burglary by the arrival of a police officer with the Grenada Police Department . . ." (C.P. at 2)

The indictment also charged Edget as a habitual offender by virtue of his five (5) prior felony convictions in 1994, 1996, 2000, and 2001for various criminal offenses. (C.P. at 2-3)

Following a competency hearing conducted on July 23, 2009, the circuit judge found as a fact and ruled as a matter of law that Edget was competent to stand trial. (R. 7-53, 52-53)

Trial on the merits was conducted on August 19, 2009, at the conclusion of which the jury returned the following verdict: "We, the jury, find the Defendant, Hudson Edget, guilty of Attempted Burglary of a Dwelling House." (R. 221)

At the conclusion of a sentence-enhancement hearing before the judge alone (R. 222-29, Judge Morgan adjudicated Edget a habitual offender under Miss.Code Ann. §99-19-81. (R. 228-29) Edget was thereafter sentenced to serve twenty-five (25) years in the custody of the MDOC " . . . and that said sentence shall not be reduced or suspended nor shall he be eligible for parole or probation." (R. 229)

Two (2) issues are raised and argued on appeal to this Court, *viz.*, (1) "[t]he evidence was insufficient to support the verdict, and the trial court erred in denying Edget's motions for directed verdict and JNOV" and (2) "[t]he verdict was against the overwhelming weight of the evidence." (Brief of the Appellant at 1, 5, and 8)

A third issue articulated but not argued is not properly before the court. **Wheeler v. State,** 826 So.2d 731, 741 (¶39) (Miss. 2002).

STATEMENT OF FACTS

Linda Townes lives in a dwelling house located at 116 Lynn Street in Grenada. (R. 119)

Hudson Edget, a 29-year-old prior convicted felon and unmarried male with a "severe personality disorder" (C.P. at 27-29, 30-33), lives with his mother next door to Townes. (R. 136) Their houses are only ten (10) feet apart. (R. 124)

Ms Townes has known Edget for at least twelve (12) years. (R. 136)

> Q. [BY PROSECUTOR:] How well did you know him? Did you see him fairly regularly?
>
> A. I seen him but never really had any words with him. (R. 136)

On April 5, 2008, "at about 9:30" p.m., Townes was home alone preparing herself for bed when the doorbell rang. (R. 120) Townes went to the side door located underneath her carport where she observed Hudson Edget standing at her door. She asked him what he wanted, and Edget replied: "I want you." (R. 120)

Ms Townes's version of what next transpired is found in the following colloquy:

> Q. [BY PROSECUTOR DENLEY:] All right. So you had opened the wooden door there. Had you opened the glass door that is in front of it?
>
> A. No, not at first until when I opened the storm door - - I mean the wooden door, then when I got to the storm door and I asked him what he wanted, and then I couldn't hear what he was saying. So I kind of unlocked the door, and then I asked him out the door what he wanted.
>
> Q. All right, and his response was?
>
> A. And that's when he was, response was, uh, that's when he started approaching me telling me what he wanted. When he started telling me he wanted me, he been wanting me, and he wanted to, he said, "fuck you." He said, "I want to fuck you." And that's when he started, you know, I'm starting - - then he grabbed the door, and I'm

trying to get the door back. I am struggling with him trying to get the door back, and we struggled with the door, and he is trying to grab at me and get his knee through the door, that's when I was able to get, you know, to push him back. And I got the door closed, and I immediately locked the door.

Q. Okay.

A. Then - -

Q. I'm sorry.

A. And then, you know, that's when I told him, you know, I was going to tell his mom. And then I told him to get out of my yard; leave me alone. And I closed the door. And my phone, I had a cordless phone. It was in the back, and so I was going to the back to get the phone so I can dial 911 because I was looking out my window trying to see, you know, was he gone or where was he going. So that's when I dialed 911. (R. 126-27)

Townes testified that Edget left but came back a second time.

Q. [BY PROSECUTOR DENLEY:] Ms. Townes, when he came , when Hudson came back the second time, what was he doing?

A. He kept ringing the doorbell trying to get in and asking me, telling me, let him in; let him in.

Q. When you say he was trying to get in, what was he doing?

A. He was, you know, like I can hear the door going like this, (Demonstrating) and the doorbell just ringing, ringing, ringing.

Q. You are indicating your hands kind of shaking. You mean – what exactly do you mean by that?

A. You know like the door?

Q. Uh-hum.

A. You can hear the door, you know, shaking and the doorbell just ringing, ringing.

Q. Okay. While you were there and you heard him shaking on the door and ringing the doorbell over and over again and making

these statements, did you see him leave at any point?

A. Maybe after 3 or 4 minutes, he left again. And he left, and he went back the same way and came back again while I was on the phone still with the dispatcher.

Q. So how many times does that make that he came back?

A. Three.

Q. Three, okay.

A. So this is the third time. The third time that he came back, he didn't come to the door. He went to - - he came - - can you, and went this way on the side going to the window. And I couldn't tell which window he was at, so I walked down the hallway telling the dispatcher that he was at my window, and can you hurry up and please send a unit because by now, I am hysterical because I don't know what he went over to his house to get. So he had something in his hand. I couldn't tell what it was, but I could hear a sound at my window, and it was this window at the back back here. (R. 129-30)

State's exhibit 5, a photograph of the window where Edget was observed the third time he returned to Ms Townes's house, reflects the screen had been bent. (R. 134)

Q. I show you State's Exhibit 5 and ask you if you recognize that photograph?

A. I do.

Q. Okay, what is that a photograph of ma'am?

A. That's the same window that he was trying to approach.

Q. And what is significant in that photograph?

A. Here. (Witness marks on monitor on the photograph.) Where the screen had been bent.

Q. Okay. Was that damage to your screen there on your window, was that damage there prior to Mr. Hudson Edget's arrival on April 5th, 2008.

A. No. No.

Q. Was it there after Mr. Hudson Edget was at your window doing something on April the 5th, 2008?

A. Yes, it was. (R. 134)

During cross-examination the following colloquy took place:

Q. [BY DEFENSE COUNSEL JOHNSON:] And you opened the storm door?

A. I did.

Q. And Mr. Hudson tried to, told you he wanted, asked - - he asked you for sex?

A. Correct.

Q. And you told him to get away from here, about his mother being upset and you were upset. And you said then he attempted to walk, come in the door. But the door was open, wasn't it.

A. No, He tried to grab the storm door and pull it open. It was cracked because I am talking- -

Q. - - you had it open?

A. I had it open, and he tried to pull it open so he can come in.

During the struggle over control of the door, Edget grabbed Ms Townes's arm without her permission. (R. 143, 156)

Q. You will agree with me that if he was trying to break in your house, he could have pushed you on in the house and kicked the door in and walked on in?

A. He tried to. He couldn't. (R 143)

Three (3) witnesses testified on behalf of the State during its case-in-chief, including the victim, **Linda Townes.**

Charles Ellis, a Grenada police officer, was the State's second witness. Ellis testified he was the first officer to respond to the 911 call. Upon his arrival he observed Edget walking away from the house toward the street. (R. 168) Ellis detained Edget and took him to the station house. (R. 172)

John Hubbard, testified that a few days after April 5th he was present at Ms Townes house when Hudson Edget came to her door. (R. 176-77) Edget said he came over to apologize about something. (R. 178)

At the close of the State's case-in-chief, the defendant moved the court for a directed verdict of acquittal on the grounds " . . . there is no law against asking for sex." (R. 181) Edget argued his crime was " . . . willful trespass at most and perhaps an assault." (R. 182) This motion was overruled with the following observations by Judge Morgan.

> BY THE COURT: Okay, the testimony from Ms. Townes in this case is that one, he did come uninvited to her house, and he did -- he might have committed at least a battery on her at that point in time. He did leave. You might have a different question if that was the end of it at that point. But then he came back, and her testimony is that he tried to break into her house. The physical evidence, the pictures show that the screen was damaged to the point where it looked like or could be interpreted to have been pried open. That would be an attempt at a burglary if, in fact, the jury believes that he did do that. And because of the language he used, they can infer that the crime he wanted to commit inside was a sexual battery of some kind in there. So the motion for a directed verdict is overruled. (R. 182)

After being advised of his right to testify or not, the defendant elected to stand mute. (R. 187) The defense then rested without producing any witnesses. (R. 193)

Following the court's reading of the jury instructions (R. 193-200) and after the closing arguments of counsel (R. 200-219), the jury retired to deliberate at 4:53 p.m. (R. 219)

Nearly an hour and a half later, at 6:10 p.m., it returned with the following verdict: "We, the

jury, find the Defendant, Hudson Edget, guilty of Attempted Burglary of a Dwelling House." (R. 221)

A poll of the individual jurors reflected the verdict was unanimous. (R. 221-22)

At the close of the sentence-enhancement proceeding conducted before judge alone, Judge Morgan adjudicated Edget a habitual offender and thereafter sentenced him to serve twenty-five (25) years in the custody of the MDOC. (R. 222-29)

On August 31, 2009, Edget filed his motion for judgment notwithstanding the verdict or, in the alternative, motion for new trial alleging, *inter alia*, the verdict of the jury was against the overwhelming weight of the evidence. (C.P. at 108-09)

The motion was overruled in an order signed and entered on September 2, 2009. (C.P. at 110)

Edget filed his notice of appeal on September 11, 2009. (C.P. at 111-12)

Mr. Edget received effective assistance from his trial attorney, Leon Johnson, a practicing attorney in Grenada and Grenada County.

Edget has, likewise, received effective assistance from his appellate attorney, Hunter Aikens, a practicing attorney with the Mississippi Office of Indigent Appeals.

SUMMARY OF THE ARGUMENT

In this appeal involving an attempted burglary for the purpose of engaging in unwanted sex, Edget assails both the sufficiency and the weight of the evidence.

He claims the evidence was insufficient to prove beyond a reasonable doubt that Edget attempted to burglarize the dwelling house of Ms Townes *with the felonious intent to rape her.* Edget argued at trial, and argues on appeal as well, that the evidence established only that Edget wanted to have sex with Townes.

The testimony of Ms Townes reflects quite clearly she did not give her consent for Edget to enter her house or have sexual intercourse with her after entry. Edget used force in attempting to enter by grabbing both the storm door and the arm of Ms Townes. Edget left but returned to Townes' house on two subsequent occasions.

On the second occasion he rang the doorbell repeatedly and shook the door violently.

On the third occasion he went to a window and fiddled with a window screen. There is more than a fair and reasonable inference that on the third occasion he was in the process of removing the window screen when he was interrupted by the arrival of a police officer.

If Edget, after successfully breaking and entering the dwelling house of Ms Townes, had succeeded in having sexual intercourse with Townes without her consent and against her will he would have been guilty of forcible rape.

Judge Waller's opinion in **Bush v. State,** 895 So.2d 836, 843 (¶¶16, 17) (Miss. 2005), makes it perfectly clear that in resolving sufficiency of the evidence issues the evidence must be viewed and considered in the light most favorable to the State's theory of the case.

Based upon the testimony of Linda Townes, the victim, " . . . any rational juror could have found beyond a reasonable doubt that all of the elements had been met by the State in proving [the crime charged.]" **Bush v. State,** *supra,* 895 So.2d at 844.

Moreover, the jury's verdict was not against the overwhelming weight of the credible evidence which does not preponderate in favor of Edget's claim he did nothing more than ask for sex.

In reviewing a claim the verdict of the jury is contrary to the weight of the evidence, this Court, sitting as a thirteenth juror, is duty bound to weigh the evidence in the light most favorable to the guilty verdict. **Bush v. State,** *supra,* 895 So.2d. at 844-45. This includes the descriptive

testimony of Townes who positively identified Edget as her persistent tormentor.

"[T]he scope of review on this issue is limited in that all evidence must be construed in the light most favorable to the verdict." **Herring v. State**, *supra*, 691 So.2d at 957 citing **Mitchell v. State**, 572 So.2d 865, 867 (Miss. 1990).

This Court will not set aside a guilty verdict unless the verdict is manifestly against the weight of credible evidence [**Maiben v. State**, 405 So.2d 87, 88 (Miss. 1981)] and unless this Court is convinced that to allow the verdict to stand, would be to sanction an unconscionable injustice. **Groseclose v. State**, 440 So.2d 297, 300 (Miss. 1983)

The case at bar certainly does not exist in this posture. This is not a case where the evidence preponderates heavily, if at all, against the verdict or where allowing the verdict to stand would sanction or amount to an unconscionable injustice.

ARGUMENT

ANY RATIONAL TRIER OF FACT COULD HAVE FOUND BEYOND A REASONABLE DOUBT THAT EDGET ATTEMPTED A BURGLARY OF A DWELLING HOUSE WITH THE INTENT TO RAPE ITS OCCUPANT.

EDGET HAS FAILED TO DEMONSTRATE THE TRIAL JUDGE ABUSED HIS BROAD JUDICIAL DISCRETION IN OVERRULING EDGET'S MOTION FOR A NEW TRIAL GROUNDED, IN PART, ON A CLAIM THE JURY VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

NO UNCONSCIONABLE INJUSTICE EXISTS HERE.

We note at the outset that Edget has stated an issue that is not argued, *viz.*, the trial court erred in failing to instruct the jury on the elements of the underlying offense of rape. (Brief of the Appellant at ii, 1) We eschew any response to this issue because issues not argued and supported with authority are not properly before the court and are deemed waived. **Wheeler v. State,** *supra*,

826 So.2d 731, 741 (¶39) (Miss. 2002).

Edget, in a nutshell, contends there was insufficient evidence from which a reasonable, fair-minded juror could find, either directly or by reasonable inference, that Edget intended to rape Ms. Townes.

He also opines for the same reason he is entitled to a new trial because the first trial resulted in an unconscionable injustice.

We disagree.

Sufficiency of the Evidence.

"In reviewing the sufficiency of the evidence, as opposed to its weight, " . . . all evidence supporting the guilty verdict is accepted as true, and the State must be given the benefit of all reasonable inferences that can be reasonably drawn from the evidence." **Jiles v. State,** 962 So.2d 604, 605 (Ct.App.Miss. 2006).

"[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." **Bush v. State,** 895 So.2d 836, 843 (¶16) (Miss. 2005), quoting from **Jackson v. Virginia,** 443 U.S. 307, 315, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

"Should the facts and inferences considered in a challenge to the sufficiency of the evidence '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 proper remedy is for the appellate court to reverse and render." **Bush v. State,** *supra*, 895 So.2d at 843 citing, *inter alia*, **Edwards v. State,** 469 So.2d 68, 70 (Miss. 1985).

The indictment alleged Edget intended to commit rape once inside the dwelling house of Ms Townes. Forcible rape consists of three elements: (a) carnal knowledge, i.e., penetration of the

victim's vagina by the defendant's penis; (b) without consent and by force, and (c) of a person fourteen years of age and upward. **Brown v. State,** 751 So.2d 1155, 1157 (Ct.App.Miss. 1999).

Clearly the evidence in this case demonstrates force, lack of consent, and an intent to have sexual intercourse.

Edget attempted to force his way into the house by grabbing both the door and Ms Townes's arm and struggling with her at the door in an attempt to enter. (R. 121, 127) A rational and fair-minded juror could have found that Edget, upon twice failing in this endeavor, went to the side of the house where, prior to the arrival of a Grenada police officer, he used force to bend the window screen.

Clearly, Ms Townes was not acting in a manner indicative of her consent to permit Edget to enter the house and have intercourse with her. Rather, the uncontradicted evidence reflects that Townes resisted Edget's advances by pushing him away from the door. After shutting and locking the glass storm door, she told Edget to leave her alone. (R. 126-27)

Finally, Edget's use of the "f" word to indicate to Townes what he wanted to do to her, demonstrates beyond a reasonable doubt he wanted to have sexual intercourse with her once inside her dwelling house. There can be no doubt the "f" word, given the parlance of the day, denotes sexual intercourse. Sexual intercourse, i.e., carnal knowledge, is penetration of the woman's vagina by the penis of a man. **Brown v. State,** *supra*, 751 So.2d 1155, 1157 (Ct.App.Miss. 1999). Although this can also be sexual battery in that penetration is involved, it is rape as well. *See* Miss.Code Ann. §97-3-97(a).

Accordingly, Judge Morgan's comment about a sexual battery (R. 182) did not allude to or identify an improper standard. Having been made outside the hearing and presence of the jury the reference thereto was both correct and purely innocuous.

In the **Jiles** *supra*, case, a prosecution for attempted rape, the Court of Appeals rejected a similar sufficiency of the evidence argument.

In **Jiles** the defendant, who was standing in front of a bathroom shower stall when the victim stepped out of the stall, 1) took the victim's clothing that was draped over the top of the shower curtain; 2) demanded that the victim give him a towel the victim had wrapped around herself; 3) snatched the towel off the victim, threw her on a bench and placed the towel over her face; 4) held her down as he started to unfasten his pants, and 5) voluntarily ceased his assault by running out of the bathroom when the victim continued to scream and resist.

Jiles argued the evidence was insufficient to prove an overt act associated with attempted rape because all he said during the struggle was "give me that towel," he never exposed his genitals, and he voluntarily ceased the assault.

If the evidence in Jiles was sufficient to associate the defendant's actions with rape, it is certainly sufficient in the case under scrutiny where forced entry of a dwelling house is attempted and the defendant directly expresses his desires and, correspondingly, his intent, with words out of his own mouth.

The cases cited by appellant in his brief at pages 7-8, particularly **Fondren v. State** [citation omitted], would seem to support the State's theory of the case since the Supreme Court found the evidence sufficient to support a finding of intent to ravish in each one of those cases.

Where, as here, the issue presented is the denial of a directed verdict, peremptory instruction, or JNOV, evidence favorable to the State must be accepted as true, and any evidence favorable to the defendant must be disregarded. **Anderson v. State,** 904 So.2d 973 (Miss. 2004), reh denied; **Lynch v. State,** 877 So.2d 1254 (Miss. 2004), reh denied, cert denied 125 S.Ct. 1299, 543 U.S. 1155, 161 L.Ed.2d 122 (2004); **Hubbard v. State,** 819 So.2d 1192 (Miss. 2001), reh denied; **Yates**

v. State, 685 So.2d 715, 718 (Miss. 1996).

The jury was properly instructed with respect to the issue of intent. *See* jury instruction 2 (S-1A) which required the jury to find, *inter alia*, that "[t]he defendant intended once inside to rape the said Linda Townes, which is a crime under the law of the State of Mississippi." (C.P. at 89)

Needless to say, the jury, as was its prerogative, resolved this issue in favor of the State.

By denying Edget's motion for a directed verdict (R. 181-82), his request for peremptory instruction (C.P. at 96), and Edget's motion for judgment notwithstanding the verdict (C.P. at 108), Judge Morgan correctly held the question of Edget's intent was a jury issue.

Edget cites to the right cases but, in our opinion, reaches the wrong conclusion.

In **Newburn v. State**, 205 So.2d 260, 265 (Miss. 1967), this Court stated:

> "Intent is a state of mind existing at the time a person commits an offense. If intent required definite and substantive proof, it would be almost impossible to convict, absent facts disclosing a culmination of the intent. The mind of an alleged offender, however, may be read from his acts, conduct, and inferences fairly deducible from all the circumstances."

In **Shanklin v. State**, 290 So.2d 625, 627 (Miss. 1974), this Court further opined:

> Intent to do an act or commit a crime is also a question of fact to be gleaned by the jury from the facts shown in each case. The intent to commit a crime or to do an act by a free agent can be determined only by the act itself, surrounding circumstances, and expressions made by the actor with reference to his intent. [citations omitted]

See also **Chambliss v. State,** 919 So.2d 30, 35 (Miss. 2005) citing **Shanklin v. State,** *supra;* **Knox v. State,** 805 So.2d 527 (Miss. 2002) [Intent to do an act or commit a crime is a question of fact to be gleaned by the jury from the facts shown in each case.]

Here Edget's intent could be read from his acts, conduct, and inferences fairly deducible from the surrounding circumstances.

It was a jury issue by virtue of jury instruction number 2 (S-1A) and number 6 (S-3) which instructed the jury in plain and ordinary English on the lesser included offense of trespass. (C.P. at 93)

Judge Waller's opinion in **Bush v. State,** *supra*, 895 So.2d 836, 843 (¶¶16,17) (Miss. 2005), makes it perfectly clear that in resolving sufficiency of the evidence issues the evidence must be viewed and considered in the light most favorable to the State's theory of the case. We quote:

> In *Carr v. State,* 208 So.2d 886, 889 (Miss. 1968), we stated that in considering whether the evidence is sufficient to sustain a conviction in the face of a motion for directed verdict or for judgment notwithstanding the verdict, the critical inquiry is whether the evidence shows "beyond a reasonable doubt that accused committed the act charged, and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction." **However, this inquiry does not require a court to**
>
> > **'Ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.' Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.**
>
> *Jackson v. Virginia,* 443 U.S. 307, 315, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (citations omitted) (emphasis in original.) Should the facts and inferences considered in a challenge to the sufficiency of the evidence "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 proper remedy is for the appellate court to reverse and render. *Edwards v. State,* 469 So.2d 68, 70 (Miss. 1985) (citing *May v. State,* 460 So.2d 778, 781 (Miss. 1984)); *see also Dycus v. State,* 875 So.2d 140, 164 (Miss. 2004). However, if a review of the evidence reveals that it is of such quality and weight that, "having in mind the beyond a reasonable doubt burden of proof standard, reasonable fairminded men in the exercise of impartial judgment might reach different conclusions on every element of the offense," the evidence will be deemed to have been sufficient. *Edwards,* 469 So.2d at 70; *see also*

Gibby v. State, 744 So.2d 244, 245 (Miss. 1999).

* * * * * *

> In light of these facts, we find that any rational juror could have found beyond a reasonable doubt that all of the elements had been met by the State in proving capital murder with the underlying felony being armed robbery. This issue is without merit. **Bush v. State,** 895 at 843-44 (¶¶16, 17) [emphasis in bold print ours].

The **Bush** case is particularly notable for re-articulating the standards of review for both the sufficiency of the evidence and the weight of the evidence. In note 3 of the **Bush** opinion, the Court pointed out that the tests articulated in **Bush** differ " . . . from the tests articulated in some of our previous opinions." **Bush v. State,** 895 So.2d at 844, note 3.

The Court in **Bush** observed that in **Turner v. State,** 726 So.2d 117, 125 (Miss. 1998), it had stated an incorrect standard of review for weight of the evidence complaints.

The test for legal sufficiency, on the other hand, was correctly stated in **Turner,** 726 So.2d at 124-25 as follows:

> Turner's contention is that the State failed to prove beyond a reasonable doubt that he was the driver of the pick-up when the accident occurred. The standard of review for Turner's legal sufficiency argument, wherein he argues the trial court erred in denying his motions for directed verdict and his motion for j.n.o.v., is:
>
> > Where a defendant has requested a peremptory instruction in a criminal case or after conviction moved for a judgment of acquittal notwithstanding the verdict, the trial judge must consider all of the evidence - not just the evidence which supports the State's case . . . . The evidence which supports the case of the State must be taken as true . . . The State must be given the benefit of all favorable inferences that may reasonabl[y] be drawn from the evidence . . . If the facts and inferences so considered point in favor of the defendant with sufficient force that

> reasonable men could not have found beyond a reasonable doubt that the defendant was guilty, granting the peremptory instruction or judgment n.o.v. is required. On the other hand, if there is substantial evidence opposed to the request or motion - that is, evidence of such quality and weight that, having in mind the beyond a reasonable doubt burden of proof standard, reasonable fair minded men in the exercise of impartial judgment might reach different conclusions the request or motion should be denied.
>
> *Weeks v. State,* 493 So.2d 1280, 1282 (Miss. 1986)(citing *Gavin v. State,* 473 So.2d 952, 956 (Miss. 1985)) * * * * * *

A finding the evidence is insufficient results in a discharge of the defendant. **May v. State,** 460 So.2d 778, 781 (Miss. 1984).

Can it be said in the case *sub judice* that no rational juror could have found beyond a reasonable doubt that all of the elements of attempted burglary with an intent to rape had been met by the State?

Absolutely not.

To the contrary, based upon the testimony of Linda Townes, the victim, " . . . any rational juror could have found beyond a reasonable doubt that all of the elements had been met by the State in proving [the crime charged.]" **Bush v. State,** 895 So.2d at 844.

Edget claims the evidence shows he could be guilty of no crime greater than trespass. The problem with this argument is that when considering the sufficiency of the evidence on motion for judgment notwithstanding the verdict, evidence favorable to the State must be accepted as true and any evidence favorable to the defendant, i.e., potential trespass, must be disregarded.

In judging the legal sufficiency, as opposed to the weight, of the evidence on a motion for a directed verdict or request for peremptory instruction or motion for judgment notwithstanding the

verdict, the trial judge is required to accept as true all of the evidence that is favorable to the State, including all reasonable inferences that may be drawn therefrom, and to *disregard* evidence favorable to the defendant. **Anderson v. State,** 904 So.2d 973 (Miss. 2004), reh denied; **Lynch v. State,** 877 So.2d 1254 (Miss. 2004), reh denied, cert denied 125 S.Ct. 1299, 543 U.S. 1155, 161 L.Ed.2d 122 (2004); **Hubbard v. State,** 819 So.2d 1192 (Miss. 2001), reh denied; **Yates v. State,** 685 So.2d 715, 718 (Miss. 1996); **Ellis v. State,** 667 So.2d 599, 612 (Miss. 1995); **Clemons v. State,** 460 So.2d 835 (Miss. 1984); **Forbes v. State,** 437 So.2d 59 (Miss. 1983); **Bullock v. State,** 391 So.2d 601 (Miss. 1980). *See also* **Jones v. State,** 904 So.2d 149, 153-54 (Miss. 2005) ["The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."]

Counsel's spin on the crime, *viz.*, Edget simply asked for sex and was guilty of no crime greater than a trespass, is an exaggeration - a hyperbole, if you please - of the strongest kind. He looks at the testimony in a light most favorable to Edget.

Weight of the Evidence.

Edget also claims the verdict of the jury was against the overwhelming weight of the evidence because "the evidence established only that Edget wanted to have sex with Townes." (Brief of the Appellant at 9)

This argument implicates the denial of Edget's motion for a new trial. "A greater quantum of evidence favoring the State is necessary for the State to withstand a motion for a new trial, as distinguished from a motion for j.n.o.v." **May v. State,** 460 So.2d 778, 781 (Miss. 1984).

This Court reviews the trial court's denial of a post-trial motion, e.g., a motion for a new trial,

under the abuse of discretion standard. **Flowers v. State**, 601 So.2d 828, 833 (Miss. 1992); **Robinson v. State**, 566 So.2d 1240, 1242 (Miss. 1990). No abuse of judicial discretion has been demonstrated here because the testimony of the witnesses for the State, including Linda Townes who made a positive in-court identification of Edget as her antagonist, weighs heavily in support of the verdict. Put another way, the testimony and evidence, in toto, does not preponderate in favor of Edget.

According to Edget, the evidence arguably demonstrated that Edget intended to commit an assault but failed to establish beyond a reasonable doubt that Edget intended to actually rape Townes. In this posture, argues Edget, " . . . allowing [this verdict] to stand would sanction an unconscionable injustice." (Brief of the Appellant at 9)

We think not.

The evidence does not preponderate in favor of Edget's claim he was guilty of no crime greater than trespass. Rather, it is lopsidedly in favor of the State's theory of the case. **Bush v. State,** 895 So.2d 836, 844-45 (¶¶18-19) (Miss. 2005). Accordingly, the trial judge did not abuse his judicial discretion in denying Edget's motion for a new trial. (C.P. at 110)

Edget claims he did nothing more than ask Ms Townes for sex. (Brief of the Appellant at 3)

Well, he went much further than that. Edget told Townes in no uncertain terms, i.e., use of the " f " word, he "*wanted*" to engage in sexual intercourse. And he voiced his "wanter" while thrice attempting to enter her dwelling house against her will.

A reasonable, fair-minded, hypothetical juror could have found that Edget, once inside Ms Townes's dwelling house, intended to rape her.

"The jury is the **sole judge** of the weight and credibility of the evidence." **Byrd v. State**, 522 So.2d 756, 760 (Miss. 1988). It's verdict will not be disturbed on appeal unless the failure to do so would sanction an "unconscionable injustice." **Groseclose v. State,** 440 So.2d 297, 300 (Miss. 1983).

The word "unconscionable" points to something that is monstrously harsh and shocking to the conscience. The verdict returned in the case at bar does not exist in this posture. It is neither harsh nor shocking, and affirmation of Edget's conviction(s) and sentence is the order of the day.

In ruling on the defendant's motion for a new trial, the trial judge - and this Court on appeal as well - must look at the evidence in the light most favorable to the State's theory of the case, i.e., "in the light most favorable to the verdict." **Herring v. State,** 691 So.2d 948, 957 (Miss. 1997), citing **Mitchell v. State,** 572 So.2d 865, 867 (Miss. 1990). "We reverse only for abuse of discretion, and on review we accept as true all evidence favorable to the State." **McClain v. State,** 625 So.2d 774, 781 (Miss. 1993). *See also* **Gibby v. State,** 744 So.2d 244, 245 (Miss. 1999 [On appellate review "[e]vidence is examined in a light most favorable to the state [and] [a]ll credible evidence found consistent with defendant's guilt must be accepted as true."] *See also* **Valmain v. State,** 5 So.3rd 1079, 1086 (¶30) (Miss.2009) quoting from **Todd v. State,** 806 So.2d 1086, 1090 (¶11) (Miss. 2001) ["(An appellate court] must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial.")]

In **Bush v. State,** *supra*, 895 So.2d 836, 844 (¶18) (2005), the Supreme Court penned the following language also articulating the true rule:

> 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. *Herring v. State,* 691 so.2d 948, 957 (Miss. 1997). We have stated that on a motion for new trial,
>
> > The court sits as a thirteenth juror. The motion, however, is addressed to the discretion of the court, which should be exercised with caution, and the power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict.
>
> *Amiker v. Drugs for Less, Inc,* 796 So.2d 942, 947 (Miss. 2000)/2 However, the 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." *McQueen v. State*, 423 So.2d 800, 803 (Miss. 1982). Rather, as the "thirteenth juror" the court simply disagrees with the jury's resolution of the conflicting testimony. *Id.* This difference of opinion does not signify acquittal any more than a disagreement among the jurors themselves. *Id.* Instead, the proper remedy is to grant a new trial./3
>
> Sitting as a limited "thirteenth juror" in this case, we cannot view the evidence in the light most favorable to the verdict and say that an unconscionable injustice resulted from this jury's rendering of a guilty verdict. * * * " [text of notes 2 and 3 omitted]

See also **Chambliss v. State,** *supra,* 919 So.2d 30, 33-34 (¶10) (Miss. 2005), quoting *Bush*, 895 So.2d at 844 (¶18).

In short, the jury's verdict was not against the overwhelming weight of the credible evidence which does not preponderate in favor of Edget's claim he did nothing more than ask for sex.

We reiterate.

In reviewing a claim the verdict of the jury is contrary to the weight of the evidence, this Court is duty bound to weigh the evidence in the light most favorable to the guilty verdict. **Bush v. State,** 895 So.2d. at 844-45. This includes the descriptive testimony of Linda Townes who

positively identified Edget as her night time tormentor.

"[T]he scope of review on this issue is limited in that all evidence must be construed in the light most favorable to the verdict." **Herring v. State**, *supra*, 691 So.2d at 957 citing **Mitchell v. State**, 572 So.2d 865, 867 (Miss. 1990).

In **Maiben v. State**, 405 So.2d 87, 88 (Miss. 1981), this Court announced that

> . . . . . we will not set aside a guilty verdict, absent other error, **unless it is clearly a result of prejudice, bias or fraud, or is manifestly against the weight of credible evidence.** [emphasis supplied]

The following observations made in **Groseclose v. State**, 440 So.2d 297, 300 (Miss. 1983), are also worth repeating here:

> We will not order a new trial unless convinced that the verdict is so contrary to the overwhelming weight of the evidence that, to allow it to stand, **would be to sanction an unconscionable injustice.** *Pearson v. State*, 428 So.2d 1361, 1364 (Miss. 1983). Any less stringent rule would denigrate the constitutional power and responsibility of the jury in our criminal justice system. [emphasis supplied]

In short, this Court will not set aside a guilty verdict unless the verdict is manifestly against the weight of credible evidence [**Maiben v. State**, 405 So.2d 87, 88 (Miss. 1981)] and unless this Court is convinced that to allow the verdict to stand, would be to sanction an unconscionable injustice. **Groseclose v. State**, 440 So.2d 297, 300 (Miss. 1983)

The case at bar certainly does not exist in this posture. This is not a case where the evidence preponderates heavily against the verdict or where allowing the verdict to stand would sanction or amount to an unconscionable injustice.

One final thought.

The defendant did not put on any evidence in defense of the charge. Neither Edget nor any

one else testified in his behalf.

Although seldom cited in recent years, there is case law addressing this state of affairs.

The testimony by the State's witnesses may be given "full effect" by the jury where, as here, an accused does not take the witness stand. **Reeves v. State**, 159 Miss. 498, 132 So. 331 (1931). Stated differently, "[t]he prohibition against adverse comment and inference does not protect a criminal defendant from the probative force of the evidence against him." **Tuttle v. State,** 174 So.2d 345 (Miss. 1965).

In **Rush v. State**, 301 So.2d 297, 300 (Miss. 1974), we find these words applicable to this observation.

> While it is the right and privilege of a defendant to refrain from taking the witness stand, and no presumption is to be indulged against him for exercising that right, still the testimony of the witnesses against him may be given full effect by the jury, and the jury is likely to do so where it is undisputed and the defendant has refused to explain or deny the accusation against him. *Reeves v. State,* 159 Miss. 498, 132 So. 331 (1931). * * * * * *

See also **Grant v. State,** 762 So.2d 800, 804 (Ct.App.Ms. 2000) ["We note that Grant presented no evidence which leaves the jury free to give full effect to the testimony of the State's witnesses. *Benson v. State*, 551 So.2d 188, 193 (Miss. 1989)."]

CONCLUSION

A reasonable and fair-minded juror could have found beyond a reasonable doubt from the testimony, photographs, and physical evidence that Edget attempted a burglary with the intent to rape. It was the sole and exclusive prerogative of the jury, not the trial judge, to consider and weigh the testimony which, if true, was sufficient to support a finding that Edget was guilty of the crime charged.

"In any jury trial, the jury is the arbiter of the weight and credibility of a witness' testimony, [and] [t]his Court will not set aside a conviction without concluding that the evidence, taken in the most favorable light, could not have supported a reasonable juror's conclusion that the defendant was guilty beyond a reasonable doubt." **Rainer v. State**, 473 So.2d 172, 173 (Miss. 1985).

Although Edget, with the able and effective assistance of both trial and appellate counsel, has pursued his claims with great vigor, they are devoid of merit.

Appellee respectfully submits no reversible error took place during the trial of this cause and the judgments of conviction of attempted rape and recidivism as well as the sentence imposed by the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Billy L. Gore, 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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