IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MICHAEL D. BARKSDALE — APPELLANT

VS. — NO. 2009-KA-1847-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 Michael Barksdale, a non- testifying defendant, of two counts of burglary of a building other than a dwelling house with the burglarious intent to steal contents contained therein and removed therefrom.

This is the companion appeal to Michael D. Brown and Michael Barksdale v. State, Cause number 2009-KA-01847. Brown and Barksdale have filed separate but nearly identical briefs.

We follow suit.

MICHAEL D. BARKSDALE, a twenty-five (25) year old African-American male and resident of Ethel (C.P. at 68), prosecutes a criminal appeal from the Circuit Court of Attala County, Mississippi, C. E. Morgan III, Circuit Judge, presiding.

Following a two count indictment returned on September 8, 2009, Brown and Michael Barksdale, were convicted of two individual counts of burglary of a building other than a dwelling

charged under Miss.Code Ann. §97-17-33(1). (R. 174; C.P. at 63, 64-67)

Barksdale has filed a separate appeal.

The indictment, omitting its formal parts, alleged in Count I that Brown, Barksdale, and Jermaine D. Alston, a third co-indictee who failed to appear for trial,

> " . . . on or about April 14, 2009, . . . either individually and/or while acting in concert with and/or aiding, abetting, assisting and/or encouraging each other, did wilfully, unlawfully, feloniously and burglariously break and enter a certain building, being a house located on Attala Road 5205 in Attala County, Mississippi, and being the property of Dean Rone, with the wilful, unlawful, felonious and burglarious intent to steal the goods, merchandise, equipment or valuable things kept therein for use, sale, deposit, or transportation, in violation of Miss.Code §97-17-33(1), constituting a common plan or scheme or related series of acts or transactions, . . ." C.P. at 1)

Count II of the indictment charged a second burglary of the same building with the same burglarious intent perpetrated the following day on April 15, 2009. (C.P. at 1)

Trial on the merits was conducted on September 22, 2009, at the conclusion of which the jury returned the following verdict: "We, the jury, find the defendant, Michael D. Barksdale, guilty in Count I of burglary of a building other than a dwelling." (R. 174; C.P. at 63)

An identical verdict of guilty was returned with respect to the charge found in Count II. (R. 174; C.P. at 63)

On October 16, 2009, following a hearing in which Brown, but not Barksdale, proffered evidence in extenuation and mitigation of sentence (R. 188-95), and following a pre-sentencing investigation and report (R. 176-77), Judge Morgan sentenced Barksdale to serve seven (7) years in the custody of the MDOC on Count I and seven (7) years, consecutive, on Count II but post-release supervision for six (6) years and 364 days after serving one day on Count II. (R. 198-99; C.P. at 4-5)

Two (2) issues are raised and argued on appeal to this Court, *viz.*, (1) "[t]he trial court erred

in denying the J.N.O.V. as the evidence was insufficient to support the jury's guilty verdict" and (2) "[t]he trial court abused its discretion in denying the motion for a new trial as the verdict was against the overwhelming weight of the evidence." (Brief of the Appellant at 1, 5, and 7)

STATEMENT OF FACTS

Doyle Dean Rone, a resident of Williamsville, Mississippi, owns another house in rural Attala County on Doty Springs Road. (R. 62) That house was occupied by his mother and father until they died in 1992 and 1993. (R. 63) Since that time the house had been vacant but was still filled with personal belongings. Rone checked on the house occasionally. (R. 63)

As a result of two previous break-ins, Rone purchased a motion detector camera and set it up in a tree overlooking the back door. (R. 63-64)

On April 14th and 15th the camera captured photographs of three black males entering the house and removing items therefrom. The men were later identified as Jermaine Alston, Michael Brown, and Michael Barksdale. All three were arrested and indicted for burglary of a building other than a dwelling.

Brown and Barksdale were tried together. On the day of trial, the third co-indictee, Jermaine Alston, was a no show.

At trial Mr. Rone described several of the motion detected photographs in the following colloquy:

> Q. [BY PROSECUTOR:] I show you what has been marked state's Exhibit 11. Can you identify that picture as well?
>
> A. Yes sir.
>
> Q. And what is that a picture of?
>
> A. That's the three gentlemen leaving the home, coming out the back door.

Q. And from that picture, can you tell what items of yours they are carrying?

A. Well, they have got a metal detector and a lot of items really. But they got a metal detector and a food processor and a knife.

Q. What all property was taken from the house over these two burglaries?

A. Well, they taken a window air conditioner, a saddle, numerous other just small items. You know, they got, like I said, they got a food processor and a metal detector and who knows? You know, when somebody vandalizes and strews everything in your house everywhere, it's hard to say exactly what is missing.

Q. Was there any damage done to the home?

A. Yes, sir. It was completely vandalized as far as everything being strewed. I had a deep freeze that was destroyed, a refrigerator - -

Q. - - How did they destroy the deep freeze and the refrigerator?

A. They cut the copper wiring out of it, both the refrigerator and the deep freeze and cut the extension cords off of it.

Q. What else, what other copper items did they take?

A. Well, they cut the cords off of lamps, just anything, I guess, they could find that maybe they could sell for copper.

Q. Now had you given anybody permission to go into the house and take any items?

A. No, sir. I hadn't. (R. 68-69)

* * * * * *

Q. I show you State's Exhibit number 1. Can you describe what you see in that photograph?

A. Yes, sir. That's a gentlemen that is rolling up wire that was stripped from the attic of the house.

Q. I show you State's Exhibit number 21. Can you describe what is going on in that photograph as well?

A. That is also other wire that is being rolled up. That wire there, they was into the attic of the house. The holes or the entrance into it, they were opened, and they went up in there and stripped the old copper out, and that is another picture of them rolling that wire.

Q. I'm going to show you two photographs. The first one is going to be State's Exhibit number 3. It's a picture from the 14th. Where was their vehicle parked on the 14th?

A. It was behind the house.

Q. And then once again on the 15th, where was their vehicle parked? This is State's Exhibit number 10.

A. Behind the house.

Q. And so to make sure I understand your testimony correctly, did you give anyone permission to go in the house and take the wire or any of these belongings?

A. No, sir. I did not. (R. 70-71)

Two (2) witnesses testified on behalf of the State during its case-in-chief, including the victim, **Doyle Dean Rone.**

Mr. Rone testified he did not know any of the men identified in the surveillance phonographs. (R. 73-74, 76) He never - no, not once - gave Brown or Barksdale or anyone else permission to enter the house and remove its contents. (R. 71) Among the Items missing were a food processor, a metal detector, a saddle, a window air conditioner and an electric filet knife. (R. 68, 88) Electrical wiring was snipped and stripped from the attic, breaker boxes, and from certain appliances, including a deep freeze and a refrigerator. (R. 68-69, 105-06)

Randy Blakely, an investigator with the Attala County sheriff's office, testified that after ascertaining the identity of the men in the surveillance photographs, he interviewed both Brown and

Barksdale after advising them of their constitutional rights. (R. 80-83) Blakely testified that when questioning Brown and Barksdale, neither one of them told Blakely they had permission to be inside the house. (R. 91)

At the close of the State's case-in-chief, the defendant moved the court for a directed verdict of acquittal on the grounds " . . . that the State has failed to prove a *prima facie* case of burglary of a building in [that] they did not show any intent on the part of Mr. Barksdale [or Mr. Brown] to steal or carry away any of Mr. Rone's items . . . and they were unable to successfully show that there was actually a breaking in which to enter that property." (R. 109)

This motion was promptly overruled without comment. (R. 109)

After being advised of their right to testify or not, Brown elected to testify while Barksdale stood mute. (R. 111-136, 138)

Michael Brown testified his impression was that "[p]ermission had been given to remove some old items from out of [the house] which is why I was there helping to remove these items." (R. 118)

Barksdale suggests he was legally on the property for the same reason. (Brief of the Appellant at 8)

Brown admitted he moved some of the items to the woods across the street from his home after agreeing to talk to Investigator Blakely but prior to his conversation with Blakey. (R. 123) Brown's explanation for concealing the stolen property was that he " . . . was scared because he knew then that something had went down that shouldn't have." (R. 123)

According to Barksdale, who relied, in part, upon the testimony of Brown, he, like Brown, " . . . believed Alston had permission from Rone to go to Rone's home and haul items way." (Brief of the Appellant at 3)

The defense for both clients then rested. (R. 138) Renewed motions for a directed verdict were both denied. (R. 138)

Peremptory instruction was, likewise, denied. (C.P. at 61)

Following consideration of the jury instructions and the court's reading of the jury instructions (R. 138-156), and after the closing arguments of counsel (R. 156-73, the jury retired to deliberate at 5:05 p.m. (R. 173)

Forty-six (46) minutes later at 5:51 p.m., it returned with dual guilty verdicts for both defendants. (R. 173-74)

A poll of the individual jurors reflected the verdict was unanimous. (R. 174-75)

A sentencing hearing was conducted on October 16, 2009, at the conclusion of which both defendants were sentenced to consecutive terms of seven (7) years in the custody of the MDOC but after serving one day on the second sentence Barksdale was to be placed on post-release supervision for six (6) years and 364 days. (C.P. at 3-6)

On October 22, 2009, Barksdale filed his motion for a new trial or for judgment notwithstanding the verdict alleging, *inter alia*, the verdict of the jury was against the overwhelming weight of the evidence. (C.P. at 69-71)

The motion was overruled in an order entered on November 23, 2009. (C.P. at 72)

Barksdale filed his notice of appeal on November 23, 2009. (C.P. at 73)

Mr. Barksdale received effective assistance from his trial attorney, Rosalind Jordan, a practicing attorney in Kosciusko.

Barksdale has, likewise, received effective assistance from his appellate attorney, Erin E. Pridgen, a practicing attorney with the Mississippi Office of Indigent Appeals.

SUMMARY OF THE ARGUMENT

In this appeal involving the burglary of a building not a dwelling, Barksdale assails both the sufficiency and the weight of the evidence.

He claims the evidence was insufficient to prove beyond a reasonable doubt that Barksdale entered the building *with the burglarious intent to steal.* Barksdale argued at trial, and argues on appeal as well, that the evidence established that Barksdale had reasonable grounds to believe that Jermaine Alston had a working relationship with Doyle Rone and that Rone had given Alston permission to be on his property. (Brief of the Appellant at 5-6, 8)

We respectfully submit the intent sufficient to support Barksdale's conviction of burglary was supplied by the very fact the defendant and his companions committed larceny while inside the house. **Wright v. State,** 540 So.2d 1 (Miss. 1989).

Even if not, Barksdale's intent was a question for the jury which was resolved adversely to Barksdale's claim of innocence.

First, Mr. Rone never granted to any of the three(3) men permission to enter the house and remove some of its contents. (R. 69-74)

Second, a reasonable and fair-minded juror could infer an intent to steal from the acts and conduct of Barksdale and the two other men acting in concert with him. They include the following:

(1) Removal of several of the items by Barksdale himself; **(2)** Snipping and stripping wires - apparently for their copper content - from a deep freeze, refrigerator, the attic, and several breaker boxes; **(3)** Barksdale himself is actually depicted in a photograph - exhibit 11 - carrying a small metal detector (R. 84); (4) a division of the loot may be inferred from Brown's concealment of several of the stolen items in the woods across the street from his house after agreeing to talk to Investigator Blakely; **(5)** Barksdale never told Blakely he thought he had permission to enter and remove; rather,

that defense was raised at trial for the first time; **(6)** the vehicle used by the three (3) men was parked at the rear of the house out of sight of the main road; **(7)** there is testimony suggesting the men covered their hands by pulling down their shirt sleeves prior to opening and closing doors. State's exhibits 7 and 11 clearly depict the hands of Alston in this posture.

The jury was entitled to consider the acts and conduct of the three men collectively in determining their intent. The snipping and stripping of copper wiring from the attic, from certain appliances, and from the breaker boxes is not consistent with the idea the presence of the three men acting in concert was innocent.

All proof need not be direct and a juror may draw any reasonable inferences from all the evidence in the case. **Campbell v. State,** 278 So.2d 420 (Miss. 1973); **McLelland v. State,** 204 So.2d 158 (Miss. 1967). Stated somewhat differently, the jury, as fact finder, is entitled to consider not only facts testified to by witnesses but all inferences that may be fairly, reasonably, and logically deduced from the facts in evidence. **Pryor v. State,** 349 So.2d 1063 (Miss. 1977).

The testimony of Mr. Rone reflects quite clearly he did not give his consent for Barksdale or for anyone else to enter the building and remove its contents. (R. 69, 71)

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 Investigator Randy Blakely and Doyle Dean Rone " . . . 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.

"The State seldom has direct and positive testimony expressly showing the specific intent of an intruder at the time he unlawfully breaks into a dwelling; however, such testimony is not essential

to establish the intent to commit a crime." **Newburn v. State,** 205 So.2d 260, 265 (Miss. 1967). *See also* **Williams v. State,** 317 So.2d 425, 427 (Miss. 1975) ["The issue of felonious intent is one of fact, and its determination is therefore within the exclusive province of the jury, under appropriate instructions from the court."]; **Ryals v. State,** 305 So.2d 354, 355 (Miss. 1974) ["(I)ntent may be determined from the acts of the accused and his conduct and . . . inferences of guilt may be fairly deducible from all the circumstances."]; **Shanklin v. State,** 290 So.2d 625, 627 (1974) ["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."]

Whether Barksdale intended to steal was a question for the jury who decided the issue adversely to Barksdale's defense of permission to enter and remove. *Cf.* **Fulgham v. State,** 12 So.3d 558 (Ct.App.Miss. 2009); **Riley v. State,** 11 So.3d 751 (Ct.App.Miss. 2008); reh denied, cert dismissed as improvidently granted)

Moreover, the jury's verdict was not against the overwhelming weight of the credible evidence which does not preponderate in favor of Barksdale's claim he did nothing more than do what he thought he had permission to do.

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.

"[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**, 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(s) or where allowing the verdict(s) to stand would sanction or amount to an unconscionable injustice.

ARGUMENT

ANY RATIONAL TRIER OF FACT COULD HAVE FOUND BEYOND A REASONABLE DOUBT THAT BARKSDALE BROKE AND ENTERED THE HOUSE WITH THE FELONIOUS INTENT TO STEAL.

BARKSDALE HAS FAILED TO DEMONSTRATE THE TRIAL JUDGE ABUSED HIS BROAD JUDICIAL DISCRETION IN OVERRULING BARKSDALE'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.

At trial all litigants agreed that "[t]he only thing that is in dispute today is [the defendants's] intent." (R. 157, 163, 167) The jury, as was its *exclusive* prerogative, decided that issue adversely to the defendant's position.

The issue on appeal is the same.

Barksdale, in a nutshell, contends there was insufficient evidence from which a reasonable, fair-minded juror could find, either directly or by reasonable inference, that Barksdale entered the building with the required intent to steal. (Brief of the Appellant at 5-6)

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 (¶ 5)(Ct.App.Miss. 2006). *See also* **McDowell v. State,** 813 So.2d 694, 697 (¶8) (Miss. 2002).

"[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,** *supra*, 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 Barksdale, either individually or while acting in concert with others, entered the building " . . . with the wilful, unlawful, felonious and burglarious intent to steal the goods, *et cetera*, kept therein . . ." (C.P. at 1) The jury was properly instructed on this issue. (C.P. at 44)

The crime of burglary consists of two essential elements: (1) the burglarious breaking and entering of a house or building described in the statute, and (2) the felonious intent to commit some crime therein. **Newburn v. State,** *supra*, 205 So.2d 260 (Miss. 1967). *See also* **Beale v. State,** 2 So.3d 693 (Ct.App.Miss. 2008), reh denied, cert denied 999 So.2d 1280 (2009).

In the case at bar the intent crime is theft, i.e., larceny.

Clearly the evidence in this case demonstrates a lack of consent or permission to enter and take, and supports a finding of an intent to steal.

The evidence from which a reasonable and fair-minded juror could find an intent to steal was fully and fairly summarized by the State prosecutor during his closing argument. We rely on those same facts here in support of our position the evidence was more than ample to support the requisite finding of intent.

> [BY MR. WHITFIELD:] * * * The only thing that is in dispute today is their intent. What did they intend to do when they went out to the house. Now you have heard [the] Defense make numerous comments to the fact that well, we thought we had permission. But if you look at the evidence, that is not what the evidence shows. The evidence shows they went out there with the intent to steal Mr. Rone's property. They took the air conditioner. They took the saddle. They took a metal detector. They stripped wires out of the attic. They cut wires off of his refrigerator. They cut wires off of his deep freeze. A food processor was taken, and all this is seen in the pictures. We got some of the property back. Mr. Brown had property hidden in the woods of his house.
>
> If he thought he had permission, why is it in the woods? Or for that fact, you have heard the testimony of Deputy Blakely. When he went and talked to them about the crime, they didn't say, "Whoa, whoa, whoa. We made a mistake. We had permission." That was never mentioned. Now after the fact, they come to court and say it was a mistake. (R. 157-58)
>
> * * * * * *
>
> In Exhibit 1, where [Brown] is out walking in the yard rolling up the wire, you see the white mark on his sleeve, and it is way back here on his wrist. As he is going into the door, you can see his hand on the screen door, and I know it's real hard to see because you are kind of looking around a corner, but if you look real close like we had it zoomed up, you will see the white mark on here by his hand.
>
> Why cover your hand it you have permission? * * * (R. 158)

* * * * * *

> Another thing you're going to see from the pictures, and you will see this on both days that they went out there. You have got your pictures from the 14th and 15th. If they had permission, why hide the car behind the house where nobody can see it from the road. They are parked behind the house. You can see the vehicle parked back here.
>
> You also heard the testimony of Mr. Rone that he didn't know these guys, and he didn't give them any permission to go to his house and take his stuff.
>
> And you see as they walk in, in this particular picture he has got his hands covered. If they are of the belief that he had permission to go in the house, like I said, why cover your hands?
>
> Mr. Barksdale and Mr. Brown, you will see from these pictures, were both involved. They are both assisting in carrying out goods. In this picture, you will see they are carrying the air conditioner and the wire. Mr. Brown is helping carry the air conditioner, and Mr. Barksdale is carrying the wire. So you can see from their actions that everybody is involved in ths enterprise of going out to this house and stealing Mr. Rone's property. (R. 157-59)

* * * * * *

> So when you look at the actions of the Defendants as a whole, all of them acting in covert together, there is no other conclusion other than the fact that they went out there with the intent to steal this property, and the State has met its burden of showing this beyond a reasonable doubt. (R. 160)

We wholeheartedly concur.

Additional argument by the prosecutor likewise placing the issue of intent squarely in the lap of the fact finder is quoted as follows:

> With the intent to take, steal and carry away the intent to take, steal and carry away - - that's what [the defendants] are going to get up and talk a lot about. What was their intent? Well, you have to look at their actions to see what their intent was. You have to see that they were parked behind the house. You have to see that they tried to conceal their fingerprints by covering their hands as they went in and out. You have to see that when they took the property home, he

> didn't take it home. He took it and hid it in the woods. When the deputies questioned [Barksdale] about the crime, they didn't say, oh, we had permission. That was their chance. They didn't say we had permission. (R. 161)

We summarize.

After parking their car behind the building out of sight of the main road, Barksdale and his accomplices took, *inter alia*, a window air conditioner, a saddle, a metal detector, and a food processor. (R. 68) Some of these items were later found hidden in the woods across the street from Brown's property.

Barksdale and his accomplices stripped the wiring out of the attic as well as the breaker boxes (R. 179) and cut, snipped, and stripped the wiring connected to a refrigerator and a deep freeze. (R. 68-69) The thieves even cut the cords off of the lamps. (R. 69) Mr. Rone was unable to repair the refrigerator which he " . . . took to the scrap metal pile, and I got twelve dollars for it." (R. 74)

A reasonable and fair-minded juror could have found all this inconsistent with the idea that Rone had given permission to Alston to cut, roll, and remove wires and cords from lamps and appliances presumably for their copper content.

The defense of "permission" was never mentioned to Deputy Blakely who interviewed both Brown and Barksdale; rather, it was raised at trial for the first time. Neither Brown nor Barksdale ever told Deputy Blakely during his interviews they thought they had permission to enter the building and remove its contents. (R. 91) We quote:

> Q. [BY PROSECUTOR HOWIE]: When you were questioning Brown and Barksdale, did either of them tell you that they had permission to be in that house?
>
> A. No sir.

Barksdale's defense, as told to Deputy Blakely prior to trial, was that they did not break into the house because the doors were already open. (R. 83)

Brown, who came to the station house voluntarily, declined to make a formal statement after being advised of his constitutional rights. (R. 85-86) He did, however, tell Blakely ". . . that some of the items that were stolen were located in a wooded area at his residence across the road from his home." (R. 87) When Blakely was unable to locate the stolen items, Brown himself "went to the wooded area, recovered the stolen items or some of the stolen items, and [Blakely] recovered them from him." (R. 87-88) The items recovered from Brown were the metal detector, the food processor, and an electric filet knife. (R. 88)

A reasonable and fair-minded juror could have found the concealment of the articles in the woods - a consciousness of guilt, if you please - especially incriminating with respect to the issue of Brown's, as well as Barksdale's, intent. This fact, standing alone, would support a conviction for burglary with an intent to steal.

Relevant testimony elicited from Investigator Blakely is quoted as follows:

> Q. [BY PROSECUTOR HOWIE:] Did [Brown] ever admit to you that he stole anything?
>
> A. He just told me that the items that were stolen were in the woods at his house.
>
> Q. He said "the items that were stolen?" Those are his exact words?
>
> A. I don't know if those were his exact words but - -
>
> Q. Did he say, "The items are at my house?"
>
> A. He told me the things that we were looking for were in the woods across the road from his house. (R. 105)

There is some testimony that Brown appears in a photograph to have pulled his right sleeve

over the top of his hand as he grabs a door handle. (R. 88-89, 101-02, 106-07) The same holds true for Alston in exhibits 7 and 11. Blakely testified "[i]t would be my opinion that he did that not to leave fingerprints." (R. 88-89) Such was a matter for the jury's perception.

Finally, Jermaine Alston, the no-show, never said to Blakely he had permission to enter the house and, according to Blakely, Alston actually apologized through Blakely " . . . for doing what he had done." (R. 108) It is clear from the photographs introduced as exhibits 7 and 11 that Alston had his shirt pulled down over his hand. (R. 101)

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."]

The jury was properly instructed with respect to the issue of intent. *See* jury instruction 2 (S-1) which required the jury to find, *inter alia*, that the breaking and entry was done". . . with the

intent to take, steal and carry away any of the property of the said Dean Rone located in said house. . ." (C.P. at 44)

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

By denying Barksdale's motion for a directed verdict (R. 109), his request for peremptory instruction (C.P. at 61), and Barksdale's motion for judgment notwithstanding the verdict (C.P. at 69-71), Judge Morgan correctly held the question of Barksdale's intent was a jury issue.

Barksdale cites to the right cases addressing the standard of review 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 Barksdale's intent could be read from his acts, conduct, and inferences fairly deducible

from the surrounding circumstances, including the acts and conduct of the other two co-indictees.

It was a jury issue by virtue of jury instruction number 2 (S-1) which instructed the jury in plain and ordinary English it had to find an intent to steal in order to convict.(C.P. at 44)

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**
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> > **'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).
>
> * * * * * *
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> 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,** *supra*, 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.
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> *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 burglary with an intent to steal had been met by the State?

We think not.

To the contrary, based upon the testimony of Deputy Blakely and Mr. Rone, 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.

Barksdale argues the evidence supports a finding that he had reasonable grounds to reasonably believe that Jermaine Alston had a working relationship with Doyle Rone and that Rone had given Alston permission to be on his property. (Brief of the Appellant at 5, 8) He points to old and unused items found inside a vacant house, the presence of a fishing pond near the house, and the fact that Alston knew the location of the house. (Brief of the Appellant at 6)

Barksdale views the evidence in the light most favorable to him. The problem with his

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., actual permission to enter the house and remove its contents, must be disregarded.

Weight of the Evidence.

Barksdale also claims, for the same reasons, the verdict of the jury was against the overwhelming weight of the evidence, *viz.*, he never denied he was one of the men in the photographs and never denied removing property from the building. (Brief of the Appellant at 8) Moreover, the house appeared vacant, and there was a fishing pond nearby. Therefore, Barksdale contends he had a "reasonable belief" he was legally on the property. (Brief of the Appellant at 8)

This argument implicates the denial of Barksdale's motion for a new trial which asserted, *inter alia*, "[t]hat the verdict of the jury was contrary to the overwhelming weight of the evidence." (C.P. at 69) "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 Deputy Blakely and Doyle Dean Rone, weighs heavily in support of the verdict. Put another way, the testimony and evidence, in toto, does not preponderate in favor of Barksdale.

The acts and conduct of Michael Brown logically implicate Barksdale who was acting in

concert with Brown and Alston. Brown testified he hid several of the items in the woods before voluntarily meeting with Blakely. (R. 123) He claimed he was scared because he " . . . knew then that something had went down that shouldn't have." (R. 123)

The evidence does not preponderate in favor of Barksdale's claim he was on the property with permission. 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 Barksdale's motion for a new trial. (C.P. at 11)

"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 Barksdale'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,
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> > 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.
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> *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 Barksdale's claims he was legitimately on the property and had permission to remove the property. 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 testimony of Rone and Blakey and the reasonable inferences to be drawn fairly therefrom.

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]

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.

Barksdale did not testify or put on any evidence in defense of the charge.

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 Barksdale and the other two men entered the house with the intent to steal. 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 Barksdale 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 Barksdale, with the able and effective assistance of both trial and appellate counsel, has pursued his claims with 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 two counts of burglary of a building other than a dwelling as well as the two (2) seven (7) year sentences 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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