

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

**MICHAEL D. BARKSDALE**

**APPELLANT**

**V.**

**NO. 2009-KA-1847-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

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**BRIEF OF THE APPELLANT**

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**On Appeal from the Circuit Court of Attala County, Mississippi**

**MISSISSIPPI OFFICE OF INDIGENT APPEALS**

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**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Michael D. Barksdale, Appellant
3. Honorable Doug Evans, District Attorney
4. Honorable Clarence E. Morgan, III, Circuit Court Judge

This the 8<sup>th</sup> day of April, 2010.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:

  
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**BRIEF OF THE APPELLANT**

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**STATEMENT OF ISSUES**

- I. THE TRIAL COURT ERRED IN DENYING THE J.N.O.V. AS THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE JURY'S GUILTY VERDICT.**
- II. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE MOTION FOR A NEW TRIAL AS THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.**

**STATEMENT OF THE CASE**

This appeal proceeds from the Attala County Circuit Court in Attala County, Mississippi. An Attala County grand jury indicted Michael D. Brown, Michael D. Barksdale and Jermaine Alston on two counts of burglary of a building other than a dwelling. [R.E. 5]. Prior to trial, Mr. Brown and Mr. Barksdale's attorneys petitioned the court to sever Mr. Alston from the case. [R.E. 7] Mr. Brown and Mr. Barksdale requested to stand trial together but informed the court their defense rested on showing Mr. Alston was the reason Mr. Barksdale and Mr. Brown mistakenly believed they had

permission to legally take the items from the building. [Tr. 3-4] The trial court denied the motion to sever and the case proceeded with all defendants joined in the same case. [Tr. 6]

On the day of trial, Mr. Alston did not appear, so the court proceeded to hear only the case that was brought against Mr. Brown and Mr. Barksdale. [Tr. 12] At the conclusion of the trial, the jury returned guilty verdicts as to both of Mr. Barksdale's counts of burglary. [R.E. 10] As to Count I, the court sentenced him to serve seven (7) years with the Mississippi Department of Corrections (MDOC). [R.E. 11-13] Mr. Barksdale was sentenced to serve seven (7) years on Count II but, after serving one day, he is sentenced to post-release supervision for six (6) years and three hundred sixty-four (364) days. The first five (5) years of post-release supervision will be supervised and the remaining one (1) year and three hundred sixty-four (364) days will be unsupervised. Mr. Barksdale was also ordered to pay restitution, court costs and fees and assessments. The sentence in Count I is to run consecutive to the sentence in County II. Mr. Alston is currently incarcerated with MDOC.

Following the trial, Mr. Barksdale filed his Motion for JNOV or, in the alternate, Motion for a New Trial. [R.E. 14] The court denied this motion and Mr. Barksdale timely noticed this appeal. [R.E. 18]

### **STATEMENT OF THE FACTS**

One day, Jermaine Alston (Alston) came to Michael Brown's home and talked with Brown and Michael Barksdale (Barksdale)<sup>1</sup>. [Tr. 117] The men discussed hauling off some old items from a home owned by Doyle Dean Rone. [Tr. 118] Rone's parents previously lived in the house but the house had been vacant since the early 1990's, after his parents died. [Tr. 63] Brown and Barksdale

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<sup>1</sup>Barksdale did not testify at trial, however, many of the facts come from the testimony of other witnesses presented at trial.

did not know Rone. However, following Alston's conversation, Brown and Barksdale believed Alston had permission from Rone to go to Rone's home and haul items away. Alston represented to the men that he had a previous working relationship with Rone and had been allowed to fish on Rone's property in the past. Barksdale and Brown agreed to accompany their friend, Alston, to help him with the hauling.

Alston drove Brown and Barksdale to Rone's property on two occasions. [Tr. 80, 117] When the men first arrived, they noticed a pond, a house, some sheds, and a butane tank. [Tr. 118] There was no one at the house and it appeared that the house had been vacant for a while. The men took old items, such as metal detectors, food processors, a saddle. [Tr. 68-69, 88, 120-21] Among other things, Alston removed the wiring from the refrigerator and deep freezer<sup>2</sup>.

Unbeknownst to the men, Rone had experienced several break-ins on his property and had installed a motion-sensor camera near the porch of his house. [Tr. 63] He checked the camera periodically and on his last trip to visit the house, he discovered the camera had recorded three men hauling off items from his home. [Tr. 66] He took the photographs to law enforcement and they began an investigation. [Tr. 67] Rone told the police that he did not recognize any of the men in the photographs<sup>3</sup>. [Tr. 73]

Police soon discovered that the three men in the photographs were Alston, Brown and Barksdale. [Tr. 80] They learned that Alston drove the men to Rone's property. [Tr. 92] When questioned, Alston told the police that he knew Rone because he had previously fished on Rone's

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<sup>3</sup>Rone also reported to police that he home had been vandalized, in addition to the stolen items. However, he admitted that the house was left unattended for several days to weeks at a time. Tr. 75

property. Just as he told Brown and Barksdale, he also told officers that he had previously worked for Rone. Rone denied having ever known Alston or granting him permission to be on his property. [Tr. 76]

Barksdale voluntarily spoke with police. [Tr. 86] He retrieved some of the missing items for the police. He did not tell the police that he had permission to be on the property. However, he informed the police that he did not break into the home because the doors of the home were already open on the house when the men arrived.

The police arrested all three men. Before trial, Brown and Barksdale filed a motion to sever their case from Alston's case. [R.E. 7] The trial court denied that motion, explaining that Alston would be in the best position to file that motion but, since Alston did not request to be severed, the court would deny the motion. [Tr. 6] At the start of trial, however, Alston had absconded from justice and Brown and Barksdale were tried together. [Tr. 112] Barksdale was convicted of both counts of burglary and sentenced to seven years on each count. [R.E. 12]

### **SUMMARY OF THE ARGUMENTS**

Michael Barksdale went to Doyle Dean Rone's property to assist Jermaine Alston with removing some of the property from the house. The house had not been occupied for some time and Barksdale believed Alston had permission from Rone to take the items from the home. Unbeknownst to Barksdale, Rone had not given Alston permission to take the items. In reality, Rone had experienced several break-ins at the house and had set up a surveillance photo camera to capture images at the home. The camera took still photos that showed Barksdale, Michael Brown and Alston removing items from Rone's property. The camera however, did not record Barksdale's intent on that day.



At trial, the State was required to show that Barksdale had the requisite intent to commit burglary of a building other than a dwelling. The prosecution did not provide sufficient evidence of the required intent of the alleged crime. In addition, based on the overwhelming weight of the evidence, the court should have granted Barksdale's request for a new trial.

## **ARGUMENTS**

### **I. THE TRIAL COURT ERRED IN DENYING THE JNOV AS THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE JURY'S GUILTY VERDICT.**

#### ***A. Standard of Review***

The Court reviews a denial of a motion for judgment notwithstanding the verdict (J.N.O.V) in the light most favorable to the State. *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993). The Court must accept as true the evidence that supports the verdict and will only reverse the trial court's decision when the trial court has abused its discretion in failing to grant a new trial. *McDowell v. State*, 813 So. 2d 694, 697 (¶8) (Miss. 2002).

This Court must consider "whether the evidence shows 'beyond a reasonable doubt that [the] accused committed the act charged, and that he did so under such circumstances that every element of the offense existed'." *Bush v. State*, 895 So. 2d 836, 843 (¶16) (Miss. 2005) (citing *Jackson v. Virginia*, 443 U.S. 307, 315, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). Where the evidence fails to meet this test, the evidence is insufficient to support the guilty verdict. *Id.*

#### ***B. The State Did Not Prove Barksdale Intended to Steal Rone's property***

Michael Barksdale's belief that he had permission to assist Alston with the removal of the items from Rone's property was founded on what appeared to be Alston's reasonable assertions that Rone had given Alston permission. Alston led Barksdale and Brown to believe that he had a

relationship with Doyle Rone. Just as Alston told the police, Brown and Barksdale were led to believe that Alston had previously fished on Rone's property, and that Alston had previously worked for Rone by cutting some trees.<sup>4</sup> Based on these statements, Barksdale's actions do not show he had the requisite intent to steal Rone's property.

Barksdale had little reason to question Alston's claims because Alston's assertions were reasonable and supported by surrounding circumstances. It is unclear how Alston led Barksdale and Brown to believe that Rone had granted permission to take things from the vacant house, but the appearance of the items were old and unused. [Tr. 129-30] Consistent with this assertion, Barksdale and Brown arrived at a property that visibly appeared to have not been lived in for a very long time. [Tr. 118]

Alston also represented to the men that he knew Rone based on a prior working relationship and that Rone had previously allowed Alston to come to his property to fish. Consistent with these assertions, Alston was the one who drove the men to the property. [Tr. 125] He knew the location of the house and this would indicate that he had previously been on the property. Also, the men saw a pond near the house Rone owned. [Tr.118] This would support Alston's claims that, on prior occasions, Rone had allowed Alston to fish on the property.

In order for the State to prove that Barksdale burglarized Rone's property, it was required to show that Barksdale, either by himself or in concert with others, (1) broke and entered into Rone's property (2) with the felonious *intent to steal* items from within. *Faust v. State*, 221 Miss. 668, 676-77, 74 So. 2d 817, 819 (Miss. 1954) (Emphasis added). Intent is usually proven by showing the acts of the person involved at the time in question, and by showing the circumstances surrounding the

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<sup>4</sup>Alston later told police during questioning that he apologized for this actions.

incident. *Johnson v. State*, 831 So. 2d 1171, 1173-74 (Miss. Ct. App. 2002). The State failed to prove, either through his actions or by the circumstances surrounding the event, that Barksdale intended to steal Rone's property.

“ ‘It is hornbook criminal law that before a criminal conviction may stand, the State must prove each element of the offense.’ *Neal v. State*, 451 So. 2d 743, 757 (Miss. 1984). Due Process requires that the State prove each element of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U. S. 307, 324 99 S. Ct. 2781, 2791, 61 L.Ed.2d 560, 576-77 (1979). *See also Carlson v. State*, 597 So. 2d 657, 659 (Miss. 1992).” *Washington v. State*, 645 So. 2d 915, 918 (Miss. 1994). In order to sustain a conviction, there must be sufficient evidence in the record to establish each and every element of the crime of burglary. *See Fisher v. State*, 481 So. 2d 203, 211 (Miss. 1985).

In this case, the State failed to prove the requisite element of *intent*. Barksdale's case should be reversed and rendered for this reason. In the alternative, Barksdale seeks relief because his guilty verdict was against the overwhelming weight of the evidence.

## **II. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE MOTION FOR A NEW TRIAL AS THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.**

### ***A. Standard of Review***

The Mississippi Supreme Court has compared the standard of review of motions for new trials as being similar in nature to the Court sitting as a thirteenth juror. *Ross v. State*, 954 So. 2d 968, 1016 (¶127) (Miss. 2007). "A finding that the verdict was against the overwhelming weight of the evidence indicates that the Court disagrees with the jury's resolution of conflicting evidence and requires a new trial." *Id.*

The Court will order a new trial and allow the evidence to be placed before a second jury if the first jury's guilty verdict was based on "extremely weak or tenuous evidence, even where that evidence is sufficient to withstand a motion for a directed verdict." *Id.* (citing *Lambert v. State*, 462 So. 2d 308, 322 (Miss. 1984) (Lee, J., *dissenting*). The Court will only disturb the jury's verdict when the verdict is so contrary to the overwhelming weight of the evidence that it would cause an unconscionable injustice if the verdict were allowed to stand. *Bush v. State*, 895 So. 2d 836, 844 (¶18) (Miss. 2005).

***B. Barksdale's Conviction is Against the Overwhelming Weight of the Evidence and Requires a New Trial***

Barksdale was among three of the men that were captured on the surveillance photo camera, removing items from Rone's house. He never denied that he was one of the men in the photo. He never denied that he was removing property from the building. However, the overwhelming weight of the evidence suggests Barksdale had a reasonable belief that he was legally on the property based on the understanding that Alston had been granted permission to be there.

First, Barksdale was recorded on the camera surveillance photos, removing items from a visibly abandoned house, in the broad daylight. [Tr. 120] Barksdale did not travel to the home under cover of night when it would have been less likely to identify him. He was not wearing camouflaging attire that would make it less likely to identify him. By all appearances of the photographic image, Barksdale was on the property to assist Alston in what he and Brown believed to be a legitimate and legal purpose.

Second, Rone's house had been left vacant for years. [Tr. 63] This was noticeable when the men first arrived on the property. The house's appearance was just as one would expect to find,

given that Alston led the men to believe he had been given permission to remove items from the home because it was no longer being used. Although Rone testified that the door to the home was left closed, Barksdale and Brown found the door open on the days in question. [Tr. 65, 83, 129]. Even the police noted that the door was left unlocked when they returned to the home several days after the reported incident. [Tr. 83] Had Barksdale arrived at the home and found evidence that the house was lived in or visited frequently, he would have had reason to be alarmed by Alston's assertions. In this case, there was no evidence to contradict Alston's statements.

Third, the nature of the items removed from Rone's house were old, basic household items. Some of these items included a metal detector, food processor and an electric file knife. The wiring was also removed from deep freezer and refrigerator. The nature and condition of these items would suggest to Barksdale that they had not been utilized in a very long time. This would support Alston's statements that he had been granted permission to remove the seemingly unused items from the home.


### CONCLUSION

Barksdale simply went to assist a friend in moving property and, as a result, he was convicted on two counts of burglary . The State did not sufficiently prove the requisite elements of burglary and Barksdale requests that this honorable Court reverse and render this case. In the alternative, Barksdale requests that this Court reverse and remand this case to the trial court for a new trial.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS  
For Michael D. Barksdale, Appellant

By:

  
ERIN E. PRIDGEN, MISS. BAR NO [REDACTED]  
STAFF ATTORNEY

**CERTIFICATE OF SERVICE**

I, Erin E. Pridgen, Counsel for Michael D. Barksdale, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

Honorable Clarence E. Morgan, III  
Circuit Court Judge  
Kosciusko, MS 39090

Honorable Doug Evans  
District Attorney, District 5  
Post Office Box 1262  
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This the 8<sup>th</sup> day of April, 2010.

  
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