IN THE SUPREME COURT OF MISSISSIPPI

NO. 2018-KA-01475-SCT

JOSEPH WARD

v.

STATE OF MISSISSIPPI

DATE OF JUDGMENT:	09/10/2018
TRIAL JUDGE:	HON. CHRISTOPHER A. COLLINS
TRIAL COURT ATTORNEYS:	P. SHAWN HARRIS BRITTANY WHITE BROWN CHRISTOPHER MORGAN POSEY
COURT FROM WHICH APPEALED:	NEWTON COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	OFFICE OF STATE PUBLIC DEFENDER BY: GEORGE T. HOLMES
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: ALICIA MARIE AINSWORTH
DISTRICT ATTORNEY:	STEVEN SIMEON KILGORE
NATURE OF THE CASE:	CRIMINAL - FELONY
DISPOSITION:	REVERSED AND RENDERED - 11/07/2019
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE KING, P.J., COLEMAN AND BEAM, JJ.

KING, PRESIDING JUSTICE, FOR THE COURT:

¶1. Joseph Ward[1] was convicted of burglary of a dwelling, and the Newton County Circuit Court sentenced him to serve twenty-five years in the custody of the Mississippi Department of Corrections (MDOC). Ward appeals and argues that the evidence was insufficient to support his conviction and that the verdict was contrary to the weight of the evidence.

[1]Throughout the record, Ward frequently is referred to as “Pop” or “Poppa.”

Because the State failed to present substantive evidence proving the elements of the burglary charge against Ward, we reverse and render Ward's conviction and sentence.

FACTS AND PROCEDURAL HISTORY

¶2. A Newton County grand jury indicted Ward on May 22, 2017, for burglary of a dwelling. Ward's trial began on August 13, 2018. Bernard Rigdon testified that he and his wife lived in Decatur, in Newton County, Mississippi. The Rigdons went out of town from July 19, 2016, to July 22, 2016. Bernard testified that when he returned home on the morning of July 22, his carport door and back doors were open and "everything [was] just strewed around all over the house." When a member of the sheriff's department arrived, Bernard went inside and determined that numerous personal items were missing. He testified that the missing items included

> a bunch of guns and ammo and jewelry and television and, you know, had a jug of money, about — a five-gallon jug about half full of change, probably about $500 worth, I'd estimate. And I had knives and shirts and a lot of different things.

¶3. S.G., a juvenile at the time of the burglary, admitted that he had broken into Rigdon's house with his cousin A.E. and another juvenile named G.[2] At trial, S.G. testified that he and A.E. had been the only ones that had entered the Rigdons' house. S.G. denied that Ward had been involved in the burglary and denied that he knew Ward. The State produced a statement supposedly written by S.G. in which S.G. implicated Ward in the burglary. However, although S.G. admitted that his signature was at the bottom of the document, he repeatedly

[2]S.G. testified that he did not know G's real name. Because S.G. and A.E. were juveniles at the time of the burglary, their full names have been removed.

testified that he did not remember writing the statement. S.G. stated that he "used to smoke weed" and that his "memory really do[esn't] go past last week." S.G's statement was not admitted into evidence.

¶4. A.E., also a juvenile at the time of the burglary, testified that G lived with his mom and his stepdad and that sometimes "Poppa" also would stay there. A.E. identified Ward as "Poppa." He testified that G's house was "a couple of houses down" from the Ridgons' house. A.E. stated that in July 2016, he and S.G. were walking down the road when they saw that the door to the Rigdons' house was open. He stated that he and S.G. went to G's house to tell him about it.[3] A.E., S.G., and G then went back to the Rigdons' house and walked in. A.E. testified that the house had already been "messed up" from another person before they went inside. The trio took "a lot of things" outside and hid the items in a bush. He testified that the three then left the Rigdons' house and that A.E. and S.G. came back later in a stolen car to retrieve the items. A.E. said that after they retrieved the stolen property, they attempted to get Ward to sell the items, but Ward never got the chance because the police arrived.

¶5. A.E. testified that he talked to Sheriff Jackie Knight the night he was arrested. After speaking with Sheriff Knight, A.E. testified that he wrote a statement.[4] A.E.'s written statement read that he and S.G. went to G's house "like always" and that Ward was present because he lived there. He continued,

> [T]he house, [P]oppa went there the night before and did what he did. Then I

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[3]A.E. testified that G was twelve or thirteen years old at the time of the burglary.

[4]A.E. testified that he actually wrote two statements but that the other statement had been thrown away.

> walked in the room and saw everything guns, money, and diamonds. Then that night he asked me and [S.G.] did we want to go and he needed us. So I really didn't want to go but I went so he wouldn't say I was a [b****] and I don't like when somebody call me that. So we all went back in there, and we were walking around look[ing] for the money but we didn't find some more diamonds that[']s it. [T]hen we left. Then the day the people came back before he could go back and clean a little. So he had us to move the things for him and we got some money from him for helping.

At trial, however, A.E. testified that he had no knowledge of whether Ward had been to the Rigdons' house the night before. A.E. said that he had told Sheriff Knight that Ward went into the house because

> they was threatening us with our life. I was a young — young man trying to get out of the situation, and he was steadily asking us — telling us we was going to have 25 years over our head if we didn't . . . tell them . . . that he broke in the house with us.

A.E. denied that Ward had been involved in the burglary and stated that he, his cousin, and G had acted on their own. A.E. claimed that Ward had been in Union while they were committing the burglary.

¶6. When A.E. was questioned at trial about seeing the guns, money, and diamonds in the room at G's house, he stated, "[b]ut that was from something else. We went in the house and got our stuff, you know. That was from probably somewhere else. You never know. A friend could have gave it to him, anything." A.E. stated that when he and S.G. went into the Rigdons' house, they took "a .22 rifle, two snipers, two .22s, one Smith & Wesson and one – and got some coins and I grabbed some jewelry. And that's what I was going to get [Ward] to sell, because I didn't know how to sell jewelry."

¶7. The State moved to have A.E.'s statement entered into evidence. Defense counsel

objected, arguing that A.E. had "stated some of those things he did not remember saying to the sheriff and that there were other statements that were given that are not in evidence. And we don't believe he has identified that as a true and accurate copy of whatever he gave to Sheriff Knight that day." The State argued that the statement should be admitted into evidence as an inconsistent statement to impeach A.E. The trial court agreed and admitted A.E.'s statement into evidence.

¶8. Denise Chamblee testified that she was familiar with Ward. She stated that the day after the burglary was reported, on Saturday, Ward had handed her a "black bag that had coins, letter opener. There was a lot of stuff in there. I only seen a letter opener and some coins." She stated that Ward had asked her to put it with his stuff because Chamblee had some of Ward's "clothes and stuff" in the trunk of her car. The next day, Sunday, Chamblee testified that Ward had called and asked her to give him a ride to his sister's house in Union.

¶9. Deputy Kris Hollingsworth with the Newton County Sheriff's Department stated that he had interviewed S.G. and A.E. after they were arrested and that both S.G. and A.E.

> told me that they were — that they were at the house, which was a rental house . . . maybe a half a mile up the road from where the burglary occurred. That they were at the house and that Mr. Joseph Ward was there. And that they had — they had saw a large amount of stolen stuff or stuff they believed to have been stolen that was laying on a bed in the bedroom of the house. When Mr. Ward had noticed that they had noticed the stolen — or the goods that were laying on the bed, they said that Mr. Ward had approached them about helping him burglarize the house. I believe their exact words were "I know a house where we can make a lick." And both of the juveniles at the time told me that they were apprehensive about it but that after some convincing, that they agreed to go with Mr. Ward. And that they had went to the house of Mr. and Mrs. Rigdon and went inside the house and stole some stuff.

Again, the trial court admitted Deputy Hollingsworth's testimony for impeachment purposes

only. Deputy Hollingsworth testified that stolen property was recovered approximately a quarter to a half mile from the Rigdons' home at an abandoned house in between the Rigdons' house and the rental house where G was staying. Deputy Hollingsworth testified that Ward had been arrested in Union at his sister's house and that he had not found any of the stolen merchandise in Ward's possession.

¶10. Ward testified in his own defense. He denied breaking into the Rigdons' house and testified that he had never entered the house. He admitted that he had been staying at G's house on and off at the time the burglary occurred. He testified that he knew S.G.'s sister, that it was common for S.G. and A.E. to come to the house where he was staying, and that the three frequently played video games. When asked why S.G. denied knowing him, Ward stated that "I don't — I don't know what was wrong with him. He — he — he don't know me well but he knows me. He's hung out with me a few times. I wouldn't actually say he knows me well, though." Ward additionally testified that Chamblee had given him a ride and that he had given her a bag containing five or six dollars worth of quarters to use for the wash and some baseball caps to place with his clothes but that none of the items were stolen.

¶11. The jury found Ward guilty of burglary. The trial court sentenced Ward to serve a term of twenty-five years in the custody of the Mississippi Department of Corrections, without the benefit of parole, suspension, or reduction of sentence.[5]

¶12. Ward now argues that the evidence was insufficient to support a conviction of burglary, that the verdict was contrary to the weight of evidence, that evidence of the out-of-

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[5]Ward was charged and sentenced as a habitual offender.

court statements of S.G. and A.E. were improperly admitted, and that Ward's trial was rendered unfair by the improper use of out-of-court statements. Because the issue of whether the evidence was insufficient to support a conviction is dispositive, the remaining issues are not addressed.

ANALYSIS

¶13. Ward argues that because prior inconsistent statements are not admissible as substantive evidence of the defendant's guilt, the State presented no substantive evidence of Ward's connection to the burglary. Thus, he contends that the evidence presented at trial was insufficient to support a conviction of burglary.

¶14. A challenge to the sufficiency of the evidence is reviewed in the light most favorable to the State, "giving the State the benefit of all favorable inferences reasonably drawn from the evidence." ***Henley v. State***, 136 So. 3d 413, 415 (Miss. 2014) (citing ***Graham v. State***, 120 So. 3d 382, 386-87 (Miss. 2013)). This Court must reverse and render "[i]f the facts and inferences so considered 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 . . . ." ***Id.*** at 415-16 (internal quotation marks omitted) (quoting ***Edwards v. State***, 469 So. 2d 68, 70 (Miss. 1985)).

¶15. Ward moved for a directed verdict at the close of the State's case-in-chief. The trial court denied the motion, finding that A.E.'s statement and Officer Hollingsworth's testimony created a question for the jury. Although Ward did not renew his motion for directed verdict at the close of the evidence, he requested a peremptory jury instruction that stated, "The

Court instructs the Jury that your verdict shall be, 'We the Jury find the defendant, not guilty.'" Ward also submitted a Motion for New Trial in which he argued the sufficiency of the evidence. *See* ***Holland v. State***, 656 So. 2d 1192, 1197 (Miss. 1995); ***Woods v. State***, 242 So. 3d 47, 54 (Miss. 2018).

¶16. Ward argues that the substantive evidence submitted was wholly insufficient to support a conviction of burglary. The elements of burglary of a dwelling are "(1) unlawful breaking and entering, and (2) intent to commit a crime therein." ***Jackson v. State***, 90 So. 3d 597, 604 (Miss. 2012) (citing ***Kirkwood v. State***, 52 So. 3d 1184, 1187 (Miss. 2011)). *See* Miss. Code Ann. § 97-17-23(1) (Rev. 2014). The State must prove beyond a reasonable doubt that the defendant committed all elements of the crime. ***Brown v. State***, 556 So. 2d 338, 340 (Miss. 1990). The burden of proof does not shift from the State. ***Id.*** at 339-40 (citing ***McVeay v. State***, 355 So. 2d 1389, 1391 (Miss. 1978)).

¶17. At trial, both S.G. and A.E. repeatedly denied that Ward had been involved in the burglary. During A.E.'s testimony, the State submitted A.E.'s statement in which he implicated Ward in the burglary as impeachment evidence. However, this Court previously has held that "it was firmly embedded in hornbook and case law that unsworn prior inconsistent statements were to be used for impeachment purposes only." ***Id.*** at 341 (citing ***Moffett v. State***, 456 So. 2d 714, 719 (Miss. 1984), *overruled on other grounds by* ***Portis v. State***, 245 So. 3d 457 (Miss. 2018). In ***Brown***, the defendant's conviction rested on two written prior inconsistent statements. ***Id.*** at 339. Because nothing else of substance was admitted, this Court reversed the defendant's burglary conviction. ***Id.*** This Court stated that

"[t]he rule seems to be universal that the impeaching testimony does not establish or in any way tend to establish the truth of the matters contained in the out-of-court contradictory statement."[6] ***Id.*** (quoting ***Moffett***, 456 So. 2d at 719-20).

¶18. Similarly, while the prosecutor referred to A.E.'s statement and the officer's testimony as impeachment evidence, she ultimately sought to use it as substantive evidence. Although our caselaw clearly prohibits this, the State tries to do the same thing on appeal. As in ***Brown***, here the State urged the jury to consider the inconsistent statements as evidence of guilt. In closing arguments, the prosecuting attorney stated,

> And then you've heard from [A.E.], and you've got his statement in evidence. And I encourage you to go back there and read that statement, where he admits, "Yeah, that's my handwriting. Yeah, that's my statement." But part of that statement is true and part of it's not, and the part that's not true is any mention of Pop or Poppa or the defendant, Joseph Ward. Everything's true except for when we talk about him. Then it's not true. Well, again, I submit to you, what's his reasoning today for it to be true then and it not be true today?
>
> . . . .
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> Again, I would ask for you to recall that both [S.G.] and [A.E.] told — made statements to — or excuse me, made statements to Deputy Kris Hollingsworth, and they told you that not — or told him that not only did they go into the home but that the defendant, Joseph Ward, went in there with them. . . . And that they were — it was their job to dispose of some of the items from the home. And, in fact, they were paid to hide those items.

The prosecuting attorney continued,

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[6]*See also* ***Moffett***, 456 So. 2d at 719 ("The prior inconsistent out-of-court statements made by one not a party may not be used as substantive evidence."); ***Carothers v. State***, 152 So. 3d 277, 284 (Miss. 2014) ("We hold that, to prevent abuse of [Mississippi] Rule [of Evidence] 607, impeachment should not be allowed where the trial court finds the purported purpose of impeachment for offering the statement(s) is in bad faith, or is subterfuge to mask the true purpose of offering the statement(s) to prove the matter asserted.").

> And one of those exhibits is [A.E.]'s written statement. . . . The statement from [A.E.] where he states that the defendant, as well as he and [S.G.], all went into the Rigdons' home and that later the defendant paid him to go hide the things that the law enforcement ultimately recovered.
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> Both [A.E.] and [S.G.] ultimately — initially had the same story that implicated the defendant, but it's until they get up here today that they want to change the part where the defendant was ever involved.

¶19. As previously stated, "a prosecutor may not use prior statements of a witness 'under the guise of impeachment for the primary purpose of placing before the jury substantive evidence which is not otherwise admissible.'" ***Harrison v. State***, 534 So. 2d 175, 178 (Miss. 1988) (emphasis omitted) (quoting ***United States v. Livingston***, 816 F.2d 184, 192 (5th Cir. 1987)). A.E. testified that he had lied in his written statement in which he implicated Ward in the burglary because he was under pressure from law enforcement and because he was scared. At trial, A.E. denied that Ward had burglarized the Rigdons' home.

¶20. The substantive evidence submitted, excluding the impeachment testimony, is insufficient to establish that Ward was involved in the burglary of the Rigdons' home. Excluding the evidence presented solely for impeachment purposes, the following was asserted at trial: that at the time of the burglary, Ward was staying in the same apartment as G, which was close to the Rigdons' house; that Ward knew S.G. and A.E.; that, according to A.E.'s testimony, the door to the Ridgdons' home was already open and the house was already in disarray when A.E. and S.G. entered; and that Ward gave Chamblee a bag of coins to put in her trunk. A reasonable jury could not conclude from the evidence, beyond a reasonable doubt, that Ward had even been involved in the burglary of the Rigdons' house.

¶21. The only evidence suggested in the State's brief is the testimony of Deputy

Hollingsworth regarding A.E.'s and S.G.'s statements to him on the day of the arrest. The trial court allowed that testimony, like the written statements, only for the purposes of impeachment. Accordingly, on appeal, the State failed to identify any admissible evidence for purposes of proving the elements of the burglary charge against Ward.

¶22. Both S.G. and A.E. admitted that they had broken into the Rigdons' home and both denied that Ward had been involved in the burglary. S.G. stated that Ward had not been involved in the burglary at all, and A.E. testified that they had attempted to get Ward to sell the stolen items that they had taken from the Rigdons' house but that Ward had not done so. Although Bernard testified that a five-gallon jug of coins had been taken from his house, Chamblee did not testify about the size of the bag of coins that Ward gave her or about the approximate amount of coins contained in the bag. Further, Ward testified that he gave Chamblee only around five dollars in coins so he could do his laundry. Because the State used prior inconsistent statements as substantive evidence in this case and because the remaining evidence was insufficient to prove the elements of burglary, this Court reverses and renders.

CONCLUSION

¶23. Because S.G. and A.E.'s prior inconsistent statements and Deputy Hollingsworth's testimony were improperly considered as substantive evidence and because the substantive evidence presented in this case was insufficient to support Ward's burglary conviction, we reverse Ward's conviction and sentence and render judgment acquitting and discharging Ward.

¶24. **REVERSED AND RENDERED.**

RANDOLPH, C.J., KITCHENS, P.J., COLEMAN, MAXWELL, BEAM, CHAMBERLIN, ISHEE AND GRIFFIS, JJ., CONCUR.