IN THE COURT OF APPEALS 09/17/96

OF THE

STATE OF MISSISSIPPI

NO. 92-KA-01114 COA

DAVID JAMES CALCOTE

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JERRY O. TERRY

COURT FROM WHICH APPEALED: HARRISON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

MICHAEL C. HESTER

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: PAT FLYNN

DISTRICT ATTORNEY: STEPHEN B. SIMPSON

NATURE OF THE CASE: CRIMINAL -- BURGLARY OF A DWELLING

TRIAL COURT DISPOSITION: GUILTY -- SENTENCED TO A TERM OF TEN YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS

BEFORE BRIDGES, P.J., COLEMAN, AND PAYNE, JJ.

COLEMAN, J., FOR THE COURT:

Pursuant to the jury's verdict of guilty of burglary of a dwelling, the Harrison County Circuit Court sentenced the Appellant, David James Calcote, to serve a term of ten years in the custody of the Mississippi Department of Corrections. Calcote's first trial ended in a mistrial, and the guilty verdict was rendered at a second trial held fifteen days later. Calcote appeals on the failure of the circuit court to provide to him a court reporter's transcript of the first trial, and he argues that the verdict is contrary to law and the weight and sufficiency of the evidence. We affirm the trial court's judgment of Calcote's guilt of the crime of burglary of a dwelling and sentence to serve ten years in the custody of the Mississippi Department of Corrections.

I. FACTS

On the night of May 15, 1991, David James Calcote was arrested for burglary of an apartment occupied by Rhonda Whitson. The manager of the apartment complex, Eugene Chapman, testified that he heard the sound of glass breaking while he was in his apartment, left his apartment to inspect, and found a window broken at Whitson's apartment. After he had gone to his apartment to call the police, Chapman went back outside in time to see Calcote coming out of the broken window with a video cassette recorder (VCR) in his hands. Chapman, who was carrying a walking stick, told Calcote to stay where he was because the police had been called and were on their way to the apartments. At that point, Calcote dropped the VCR in the grass and got into a confrontation with Chapman. During the fight that ensued, Calcote grabbed the walking stick and hit Chapman with it twice. Chapman escaped the altercation with Calcote, and Calcote left carrying Chapman's walking stick with him.

After the police arrived, Chapman identified Calcote and gave a description of him to the officers. The police found Calcote in a neighboring apartment complex at a friend's apartment. The police took Calcote into custody, and when the police arrested him, Calcote had Chapman's walking stick in his possession.

Calcote was tried in the Circuit Court of Harrison County, First Judicial District, on September 30, 1992, and this trial ended in a mistrial. He was retried in the same court two weeks later, when he was found guilty of burglary of a dwelling and sentenced to serve a term of ten years in the Mississippi Department of Corrections. Calcote has appealed from the trial court's judgment of his guilt of burglary of a dwelling.

II. ISSUES AND THE LAW

In his brief, Calcote poses the following two issues for our analysis and resolution:

> (1) Was the trial court in error in denying to the accused a transcript of the first trial held only 15 days prior to the second trial from which this appeal is taken?
>
> (2) Was the jury verdict contrary to the law and the weight and sufficiency of

the evidence?

This Court considers these issues to determine whether the trial court erred so as to justify a reversal of the trial court's judgment of Calcote's guilt.

> **(1) Was the trial court in error in denying to the accused a transcript of the first trial held only 15 days prior to the second trial from which this appeal is taken?**

We noted that Calcote's first trial on the last day of September, 1992, resulted in a mistrial. The second trial was set for October 15, 1992, fifteen days later. On October 8, 1992, Calcote moved ore tenus to receive a transcript from the first trial. After a hearing on that motion, the trial court denied it, and the second trial proceeded as scheduled one week later.

Calcote contends that the failure of the trial court to grant him a transcript of his first trial denied him a fair trial. Calcote's counsel states, "[I have] not been able to adequately prepare for trial because I have been denied a transcript of the first trial." The United States Supreme Court has established the principle that the state must, as a matter of equal protection, provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners. *Britt v. North Carolina,* 404 U.S. 226, 92 S. Ct. 431, 433-34, 30 L. Ed. 2d. 400 (1971). In *Britt,* the United States Supreme Court identified two factors that were "relevant to the determination of need: (1) the value of the transcript to the defendant in connection with the appeal or trial for which it is sought, and (2) the availability of alternative devices that would fulfill the same functions as a transcript." *Britt,* 92 S. Ct. at 433-34. Further, "a transcript of a prior mistrial would be valuable to the defendant in at least two ways: as a discovery device in preparation for trial, and as a tool at the trial itself for the impeachment of prosecution witnesses." *Id.* at 434.

The facts in *Britt v. North Carolina* were similar to the situation encountered by David Calcote. In *Britt,* the petitioner's three-day murder trial ended in a mistrial, and a retrial was scheduled for the following month. *Id.* at 433. The petitioner filed a motion alleging that he was indigent, and requested a free transcript of the first trial. *Id.* In denying the motion, the North Carolina Court of Appeals affirmed the trial court by stating that the record of the case did not reveal a sufficient need for the transcript. *Id.* The United States Supreme Court agreed. It wrote:

> The second trial was before the same judge, with the same counsel and the same court reporter, and the two trials were only a month apart. In these circumstances, the court [below] suggested that petitioner's memory and that of his counsel should have furnished an adequate substitute for a transcript.

Id. at 434.

In *Ruffin v. State,* 481 So. 2d 312, 315 (Miss. 1985), the Mississippi Supreme Court, citing *Britt,* denied an indigent a transcript. The supreme court concluded "that appellant's reason to obtain the transcript bears no indication that the trial transcript would have been useful, or necessary to defendant's case or that alternative devices were unavailable." The court continued, "Appellant was not denied the transcript because he was indigent . . . The concept of equal protection, although greatly expanded in recent years, does not require the granting to an indigent accused rights or privileges not available to the non-indigent." *Id.* at 315 (quoting *State v. Jones,* 545 S.W. 2d 659, 664 (Mo. Ct. App. 1976).

In the case *sub judice,* Calcote's first trial had only an hour and thirty minutes worth of testimony. The State had four witnesses, three of whom were brief, and the defense did not put on any witnesses, nor did the Appellant testify. Most importantly, the time lapse between the first trial and the second trial was only fifteen days. The same counsel, though appointed, was present at both trials. There is nothing present in the record of the second trial that would indicate that counsel for the Appellant was unable to prepare for trial due to the lack of a first trial transcript. The same witnesses were called to testify, and no new evidence was presented. Only twice, once with the witness Eugene Chapman, and once with the apartment renter, Rhonda Whitson, did Calcote's counsel refer to those witnesses' testimony from the first trial, and each time Calcote's counsel accepted that witness' explanation of his or her earlier testimony. The Mississippi Supreme Court held in *McClendon v. State*, 387 So. 2d 112, 115 (Miss. 1980), that not granting a transcript to a defendant from the first trial "did not prejudice the defendant in this trial because his counsel had equal knowledge with the state's attorney of the events of the first trial."

The Appellant relies on *Fielder v. State,* 569 So. 2d 1170 (Miss. 1990), to state his argument. However, the facts in *Fielder* are not applicable to the case *sub judice*. In *Fielder,* the first trial was ruled a mistrial, and the defendant was denied a transcript to prepare for the second trial. *Id.* at 1172. These are the only similarities between the cases. Under the facts of that case, the second trial was ten months after the first, it was heard by a different judge, and the defendant was represented by a different public defender. *Id*. at 1172-73. There was also conflicting testimony between two witnesses which made the transcript even more necessary to the defendant for adequate preparation. *Id.* In *Fielder*, the Mississippi Supreme Court ruled that in the circumstances there presented, the trial court committed reversible error when it denied the appellant's request for a transcript of the first mistrial. *Id.* at 1173.

The situation faced by David Calcote before his second trial is very different than that presented in *Fielder*. The time between the first and second trial was only fifteen days; the testimony at the trial was only approximately ninety minutes in length; and Calcote was represented by the same counsel. Defense counsel had firsthand knowledge of the first trial because he was there. Other methods were available to the defense counsel as a alternative to a transcript such as, as stated in *Britt,* the appellant's memory and that of his counsel. *Britt,* 92 S. Ct. at 434.

The trial court did not abuse its discretion by denying Calcote a copy of the transcript from the first proceeding according to the standards set out by the United States Supreme Court and the Mississippi Supreme Court. Thus, we conclude that Calcote was not prejudiced by the trial court's denial of a transcript of the first trial. We accordingly decide this issue adversely to Calcote, and affirm the trial court's denial of Calcote's ore tenus motion to provide him a transcript of the first trial.

(2) Was the jury's verdict contrary to the law and weight and sufficiency of the evidence?

Section 97-17-19 of the Mississippi Code of 1972, pursuant to which the grand jury indicted Calcote, establishes the following two elements of the crime of burglary of a dwelling house: 1) breaking and entering of any dwelling house 2)with intent to commit a crime. David Calcote was found guilty of this crime and sentenced to the maximum punishment of ten years in the penitentiary as an habitual offender. Calcote argues that the evidence which the State presented against him did not support the jury's verdict of guilty of the burglary of a dwelling house, the felony for which the grand jury had indicted him.

The Mississippi Supreme Court has established a standard for reviewing a "sufficiency of the evidence question." That standard is:

> [T]he sufficiency of the evidence as a matter of law is viewed and tested in a light most favorable to the State. The credible evidence consistent with [Calcote's] guilt must be accepted as true. The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. Matters regarding the weight and credibility of the evidence are to be resolved by the jury. [The Supreme Court of Mississippi is] authorized to reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty.

McClain v. State, 625 So. 2d 774, 778 (Miss. 1993) (citations omitted).

The evidence, taken in light most favorable to the State, would allow reasonable and fair-minded jurors to find Calcote guilty of the felony of the burglary of a dwelling house. Eugene Chapman, the manager of the apartment complex, testified: "I saw him [Calcote] coming out of the apartment. He was half in the apartment and half out the window." Although Calcote denies the burglary, and although Chapman was the only witness who placed Calcote at the scene of the burglary, Chapman positively identified Calcote as the burglar. This testimony established the "breaking and entering of a dwelling" element of the burglary charge. In addition, Chapman's testimony that he saw Calcote as he exited the window of the apartment with a VCR in his hands established Calcote's intent to commit the crime of larceny as a part of his breaking into the apartment. The intent to commit a crime is the second element which Section 97-17-19 requires to constitute the felony of burglary of a dwelling house.

Because Eugene Chapman was blind in one eye, and because the burglary was committed at night, Calcote argues that Chapman misidentified him as the intruder. Mr. Chapman positively identified Calcote to the police that night and in court at trial. In his brief Calcote cites *Williams v. State*, 512

So. 2d 666, 670 (Miss. 1987), in which the Mississippi Supreme Court held, "The testimony of a single uncorroborated witness is sufficient to sustain a conviction, even though there may be more than one person testifying to the contrary." The police officers' testimony that Calcote had Chapman's walking stick when they arrested him in the another apartment tended to corroborate Chapman's identification of Calcote as the perpetrator of the burglary of Whitson's apartment. Thus, this Court holds that the evidence which the State presented in the trial court was sufficient to establish both of the elements of the felony of burglary of a dwelling house and to establish that Calcote was the perpetrator of the crime.

Were the jury's verdict that Calcote was "guilty as charged" contrary to the weight of the evidence, Calcote would be entitled to a new trial. However, the trial court denied Calcote's motion for a new trial. The Mississippi Supreme Court wrote in *McClain:*

> Moreover, the challenge to the weight of the evidence via motion for a new trial implicates the trial court's sound discretion. Procedurally such challenge necessarily invokes Miss. Unif. Crim. R. of Cir. Ct. Prac. 516. New trial decisions rest in the sound discretion of the trial court, and the motion should not be granted except to prevent an unconscionable injustice. We reverse only for abuse of discretion, and on review we accept as true all evidence favorable to the State.

McClain, 625 So. 2d at 781. All matters concerning the weight and credibility of the evidence are to be resolved by the jury. *Id.* at 778.

The supreme court further explains in the case *Williams v. State,* 463 So. 2d 1064, 1068 (Miss. 1985):

> On the other hand, if there is substantial evidence opposed to the motion, that is, evidence of such quality and weight that, having in mind the beyond a reasonable doubt burden of proof standard, fair-minded men in the exercise of impartial judgment might reach different conclusions, the motion should be denied and the jury's verdict allowed to stand.
>
> In other words, once the jury has returned a verdict of guilty in a criminal case, we are not at liberty to direct that the defendant be discharged short of a conclusion on our part from that the evidence, taken in the light most favorable to the verdict, no reasonable, hypothetical juror could find beyond a reasonable doubt that the defendant was guilty.

The jury's verdict against Calcote was based on testimony from the police that investigated the crime and the apartment manager who witnessed the crime. The defense wanted the jury to believe that Chapman had mistakenly identified Calcote because of Chapman's bad eye and/or the poor lighting at night. The fact is Chapman had dealt with Calcote in eviction proceedings when Calcote was a tenant at Chapman's apartments. Chapman not only recognized Calcote, he called Calcote by name. In addition, the defense tried to infer that Chapman "had a personal dislike for Mr. Calcote" because Calcote still owed money for the apartment he rented from Chapman.

Any possible conflicts arising from the evidence created questions that only the jury could resolve in their deliberations. The jurors listened to all of the testimony presented and unanimously decided that the weight of the evidence established Calcote's guilt beyond a reasonable doubt. This Court finds that the State's evidence was sufficient to support Calcote's guilt of burglary of Rhonda Whitson's dwelling. It further finds that because the jury's verdict was not against the great weight of the evidence, the trial court did not err when it denied Calcote's motion for a new trial.

III. SUMMARY

The trial court's failure to provide Calcote with a transcript of his first trial for burglary was not error under the circumstances presented. An indigent does have the same right to a transcript as a defendant who is not indigent; however, in this instance the transcript of Calcote's first trial was not necessary for his preparation for his second trial. Contrary to Calcote's contention, the evidence presented at the second trial was sufficient to sustain the jury's verdict of guilty of Calcote's having burglarized Whitson's apartment; and the jury's verdict was not against the overwhelming weight of the evidence. Therefore, this Court affirms the trial court's judgment of Calcote's guilt of the felony of burglary of a dwelling and its sentence of Calcote as an habitual offender to serve ten years in the custody of the Mississippi Department of Corrections without hope of parole or probation.

THE HARRISON COUNTY CIRCUIT COURT'S JUDGMENT OF THE APPELLANT'S GUILT OF THE CRIME OF BURGLARY OF A DWELLING AND ITS SENTENCE TO A TERM OF TEN YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AS AN HABITUAL OFFENDER WITHOUT THE HOPE OF PAROLE OR PROBATION ARE AFFIRMED. COSTS ARE ASSESSED TO HARRISON COUNTY.

FRAISER, C.J., BRIDGES, P.J., BARBER, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR. THOMAS, P.J., NOT PARTICIPATING.