

IN THE COURT OF APPEALS 12/17/96

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-01359 COA

STEVE SMITH A/K/A STEVEN CRAIG SMITH

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

PER CURIAM AFFIRMANCE MEMORANDUM OPINION

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. KENNETH LEVENE THOMAS

COURT FROM WHICH APPEALED: COAHOMA COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

AZKI SHAH

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: BILLY L. GORE

DISTRICT ATTORNEY: LAWRENCE Y. MELLEN

NATURE OF THE CASE: CRIMINAL: BURGLARY

TRIAL COURT DISPOSITION: BURGLARY: SENTENCED TO SERVE A TERM OF 5 YRS IN

THE MDOC; THE DEFENDANT SHALL MAKE RESTITUTION TO THE VICTIM IN THE AMOUNT OF \$300.00; SENTENCE SHALL RUN CONSECUTIVELY TO ANY AND ALL PREVIOUSLY IMPOSED

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

PER CURIAM:

This is a criminal appeal from the Circuit Court of Coahoma County wherein Steve Smith a/k/a/ Steven Craig Smith was convicted of burglary. The trial court sentenced Smith to serve five years in the custody of the Mississippi Department of Corrections and ordered him to pay restitution in the amount of \$300.00. Smith appeals to this Court arguing that the verdict is against the overwhelming weight of the evidence. Finding his assignment of error without merit, we affirm.

DISCUSSION

WHETHER THE VERDICT IS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE?

Smith asserts that the verdict is against the overwhelming weight of the evidence. Specifically, Smith attacks the testimony of the State's witness, Willie McGee. Smith argues that McGee's testimony was so incredible due to his obvious state of intoxication at the time of the alleged sighting of Smith that reasonable and fair-minded jurors could only find Smith not guilty.

The Mississippi Supreme Court has held that "[t]he jury is charged with the responsibility of weighing and considering the conflicting evidence and credibility of the witnesses and determining whose testimony should be believed." *McClain v. State*, 625 So. 2d 774, 781 (Miss. 1993) (citations omitted); *see also Burrell v. State*, 613 So. 2d 1186, 1192 (Miss. 1993) (witness credibility and weight of conflicting testimony are left to the jury); *Kelly v. State*, 553 So. 2d 517, 522 (Miss. 1989) (witness credibility issues are to be left solely to the province of the jury). Furthermore, "the challenge to the weight of the evidence via motion for a new trial implicates the trial court's sound discretion." *McClain*, 625 So. 2d at 781 (citing *Wetz v. State*, 503 So. 2d 803, 807-08 (Miss. 1987)). The decision to grant a new trial "rest[s] in the sound discretion of the trial court, and the motion [for a new trial based on the weight of the evidence] should not be granted except to prevent an unconscionable injustice." *Id.* This Court will reverse only for abuse of discretion, and on review will accept as true all evidence favorable to the State. *Id.*

In the present case, Willie McGee testified on behalf of the State. McGee stated that on the morning of March 18, 1995, he arrived home between 3:30 and 4:00 A.M.. McGee's home was next door to The Warehouse, a clothing resell business. McGee testified that he observed Steve Smith coming out the broken door of The Warehouse building. According to McGee, Smith had an armful of clothing when he stated "Well, the door is open. You can go in there and get you something." McGee admitted that he had been drinking, but denied being intoxicated. McGee testified that he knew Smith for eight-to-nine years and had no doubt that the man he observed on March 18, 1995, was the

Defendant, Steve Smith. After observing Smith, McGee went into his house, called the police, looked up the telephone number of the owner of The Warehouse in the telephone book, and called the owner.

In addition to McGee's testimony, the investigating officer, Kenneth Kiger, testified on behalf of the State, as did the owner of The Warehouse, Oliver Hicks. Smith testified in his own defense, denying that he had burglarized The Warehouse. Smith admitted that he and McGee knew one another by name.

The jury heard the evidence presented by both the State and by Smith in his own defense. The jury's decision to believe the State's evidence and witnesses was well within its discretion. Moreover, the jury was well within its power to weigh the evidence and the credibility of the McGee's testimony and to convict Smith. We do not find that the jury's verdict was so contrary to the overwhelming weight of the evidence that, to allow it to stand, would be to promote an unconscionable injustice. Accordingly, we find Smith's assignment of error to be without merit.

THE JUDGMENT OF THE CIRCUIT COURT OF COAHOMA COUNTY OF CONVICTION OF BURGLARY AND SENTENCE OF FIVE YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITH SENTENCE TO RUN CONSECUTIVELY TO ANY AND ALL SENTENCES PREVIOUSLY IMPOSED, AND TO PAY RESTITUTION IN THE AMOUNT OF \$300 IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO COAHOMA COUNTY.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.