IN THE COURT OF APPEALS 08/20/96

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00431 COA

JAMES CULPEPPER

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. BILLY JOE LANDRUM

COURT FROM WHICH APPEALED: JONES COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

THOMAS GENE CLARK

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: DEIRDRE MCCRORY

DISTRICT ATTORNEY: JEANNENE T. PACIFIC

NATURE OF THE CASE: CRIMINAL - GRAND LARCENY

TRIAL COURT DISPOSITION: CONVICTED OF GRAND LARCENY AND SENTENCED AS A HABITUAL OFFENDER TO FIVE YEARS IN THE CUSTODY OF M.D.O.C.

BEFORE BRIDGES, P.J., KING, AND McMILLIN, JJ.

BRIDGES, P.J., FOR THE COURT:

James "Chico" Culpepper was convicted of grand larceny and was sentenced as a habitual offender to a term of five years in the custody of the Mississippi Department of Corrections. Culpepper argues on appeal that the verdict was against the overwhelming weight of the evidence, and that the prosecutor's use of the phrase "The guilty run when no man pursueth" in her closing argument constituted plain error. Finding no merit in either of Culpepper's issues, we affirm the decision of the lower court.

THE FACTS

On the afternoon of February 17, 1994, James "Chico" Culpepper entered Arthur's Clothes Shop in Laurel, Mississippi. Prior to entering the store, Culpepper was noticed and recognized by Robert Froman, the manager of Arthur's Clothes Shop. While in the store, Culpepper picked up a stack of pants consisting of approximately ten pairs valued at nearly $450.00. S.L. Johnson, an employee of the store, then noticed that Culpepper appeared to be leaving the store with the stack of pants. Realizing that Culpepper had not paid for the pants, Johnson shouted for Culpepper to drop the pants.

Culpepper dropped the pants in and about the doorway of the shop as he made his hasty exit. At that point, Johnson chased Culpepper out the door of the shop, where he stopped and watched Culpepper disappear around the corner. Patrol officer Jessie Hunter, the first responding police officer, stated that upon his arrival at the scene, he noticed pants strewn from outside the doorway to the inside of the store, with at least one pair of pants lying outside the doorway.

ARGUMENT AND DISCUSSION OF THE LAW

> I. WHETHER THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

On appeal, Culpepper contends that the verdict is against the overwhelming weight of the evidence, which he raised in his motion for a new trial. *May v. State*, 460 So. 2d 778, 780 (Miss. 1984). Nevertheless, in the body of his argument on this point it appears that he is, in fact, claiming that the evidence was insufficient as a matter of law to sustain his conviction. This would entitle him to a JNOV, rather than a new trial. Because of the uncertainty surrounding Culpepper's position, we have elected to address both issues.

Our standards for reviewing challenges to convictions based on both the weight of the evidence and the sufficiency of the evidence are well established. As to each element of the offense, we consider all of the evidence in the light most favorable to the verdict. We reverse and render when, with respect to an element of the offense charged, the evidence 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); *Wetz v. State*, 503 So. 2d 803, 808 (Miss. 1987). As to the related but separate issue of whether the verdict is contrary to the overwhelming weight of the evidence, the trial court is given discretion to order a

new trial in the face of overwhelming evidence contrary to the jury's verdict in order to prevent an unconscionable injustice. *McClain*, 625 So. 2d at 781 (citation omitted). This Court, on appeal, will reverse and order a new trial upon a determination that the trial court abused its discretion by denying the new trial motion.

In his appeal Culpepper denies that the State carried its burden of proving the elements of the offense, specifically, the elements of taking, asportation, and felonious intent. Culpepper argues that simply picking up the pants and holding them in plain view is not a taking. He also sought to imply that his actions were justified by his being a shopper in the store. A taking, also referred to as a caption, occurs "when the defendant takes possession; he takes possession when he exercises dominion and control over the property." *Harbin v. State*, 402 So. 2d 360, 361 (Miss. 1981). The testimony of Johnson indicated possession coupled with dominion and control in that he saw Culpepper moving toward the door with the stack of pants in his hands. It is from Johnson's observations which we derive a taking. Culpepper's actions became criminal when he formed the felonious intent.

In his brief to this Court, Culpepper also denies that the evidence adduced by the State at trial shows asportation of the pants. The law as stated in *Mapp v. State*, 162 So. 2d 642, 645 (Miss. 1964), which was also cited in Culpepper's brief, disposes of this argument. In *Mapp*, the court explained:

> It is not necessary to constitute a sufficient asportation, that the goods be removed from the owner's premises. To remove them with the requisite felonious intent from one part of the premises to another, or from the spot or house where they were found, or even from one place to another in the same room, is a sufficient asportation.

Id. Johnson and the responding officer testified that the pants had been moved and strewn in and about the doorway of Arthur's Clothes Shop, clearly indicating asportation.

Culpepper also argues, without factual support, that the requisite felonious intent was not proved. Clearly it was within the jury's province to infer the requisite felonious intent from the circumstances as described at trial and above. That Culpepper made no effort to regain possession of the pants does not negate the requisite felonious intent formed prior to his taking of the pants. *Mapp,* 162 So. 2d at 645. We find Culpepper's challenge to his conviction, whether from the standpoint of the weight or the sufficiency of the evidence, is without merit.

> II. WHETHER THE LOWER COURT ERRED IN ALLOWING THE USE OF THE REMARK "THE GUILTY RUN WHEN NO MAN PURSUETH" IN THE STATE'S CLOSING ARGUMENT.

Culpepper also objects for the first time on appeal to this Court to the prosecutor's utterance of "[t] he guilty run when no man pursueth" during the State's closing argument. We need not reach this discussion because Culpepper's contention is procedurally barred since the record does not reflect a timely objection by Culpepper to this remark at the trial level. *Earley v. State,* 595 So. 2d 430, 433

(Miss. 1992). Based on the foregoing, Culpepper's second argument is also without merit.

THE JUDGMENT OF THE JONES COUNTY CIRCUIT COURT OF CONVICTION OF GRAND LARCENY AND SENTENCE OF FIVE (5) YEARS AS A HABITUAL OFFENDER IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO JONES COUNTY.

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