IN THE COURT OF APPEALS 11/12/96

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00079 COA

PERRY BYRD

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. GEORGE C. CARLSON

COURT FROM WHICH APPEALED: DESOTO COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

SIDNEY F. BECK, JR.

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JEFFREY A. KLINGFUSS

DISTRICT ATTORNEY: ROBERT L. WILLIAMS

NATURE OF THE CASE: CRIMINAL-BURGLARY AND SIMPLE ASSAULT

TRIAL COURT DISPOSITION: COUNT I, BURGLARY-SENTENCED TO SERVE 10 YEARS IN THE MDOC, SUSPENDED; COUNT II, SIMPLE ASSAULT-SENTENCED TO SERVE 6 MONTHS IN THE MDOC, TO RUN CONCURRENT WITH COUNT I, SUSPENDED.

EN BANC

FRAISER, C.J., FOR THE COURT:

Perry Byrd (Byrd) was indicted, tried and convicted of simple assault and burglary in the Circuit Court of Desoto County. His appellate complaints are directed toward the sufficiency and weight of the evidence. While our scope of review would hardly warrant reversal if the conviction rested on competent credible evidence, we are confronted with more egregious errors affecting Byrd's basic constitutional right to a fair trial. Cumulative and pyramided contravention of settled legal principles which first authorized then required the trial court jury to use impeaching evidence as substantive proof of an essential element of the burglary charge requires reversal of that conviction.

FACTS

Early on the morning of May 31, 1994, Byrd went to see his girlfriend Velma Green (Velma) at her apartment. Byrd and Velma had been involved for several years, although at the time of this incident, the status of their relationship was in dispute. When Byrd arrived at Velma's door, his knock was answered by his friend and Velma's cousin, Edward Green (Edward). Edward was on the floor in a drunken stupor when Byrd arrived and let him in, forgetting that Velma was upstairs in bed with another man. Byrd awakened the sleeping couple. From that point, the eyewitnesses' reflections, while similar, are not precisely the same.

Velma testified that she was shocked to see Byrd in her bedroom because she had taken his key away from him. She stated that he simply stood at the foot of her bed without speaking, and she asked him to leave. Byrd left, but was back inside shortly thereafter. Velma related that Byrd did not hit anyone, and although he had a gun, he did not point it at anyone. When he was inside the second time, Byrd ripped the phones out of the wall and grabbed Velma around the waist. Velma went to her sister's apartment to call the police. At trial, she stated that Byrd did not threaten her nor did he harm her in any way.

Karloas D. Bell (Bell) was in bed with Velma when Byrd went upstairs. Bell testified that Byrd was verbally abusive, ripped the phone out of the wall, and hit Bell in the face with his fist.

According to Bell, Byrd left the room and returned with a gun. Byrd pointed the gun at Bell, who proceeded to jump out of the bedroom window.

Edward Green testified that he had known Byrd for about eight years. He opened the door for Byrd the morning of the incident. When asked how the door to Velma's apartment got broken, Edward replied that he and Byrd were standing outside the door talking and Velma shut and latched the door. A tussle ensued between Edward and Byrd. At some point, they both fell through the door and that is how Byrd gained reentry to Velma's apartment the second time.

Officer Wayne Hissong with the Southaven Police Department testified that the apartment door jamb was split.

Byrd took the stand in his own defense and stated that at the time of the incident, he understood that he and Velma were still together. He was working as a policeman in Helena, Arkansas and as a security officer at Southern Belle Casino in Robinsonville, Mississippi. On the morning of May 30, 1994, he left his shift at the casino early to go and see Velma. Edward let him in the apartment and

Byrd proceeded upstairs. He was shocked to see Velma in bed with someone else because they had been out together two days earlier. When Velma asked him to leave, he did so in a state of shock. He admits to having his gun stuck in the front of his pants because as a policeman he never leaves his weapon unsecured in his vehicle. Therefore, he took it inside with him, but stated that he never pointed it at anyone.

As Byrd went back downstairs, Edward met him and walked him outside. Someone shut the door behind them. He and Edward became embroiled in a scuffle, and as a result, both men fell against and through the closed door. At that point, Byrd went back upstairs to the bedroom. As he entered, he saw Bell with one leg out of the window. Bell screamed and "[o]ut the window he went." Byrd left Velma's apartment.

The state sought to impeach Edward by testimony from Officer Jim Caldwell of the Southaven Police Department that shortly after the incident occurred, Edward stated to him that Byrd had gained entrance to the apartment by kicking in the door.

When the testimony was concluded, the trial judge was not requested and did not instruct the jury that the impeaching statement could not be used as substantive evidence of a breaking and entry by Byrd, an essential element of the burglary charge. The trial judge then granted the State the following instruction, with our emphasis added:

> In Count 1, the Defendant, PERRY BYRD, is charged with the crimes of Burglary of an Inhabited Dwelling at Night while Armed with a Deadly Weapon, with the intent to commit some crime once inside, while the dwelling house was occupied by Velma Green, Edward Green and Karloas Bell, human beings.
>
> If the jury finds from the evidence in this case beyond a reasonable doubt that:

1.) The building was used by Velma Green as a dwelling house; and

> *2.) PERRY BYRD on or about May 31, 1994, broke into Velma Green's dwelling by kicking in the front door;*
>
> 3.) PERRY BYRD entered Velma Green's dwelling at night; and
>
> 4.) PERRY BYRD was armed with a 9MM pistol; and
>
> 5.) At that time Velma Green and other human beings were inside the dwelling; and
>
> 6.) PERRY BYRD intended to commit an assault, assault being a crime in the State of Mississippi, *then the Jury shall find PERRY BYRD guilty as charged.*
>
> *If the State has failed to prove any one or more of these elements beyond a reasonable doubt, then you shall find the Defendant not guilty in Count 1.*

The foregoing instruction was the *only* instruction granted by the court embracing the elements of the burglary charge. An instruction offered by Byrd's counsel which omitted the language "by kicking in

the front door" was denied by the court.

The district attorney then argued to the jury, with our emphasis:

> [T]he defendant is a strong man. He is not a small human being. He is physically capable of breaking a door. . . . It doesn't matter if you think Perry Byrd broke in the door when he initially came to the home or if Perry Byrd broke in the door after he was first inside and then left. . . . Edward Green says that Edward Green opened the door and the defendant went upstairs and then the defendant came downstairs. And while they were outside, Edward and the defendant tussled and struggled, and that's when the door broke. At least that's the way Edward and the defendant, Byrd, say it. . . . *But according to Officer Caldwell of the Southaven Police Department who saw Edward Green that very morning of the event, Edward Green the morning of the event told Officer Caldwell that Perry kicked in the door. So if you consider all of those things, you will say that all of the elements of instruction S-1have been met.*

The jury retired at 4:00 P.M. to consider its verdict, but later returned to the court with the

following query: THE COURT: . . . "The jury has a question concerning the wording in number two, count one, 'by kicking in the front door.'" The word "kicking" was underlined in the query. The jury asked "To what extent is the word "kicking," to be interpreted? Literally kicking or breaking in, etc.? " The trial court judge gave the following response: "Members of the jury, by law, I am not to instruct you further on this point." Shortly afterward (5:21 P.M.) the jury returned its verdict of guilty on Count I, the burglary charge.

DISCUSSION OF THE RELEVANT LAW

This case is fraught with serious errors fundamental to the judicial process. While we affirm the judgment and sentence for count II (simple assault), the burglary trial and conviction contain fatal flaws. Perusal of the record shows that the State prepared its case on the theory that Byrd reentered the Green apartment by kicking in the door. However, at trial, Edward, who opened the door for Byrd's first entry, testified as follows concerning his reentry:

> Q. How did the door get broken?
>
> A. Well, one while--you know, I was trying to talk to him and calm him down.
>
> Q. Who were you trying to calm down?
>
> A. Perry, you know. And we was standing by the door, and you know how two persons standing in front of a door and I'm telling him, you know, ya'll just trying to talk it over.

> You know, he's shouting and stuff like that. And I'm just 140 pounds, so I just put what I had and braced him like that. We were tumbling by that door. The chain was on the door, the little latch thing. And we just tumbled. You know, I'm trying to get him to just go outside and we could talk. Both of us fell and went through the door.

The State called Officer Jim Caldwell to impeach Edward's testimony. Officer Caldwell testified that Edward had previously stated to him that Perry Byrd entered the apartment by kicking in the door.

A brief review of the undisputed facts tells us:

> (A) The impeaching statement of Officer Caldwell that Edward told him that Byrd entered the apartment by kicking in the door was used as substantive evidence of an element of the burglary charge;
>
> (B) The district attorney argued the impeaching statement as substantive evidence of the charged crime;
>
> (C) The State's instruction told the jury that it was necessary for them to find that Byrd entered the dwelling "by kicking in the front door" before they could convict;
>
> (D) The jury acted on the instruction only after seeking additional information from the court concerning the manner of Byrd's entry;
>
> (E) The jury necessarily relied on the impeaching statement in finding that Byrd entered the dwelling by kicking in the door.

The Mississippi Supreme Court has consistently warned bench and bar regarding the limited use of impeaching testimony. In *Moffett v. State*, the court stated:

> It is hornbook law firmly imbedded in the case law of this State, that unsworn prior inconsistent statements may be used for impeachment of the witnesses' credibility regarding his testimony on direct examination. The prior inconsistent out-of-court statements made by one not a party may not be used as substantive evidence.
>
> . . .
>
> The 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.
>
> . . .
>
> One of the major premises underlying our rules of evidence is that no evidence may be credited which is not purified via the witnesses' oaths that the evidence is true.
>
> . . .
>
> [T]he function of the prior inconsistent statement is to impeach the credibility of the witness' direct testimony. It is to suggest to the fact finder that the direct testimony may not be true because the witness may not be worthy of belief with respect to the matter as to which he has testified.

Moffett v. State, 456 So. 2d 714, 719-20 (Miss. 1984) (citations omitted). The trial judge in *Moffett* did instruct the jury that the impeaching statement could not be used as substantive evidence of Moffett's guilt. *Id.* at 720. However, the supreme court stated "[c]onsidering that the prior unsworn statement was the sole support for a central issue in the case and considering the fact that the prosecuting attorney vigorously argued it as a reason why the jury should find Moffett guilty, the error was not cured." *Id.* The facts of *Brown v. State* are very similar to *Byrd*. In *Brown*, prior inconsistent statements of two witnesses were introduced in written form. *Brown v. State*, 556 So. 2d 338, 340 (Miss. 1990). The statements were supposedly made to investigating officers and implicated the defendant in a burglary. *Id.* "The witnesses whose out-of-court statements were introduced did not testify to any such facts in court. In fact, they testified to the contrary and denied the assertions made by the statements so introduced." *Id.* The trial court did not instruct the jury on the limited use of the prior inconsistent statements, and the supreme court held that such an instruction would not have cured the error. *Id.* The supreme court reaffirmed their decision in *Moffett* in *Conner v. State*, 632 So. 2d 1239, 1260-61 (Miss. 1993), *cert. denied*, 115 S. Ct. 314 (1994). The court stated that *Moffett*, a pre-rules case, had been reaffirmed by *Brown v. State*, and both cases were correct in holding that prior inconsistent statements cannot be used as substantive evidence. *Conner*, 632 So. 2d at 1260. The court in *Conner*, however, held that the error in admitting the prior inconsistent statement was cured by the granting of a limiting instruction that the statement was not to be considered proof of the truth of the statement. *Id.* However, the court went further by pointing out the inc urable error in *Brown*:

> In *Brown*, the jury was not instructed concerning how they should view the improperly admitted statement. The Court found that "[e]ven if a limiting instruction had been given, however, we doubt that it would have sufficed to cure the error, because without these statements, there simply was no case." *Brown*, 556 So. 2d at 340.

Conner, 632 So. 2d at 1261.

In this case the jury was specifically instructed by the court that it was necessary for them to use the impeaching evidence (entry by kicking in the door) before they could return the guilty verdict. When

the jury sought some amplification of the instruction, they were told that the court would not "instruct them further on the point." Shortly thereafter, the jury returned the guilty verdict. Even if the trial court had granted a limiting instruction, it would have been contradictory to the instruction it gave and that in and of itself would have been reversible error. There is not even room for an inference of forcible entry because (a) there is no record evidence, other than the impeaching statement, that Byrd gained reentry by kicking in the door; and (b) the jury was forbidden by the court's instruction to find forcible reentry by any other means than that contained in the impeaching statement. The error was incurable.

Moreover, in *Guilbeau v. State*, the Mississippi Supreme Court addressed the responsibilities of the parties and the court regarding incorrect jury instructions and stated:

> [W]here under the evidence a party is entitled to have the jury instructed regarding a particular issue and where that party requests an instruction which for whatever reason is inadequate in form or content, the trial judge has the responsibility either to reform and correct the proffered instruction himself or to advise counsel on the record of the perceived deficiencies therein and to afford counsel a reasonable opportunity to prepare a new corrected instruction. Where the trial judge fails in this duty and where the proffered instruction relates to a central issue in the case which is not covered by any other instruction given to the jury, we will reverse. *Harper v. State*, 478 So. 2d at 1018.

. . . .

> A close reading of *Harper* indicates this Court will reverse when the trial court fails in its responsibility to reform or advise counsel "where the proffered instruction relates to a central issue in the case which is not covered by any other instruction given to the jury. . . ."

Guilbeau v. State, 502 So. 2d 639, 642 (Miss. 1987).

It must be noted that no objection was timely made to the impeaching testimony and Byrd's counsel made no request for a limited instruction. We have no quarrel with the usual requirements of timely objection and instruction request. Indeed, Rule 105 of the Mississippi Rules of Evidence sets forth the requirement. The rule is not without exception, particularly in cases where a limiting instruction would be useless. *See Brown*, 556 So. 2d at 340.

Our notion of fair trial and fundamental rights undergirds all procedural rules promulgated by the Mississippi Supreme Court. In *Gray v. State*, the Mississippi Supreme Court reversed where an issue was not assigned as error and stated:

> Under the proper circumstances, this Court has a well established body of case law authorizing the noticing of an issue on its own motion when "plain error" is noted. Mississippi Supreme Court Rule 28(a)(3) states:
>
> > No issue not distinctly identified shall be argued by counsel, except upon request of the Court, but the Court may, at its option, notice a plain error not

identified or distinctly specified.

> Our cases are also clear on this point. *Johnson v. State*, 452 So. 2d 850, 853 (Miss. 1984); *House v. State*, 445 So. 2d 815, 820 (Miss. 1984); *Hooten v. State*, 427 So. 2d 1388 (Miss. 1983); *Fondren v. State*, 253 Miss. 241, 175 So. 2d 628 (1965).

Gray v. State, 549 So. 2d 1316, 1321 (Miss. 1989).

In *Fuselier v. State*, 468 So. 2d 45, 48-49 (Miss. 1985), the trial court admitted into evidence two prior inconsistent statements of the key defense witness that implicated Fuselier in a murder. *Id.* Additionally, the prosecutor argued the impeaching testimony as substantive evidence of Fuselier's guilt to the jury in closing argument. *Id.* The supreme court relied on *Moffett v. State*, and held that the error of admitting the inconsistent statements was compounded by the prosecutor arguing them as if they were substantive evidence to the jury. *Fuselier*, 468 So. 2d at 50. The supreme court quoted *Moffett* as follows:

> There is a more practical reason why the statement should not have been given to the jury. The average juror will have a difficult enough time without the statement sitting in his lap keeping distinct in his mind that which he has heard as evidence and what he has been told may be considered for impeachment only. Many suggest it is folly to think juries can--or will even attempt to --keep this distinction in mind.

Fuselier, 468 So. 2d at 50 (quoting *Moffett*, 456 So. 2d at 721). As the supreme court stated in *Moffett*, "such errors so infected the proceedings below that [the defendant] has been denied a fair trial." *Moffett* 426 So. 2d at 721.

Absent the impeaching statement that Byrd entered Velma's apartment by "kicking in the door," no direct and little circumstantial evidence is available to establish a forcible entry by him. While the dissenting opinion relates that testimony of a loud noise followed by Byrd's reentry suffices to raise an inference that the door was kicked in, this articulation wholly disregards the trial testimony of Edward concerning Byrd's reentry. Edward testified that he and Byrd, while tussling outside, tumbled and fell against the door, resulting in its opening. This testimony does not meet the requirements of a willful and forcible entry, or authorize a jury to infer not only a forcible entry, but to further infer that the door was "kicked in." A criminal conviction cannot be sustained on such tenuous circumstances. The state may not base proof of the required element of breaking on forbidden inferential sequences. In the recent case of *Vines v. Windham*, the Mississippi Supreme Court reaffirmed their pronouncement in *Goodyear Tire & Rubber Co. v. Brashier*, 298 So. 2d 685, 688 (Miss. 1974), that as a general rule, "an inference essential to establish a cause of action may not be based upon another inference." *Vines v. Windham*, 606 So. 2d 128, 131 (Miss. 1992). While the rule is not without some exceptions, none are applicable to the facts of this case. In *American Law Reports*, an annotation entitled "Modern Status of the Rules Against Basing an Inference Upon an

Inference or a Presumption on a Presumption," the author cites cases of a closely related corollary to the general rule against basing an inference on an inference. Section 7 of the annotation states:

> Closely related to the rules against basing an inference on an inference or a presumption on a presumption is the rule occasionally stated to the effect that where circumstantial evidence is relied upon, the circumstances in question must themselves be proved and cannot be inferred or presumed by other circumstances.

W. E. Shipley, Annotation, *Modern Status of the Rules Against Basing an Inference Upon an Inference or a Presumption Upon a Presumption*, 5 A.L.R. 3d 100, 138 (1966). It is not permissible to infer Byrd's reentry as willful and forcible, then infer that the reentry was made by "kicking in the door." Well established rules of evidence prevent this adaptation. Under established case law, due process requires that the State prove each element of the charged offense beyond a reasonable doubt. *Washington v. State*, 645 So. 2d 915, 918 (1994). It follows as "night follows day" that the proof should be by competent evidence.

The wrongful action by the district attorney in arguing to the jury that they could consider the impeaching statement of Edward Green as substantive evidence of the elements of the offense must not go unnoticed. Instruction S-1 was the *only* instruction granted by the court setting forth what it considered constituted the elements of the offense. This instruction told the jury that it could convict Byrd only in the event they found he broke into Velma Green's home by "kicking in the door." The district attorney reminded the jury that Edward told Officer Caldwell that Byrd "kicked in the door." In using this impeaching statement to fulfill the state's obligation to conform its proof to the instruction, the district attorney after reciting Green's impeaching statement told the jury, "[s]o if you consider all of those things, you will say that all of the elements of instruction S-1 have been met." The jury reluctantly but obediently conformed the instruction to the proof by using the impeaching statement as substantive proof that Byrd reentered by "kicking in the door." "This Court assumes that juries follow the instructions given to them by the trial court." *Collins v. State*, 594 So. 2d 29, 35 (Miss. 1992).

While the State is properly charged with the duty of prosecuting vigorously, nevertheless, the district attorney as an officer of the court is charged with the duty and responsibility to see that nothing but competent evidence is submitted to the jury. *Adams v. State*, 202 Miss. 68, 30 So. 2d 593, 596 (1947). In *Adams*, the Mississippi Supreme Court also held that it is the duty of the prosecuting attorney to discharge fairly his duty, to hold himself under proper restraint, and to avoid any action on his part which may tend to deprive the defendant of a fair trial. *Id.* at 596.

The use by the district attorney of impeaching evidence as proof of an element of the charged offense exacerbates the court's error allowing its use by the jury instruction, and constituted a breach of the Defendant's right to a fair trial.

In *Seals v. State*, 208 Miss. 236, 44 So. 2d 61, 67 (1950), the Mississippi Supreme Court reminded bench and bar:

> The ascertainment of impartial justice is, or should be, the supreme object of all courts. It

> is for this purpose they exist and for which they are maintained. It is the object of the courts, as it has been the dream of the sculptors, to symbolize justice as an innocent maiden balancing in her hands the scales of justice, suspended and poised in the open light of day before the world, blinded to bias and prejudice, but ever awake to do fair and impartial justice.

Seals, 44 So. 2d at 67. Byrd has not received his rightful entitlement to due process or impartial justice in this case.

REVERSAL AND REMAND FOR A NEW TRIAL

While one might think that the Double Jeopardy Clause of the Fifth Amendment requires the reversal and discharge of Byrd, the proper course of action is for us to reverse and remand for a new trial. Such action in no way offends Byrd's double jeopardy rights.

United States v. Ball, 163 U.S. 662, 672 (1896), established the general rule that the Double Jeopardy Clause does not bar retrial of a defendant whose conviction is reversed on appeal. *Burks v. United States*, 437 U.S. 1, 18 (1978), recognized the only exception to the general rule that double jeopardy bars retrial when a defendant's conviction is reversed because the evidence presented at trial was insufficient to convict the defendant. A reversal on grounds of evidentiary insufficiency, the court opined, is the functional equivalent of an acquittal at trial. *Id.* at 11. The Double Jeopardy Clause must extend to such functional acquittals because "[t]o hold otherwise would create a purely arbitrary distinction" between defendants based upon the hierarchical level of the judiciary at which a finding of evidentiary insufficiency is made. *Id.*

In reaching its conclusion, the *Burks* Court made an important distinction between the reversal of a conviction for trial error and a reversal for evidentiary insufficiency. *Id.* at 13-16. A reversal for trial error "does not constitute a decision to the effect that the government has failed to prove its case"; therefore, it is not the equivalent of an acquittal at trial. *Id.* at 15. The supreme court found that such a reversal is simply "a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect." *Id.*

Lockhart v. Nelson, 488 U.S. 33, 39-42 (1988), further explained the contours of constitutional double jeopardy protection in cases reversed on trial error. In *Lockhart*, the trial court erroneously admitted evidence without which there was insufficient evidence to convict Nelson. *Id.* at 40. Nelson sought a writ of habeas corpus in federal district court, which was granted based only on the erroneous admission of evidence by the trial court. *Id* . at 37. The State of Arkansas anounced that it would place Nelson on trial again based on other evidence not submitted at the first trial. *Id.* The federal district court held such action violative of the protection against double jeopardy enunciated in *Burks*. *Id.* The Eighth Circuit Court of Appeals affirmed, and the State of Arkansas sought and was granted a writ of certiorari to the United States Supreme Court. *Id.* The question before the supreme court was "whether the Double Jeopardy Clause allows retrial when a reviewing court determines that a defendant's conviction must be reversed because evidence was erroneously admitted against him, and also concludes that without the inadmissible evidence there was insufficient evidence to support a conviction." *Id.* at 40. In resolving this question, the United States Supreme

Court held as follows:

> We think the logic of *Burks* requires that the question be answered in the affirmative.
>
> *Burks* was careful to point out that a reversal based solely on evidentiary insufficiency has fundamentally different implications, for double jeopardy purposes, than a reversal based on such ordinary "trial errors" as the "incorrect receipt or rejection of evidence." While the former is in effect a finding "that the government has failed to prove its case" against the defendant, the latter "implies nothing with respect to the guilt or innocence of the defendant," but is simply "a determination that [he] has been convicted through a judicial process which is defective in some fundamental respect."
>
> It appears to us to be beyond dispute that this is a situation described in Burks as reversal for "trial error"--the trial court erred in admitting a particular piece of evidence, and without it there was insufficient evidence to support a judgment of conviction. But clearly with that evidence there was enough to support the sentence
>
> . . .
>
> It is quite clear from our opinion in *Burks* that a reviewing court must consider all of the evidence admitted by the trial court in deciding whether retrial is permissible under the Double Jeopardy Clause--indeed, that was the ratio decidendi of Burks,--and the overwhelming majority of appellate courts considering the question have agreed. The basis for the Burks exception to the general rule is that a reversal for insufficiency of the evidence should be treated no differently than a trial court's granting a judgment of acquittal at the close of all the evidence. A trial court in passing on such a motion considers all of the evidence it has admitted, and to make the analogy complete it must be this same quantum of evidence which is considered by the reviewing court.

Lockhart, 488 U.S. at 40-42. Thus, an appellate court may reverse a conviction and remand a case for a new trial without offending the Double Jeopardy Clause if the court finds that there was sufficient evidence to support the initial conviction including the evidence which was improperly admitted.

In the well known treatise entitled *Criminal Procedure* by Wayne R. LaFarve and Jerold H. Israel, *Lockhart* is discussed as follows:

> *Lockhart v. Nelson* raised the question of what evidence an appellate court should consider in reviewing the sufficiency issue after it has first held that the conviction must be overturned because of the erroneous admission of evidence. The Court there held that *Burks* does not bar a retrial where the appellate court concludes that the evidence would be insufficient only if it does not include the evidence that the appellate court has now held to be inadmissible. *Burks*, the Court noted, had carefully distinguished between reversals based solely on evidentiary insufficiency and reversals based on "such ordinary trial errors" as the "incorrect receipt or rejection of evidence," with the latter remaining subject to the

> *Ball* rule. Where the evidentiary insufficiency exists only because of the appellate court's initial conclusion that there was error in admitting prosecution evidence, the reversal, under the logic *of Burks*, should be characterized simply as one based upon a "trial error." . . . .
>
> Thus *Burks* should bar a retrial only if the evidence was insufficient even with the erroneously admitted evidence. Where that is not the case, allowing a retrial following reversal is consistent with giving the prosecution "one fair opportunity to offer whatever proof it could assemble." Had the trial court excluded the inadmissible evidence, the prosecution would have been given the opportunity to introduce other evidence on the same point, and allowing a retrial where the proof is deemed insufficient on appeal only because of that inadmissible evidence merely recreates the situation that would have existed if not for the trial court's error.

Wayne R. LaFarve and Jerold H. Israel, *Criminal Procedure* 1081 (2d ed. 1992).

The case before us is procedurally identical to *Lockhart*. Like Lockhart, Byrd was convicted using inadmissible evidence. Without the inadmissible evidence there was insufficient evidence to convict Byrd. This fact notwithstanding, the United States Supreme Court clearly held that under these conditions an appellate reversal and remand for a new trial does no injury to Byrd's double jeopardy rights provided there was sufficient evidence to convict Byrd using the inadmissable evidence. By erroneously using as substantive proof the impeaching testimony that Byrd kicked in the door, there was sufficient evidence to convict Byrd of burglary. Thus, our remand for a new trial on the burglary charge does no injury to Byrd's double jeopardy rights.

Additionally, the Mississippi Supreme Court has previously reversed and remanded cases similar to Byrd's for a new trial. *See Moffett*, 456 So. 2d at 720-21.; *Fuselier v. State*, 468 So. 2d 45, 49-50 (Miss. 1985). In *Moffett* and *Fuselier*, the Mississippi Supreme Court reversed convictions and remanded the actions for new trials based on the erroneous admission of evidence. Consequently, we find no procedural or constitutional reason not to reverse Byrd's conviction and remand for a new trial.

Byrd’s simple assault conviction is affirmed. His burglary conviction is reversed and remanded for a new trial.

THE JUDGMENT OF THE DESOTO COUNTY CIRCUIT COURT OF CONVICTION OF SIMPLE ASSAULT AND BURGLARY IS AFFIRMED IN PART AND REVERSED IN PART. COUNT I, BURGLARY, IS REVERSED AND REMANDED FOR A NEW TRIAL; COUNT II, SIMPLE ASSAULT, SENTENCED TO SERVE SIX MONTHS, WITH SIX MONTHS SUSPENDED, IS AFFIRMED. THE COSTS ARE ASSESSED TO DESOTO COUNTY.

BRIDGES AND THOMAS, P.JJ., COLEMAN, KING, AND SOUTHWICK, JJ., CONCUR.

PAYNE, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE OPINION JOINED BY BARBER, DIAZ, AND MCMILLIN, JJ.

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PAYNE, J., CONCURRING IN PART, DISSENTING IN PART:

I agree with the portion of the majority's opinion which affirms the simple assault conviction. However, I am compelled to dissent on the majority's reversal of Byrd's burglary conviction. It is apparent that the majority believes (1) that there was no breaking and entering as required to convict of burglary as well as (2) that there was no evidence--and that such evidence is essential--of "kicking in the door" when Byrd broke and entered. I write separately because I think the majority spends too much time emphasizing the jury instruction while setting aside the facts which meet the elements of the burglary charge.

Byrd argues that all of the elements of the crimes of burglary and assault were not proven by the State. Byrd's arguments regarding the failure to grant a peremptory instruction, denial of his motions for directed verdict, and the denial of the JNOV all challenge the legal sufficiency of the evidence against him. *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993). These challenges require consideration of the evidence before the court when made, so that this Court must review the ruling on the last occasion the challenge was made at the trial level. *Id*. This occurred when the trial court overruled Byrd's motion for JNOV. The Mississippi Supreme Court has stated, in reviewing an

overruled motion for JNOV, that the standard of review will be:

> [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 [Byrd'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. We are 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.

Id. (citations omitted). Here, the evidence was legally sufficient to find that Byrd committed burglary.

The crime of burglary has consistently been held to contain two essential elements: (1) the unlawful breaking and entering and (2) the intent at the time of entry to commit a crime therein. *Deloach v. State*, 658 So. 2d 875, 876 (Miss. 1995) (citation omitted); *Alford v. State*, 656 So. 2d 1186, 1189-90 (Miss. 1995) (citation omitted); *Davis v. State*, 611 So. 2d 906, 911 (Miss. 1992); *Ashley v. State*, 538 So. 2d 1181, 1183 (Miss. 1989); *Mason v. State*, 344 So. 2d 144, 145-46 (Miss. 1977) (citation omitted).

There are uncontradicted facts which, when considered in light of other testimony, contradict the conclusions of the majority and compel us to affirm Byrd's burglary conviction. One fact which must be made clear is that Byrd entered Velma Green's apartment twice on the morning of May 31, 1994. Byrd first entered when Edward Green answered the door. Byrd proceeded upstairs to Velma's bedroom to discover Velma and Karloas Bell together in bed and asleep. After his initial encounter with the awakened couple, Byrd left the bedroom and the apartment. Velma testified that after Byrd left, she locked and chained the front door. Soon thereafter, Velma heard a loud noise, and Byrd was in her bedroom again. Edward testified that he went outside with Byrd when Byrd left the apartment after his initial entry. Edward testified that he was outside with Byrd because Byrd was upset and crying, and he was trying to keep Byrd out of trouble as Byrd had done for him in the past. Byrd attempted to reenter the apartment only to be stopped by Edward. Edward testified that a scuffle ensued, and he and Byrd fell against the door breaking the door jam. Byrd corroborated that Edward also went outside with him, and that as he attempted to reenter the apartment he and Edward were involved in a scuffle. According to Byrd, the door was broken when he and Edward fell against it. Byrd denied kicking in the apartment door.

The testimony of Edward Green must be considered as a whole. Edward testified that he was drunk and asleep upon Byrd's initial arrival at Velma's apartment. Edward was substantially impeached, and the jurors were entitled to completely disregard his testimony, which I strongly suspect they did. In taking the evidence in the light most favorable to the State, it can fairly be assumed that Edward's testimony was of no moment to the jury. This leaves us only to consider the physical evidence--a badly battered door that everyone admits was broken down from the outside; Velma's testimony that she escorted Byrd out of her home and locked the door, went back upstairs, heard a loud noise, and subsequently discovered Byrd back in her house. Velma testified that she did not know whether Edward Green was with Byrd at the time. This seems to further impeach Edward, who claims to have

had a part in escorting Byrd out the door. Byrd's testimony was that he was trying to get back in the house while Edward tried to physically restrain him from reentering and that during the ensuing struggle they both crashed in and through the door. This is essentially the same story the successfully impeached Edward told, and certainly no one would contend that the jury was required to believe Byrd's self-serving story of how he got into the house. Otherwise, there could never be a conviction for burglary because all the defendant would have to do is to deny forced entry, i.e. "breaking."

What the majority ignores is the fact that when Byrd sought to move Edward in his attempt to reenter the apartment coupled with Byrd's subsequent entry, the breaking and entering element was met. "Any slight act of force may constitute 'breaking.'" *Ross v. State*, 603 So. 2d 857, 865 (Miss. 1992) (citing *Branning v. State*, 222 So. 2d 667, 669 (Miss. 1969)). "Any effort, however slight, such as the turning of a door knob to enter, constitutes a breaking, ..." *Alford*, 656 So. 2d at 1190. "[E]vidence of the slightest force necessary to open an entrance into a dwelling house is sufficient to satisfy the essential element of breaking under the charge of burglary of an inhabitant's dwelling." *Id.* at 1190 (quoting *Newburn v. State*, 295 So. 2d 260, 263 (Miss. 1967)). "'[B]reaking' is 'any act or force, however, slight, employed to effect an entrance through any usual or unusual place of ingress, whether open, partly open, or closed.'" *Id.* (quoting *Smith v. State*, 499 So. 2d 750, 752 (Miss. 1986) (citations omitted)). "[A]ny act of force necessary to enter, no matter how slight is a 'breaking.' The turning of a knob, a slight push on an already open door, or the lifting of a latch is sufficient to constitute the act." *Branning v. State*, 222 So. 2d 667, 669 (Miss. 1969) (citing *Gross v. State*, 191 Miss. 383, 2 So. 2d 818, 820 (1941)). "Constructive breaking may occur when a defendant gains entry by becoming violent or threatening violence." *Ross*, 603 So. 2d at 865 (citing *Smith v. State*, 499 So. 2d 750, 752-53 (Miss. 1986)). In *Ross*, the victim initially opened the door to the defendant. The defendant then "brandished a gun, grabbed [the victim's] arm, and forced her into her house." *Id.* The Mississippi Supreme Court held either the weapon (threatening violence) or grabbing and pushing the victim (actual force) satisfied the breaking and entering. "It does not matter how much [the victim] had opened the door to speak with [the defendant]. She did not let him in. He forced his way in." *Id.*

In the present case, there was varying testimony regarding how the door jam was damaged and how Byrd gained reentry into the apartment--either a struggle between Edward and Byrd outside the apartment when Edward was trying to stop Byrd's reentry, or some other forcible breaking of the locked door immediately prior to Byrd's reentry. While recognizing that Officer Caldwell's testimony regarding Edward's prior statement that Byrd had kicked in the door was admissible for impeachment purposes only and not as substantive evidence, we cannot ignore the other evidence that the door was "kicked in." The locked door, noise, and photographs of the damage to the door facing could lead a juror to believe that the door had been "kicked in." Clearly, there was conflicting evidence presented in this case. There is no rule of evidence that demands that the jurors believe Byrd's and Edward's testimony and reject Velma's testimony along with the physical evidence. Even under the jury instruction on the elements of the crime which contained the unnecessary words of "by kicking in the door," the jury could have determined from the evidence that that very thing happened. This Court may not invade the province of the jury because "the jury is the sole judge of the credibility of witnesses, and the jury's decision based on conflicting evidence will not be set aside where there is substantial and believable evidence supporting the verdict." *Wash v. State*, 521 So. 2d 890, 896 (Miss. 1988).

Regardless of how the door jam was actually damaged, there was competent evidence which established that Velma closed and secured the door including the chain lock, that no one allowed Byrd to reenter the apartment, that Byrd intended to reenter the apartment, that Byrd's effort to reenter resulted in damage to the door jam, and that Byrd, in fact, did reenter the apartment through the damaged door way. The testimony concerning the loud noise, followed by Byrd's reentry, and the damage to the door facing that was caused by forced reentry was sufficient evidence to raise an inference that the door was "kicked in" in the commonly accepted broad meaning of that phrase. *See Rideau v. Parkem Indus. Servs.*, 917 F.2d 892, 897 (5th Cir. 1990) (citations omitted) ("A jury may draw reasonable inferences from the evidence, and those inferences may constitute sufficient proof to support a verdict."); *Pryor v. State*, 349 So. 2d 1063, 1064 (Miss. 1977) (citation omitted) ("It is well established in Mississippi that a jury, as the finder of fact, is entitled to consider not only facts as testified to by witnesses, but all inferences that may be reasonably and logically deduced from the facts in evidence."). There is sufficient evidence upon which the jury could determine that Byrd's actions met breaking and entering.

There is no "inference on an inference" as the majority insists. There was a breaking and entering and no inference is necessary to conclude that breaking and entering occurred. There was a simple assault on the Velma Green, which the majority here affirms. All of the elements of the burglary are here with ample evidence. The *only* inference that the jury had to draw was whether or not under the instruction the entry was by literally "kicking in the door." I believe that the physical evidence coupled with Velma's testimony can support such a finding.

I also recognize that the State's use of the phrase "by kicking in the door" in its proposed jury instruction is somewhat troubling due to the conflict, *and not the absence*, of the affirmative evidence as to exactly how the door was broken. However, I conclude that the proof is sufficient to sustain a conviction under the instruction regardless of whether any kicking actually occurred. Thus, I would not reverse on a showing, for example, that Byrd broke open the door with his shoulder. There was adequate evidence of a forced entry into the apartment and Byrd's complicity in the act. The majority's emphasis on the phrase "kicking in the door" is misplaced. To send this case back for another trial is unnecessary and a waste of time.

The intent element of burglary was also established by the evidence. The Mississippi Supreme Court has stated:

> The State seldom has direct and positive testimony expressly showing the specific intent of an intruder at the time he unlawfully breaks into a dwelling house; however, such testimony is not essential to establish the intent to commit a crime. Intent is an emotional operation of the mind, and is usually shown by acts and declarations of the defendant coupled with facts and circumstances surrounding him at the time. Defendant's intention is manifested largely by the things he does.
>
> It has been said that:
>
> > Intent is a state of mind existing at the time a person commits an offense. If intent required definite and substantive proof, it would be almost impossible to convict, absent facts disclosing a culmination of the intent. The mind of an alleged offender, however, may be read from his acts, conduct, and inferences

fairly deducible from all the circumstances.

Newburn v. State, 205 So. 2d 260, 265 (Miss. 1967). "Intent may be inferred 'from the time and manner in which entry was made and the conduct of the accused after entry, intent is a state of mind seldom susceptible of direct proof absent a confession.'" *Williams v. State*, 512 So. 2d 666, 668 (Miss. 1987) (citations omitted).

Byrd made his intent clear when he reentered the apartment. Bell, the only person involved in the incident who did not have a previous relationship with Byrd, testified that Byrd returned to the bedroom with a gun, that Byrd threatened him, and pointed the gun at Bell. Even more compelling is Bell's jump in the dark from the second floor window. The fact that Byrd did no more harm when he reentered the apartment does not alter his intent when he reentered the apartment. Byrd gained entry either through a struggle with a friend who attempted to stop him or by kicking in the door and entered wielding a gun. Byrd admitted that he was upset. His actions at the point of reentry speak for themselves. I believe that reasonable jurors could conclude from this conduct and the other evidence in the record that Byrd formed the intent to commit an assault before he reentered the apartment.

In light of the foregoing discussion, it must also be considered that the majority is raising the issue as plain error. Byrd makes absolutely no complaint about the instruction, or the proof varying from the instruction. Byrd simply argues that falling through the door while wrestling is not breaking and entering. That is the issue Byrd presented on appeal. On the proof in this case, the jury could completely disregard the testimony of Byrd and Edward Green and decide the case upon Velma's testimony. That evidence is sufficient to convict and would support an inference that the door was "kicked in" in the sense that Byrd didn't ring the doorbell and get invited in. The majority seeks to sua sponte reverse for objections never made, failure to give limiting instructions never requested, and improper argument never objected to, all on a theory of the case not presented on appeal. I would affirm Byrd's conviction and sentence for burglary.

BARBER, DIAZ, AND McMILLIN, JJ., JOIN THIS SEPARATE WRITTEN OPINION.