

6/17/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00720 COA

FREDDIE LEE MOORE 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. KENNETH LEVENE THOMAS

COURT FROM WHICH APPEALED: BOLIVAR COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: RAYMOND L. WONG

ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL

BY: BILLY L. GORE

DISTRICT ATTORNEY: GLENN ROSSI

NATURE OF THE CASE: CRIMINAL: BURGLARY

TRIAL COURT DISPOSITION: BURGLARIZING AN AUTOMOBILE AS HABITUAL  
OFFENDER; 7 YEARS

MOTION FOR REHEARING FILED:6/26/97

MANDATE ISSUED: 9/2/97

BEFORE THOMAS, P.J., DIAZ, AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

Freddie Lee Moore was indicted for the crimes of burglary of an automobile in Count I and possession of a firearm by a convicted felon in Count II. The trial court granted a directed verdict for the defendant on the Count II charge and submitted Count I to the jury for consideration. The jury

returned a verdict of guilty of burglary of an automobile, and Moore was sentenced as a habitual offender to serve a term of seven years in the custody of the Mississippi Department of Corrections. The trial court denied Moore's motion for JNOV or, in the alternative, a new trial. We find that none of Moore's issues on appeal have merit and therefore affirm.

## FACTS

On the night of September 29, 1994, at approximately 9:00 p.m., a truck belonging to J. W. Mathis was burglarized while it was parked in the driveway of Sandra Harvey's house. Ms. Harvey testified that she heard a noise outside and that when she looked out she saw the door of Mathis's truck standing open and the seat was folded over. Harvey stated that a car was driving away but she could not see it very well because of the lack of lighting. Harvey indicated, however, that the car appeared to be light in color and was bigger than a compact car. Harvey testified that she immediately awakened Mr. Mathis who went outside to investigate. Mathis testified that his truck door was ajar and that a .357 pistol, holster, gun carrying case, and one box of bullets were missing. Mathis indicated that he reported the burglary to the Bolivar County Sheriff's Department who responded immediately.

On that same night, at 9:26 p.m., an anonymous call came into the Cleveland Police Department indicating that a man named Freddie had pulled a gun on someone at the Elite Club. Officers Little and Harvey responded to the call. The officers went to the Elite Club and spoke with the patrons standing outside who indicated that the "Moore boy" had pulled the gun and had driven away in an old station wagon. The patrons indicated the direction Moore had gone and the officers went in search of Moore. Officer Harris spotted Freddie Moore driving an old station wagon less than a block from the Elite Club. Harris followed behind Moore as he pulled into the In and Out Grocery. Officer Little also arrived on the scene at the same time. The dispatch records indicate that the officers called in Moore's tag number at 9:40 p.m. Both Harris and Little approached Moore's car as Moore was exiting the vehicle. The officers indicated that a black female identified as Katrenia was sitting on the passenger's side of the car. Harris asked Moore if he had any problems at the club, and Moore responded negatively. Harris then asked Moore if he had a weapon to which Moore said "no." The officers requested consent to search Moore's vehicle to which Moore agreed. Upon searching the vehicle, the officers discovered a .357 pistol, holster, gun carrying case, and one box of bullets under the middle portion of the front seat. Moore told the officers that the gun did not belong to him nor Katrenia and that he did not know the gun was in his car. Moore indicated that the gun must belong to a guy named "Joe" who had been sitting in his car with Katrenia while Moore had been inside the Elite Club. Moore did not know Joe's last name or where he could be found. The officers did not place Moore under arrest at this time because they were unable to substantiate the anonymous phone call indicating that Moore had pulled a gun on someone. The officers did confiscate the gun and instructed Moore to tell "Joe" that he could come to the police station to claim the gun.

The following day, it was determined that the gun confiscated from Moore's car was the same gun reported stolen by Mr. Mathis. Moore was subsequently arrested and charged with burglary and possession of a firearm by a convicted felon. The latter charge was dismissed by the trial judge, but Moore was convicted of burglary. At trial, Moore testified in his own behalf and recounted the story that the gun belonged to "Joe." Moore indicated that he spoke to "Joe" about the gun but "Joe"

refused to go to the police station to claim the gun. Moore presented no witnesses to corroborate his story that "Joe" left the gun in his car.

Feeling aggrieved by the judgment of the trial court, Moore filed this appeal asserting two issues.

## ANALYSIS

### I. THE TRIAL COURT ERRED IN NOT GIVING INSTRUCTIONS REQUESTED BY THE DEFENSE.

Moore argues that the jury was not properly instructed on the law because the trial court refused to give Instructions D-3 and D-4 as requested by the defense. Instructions D-3 and D-4 are as follows:

#### Instruction D-3:

The Court instructs the jury that the presumption of guilt based upon recent possession of stolen goods will not be allowed to stand when the explanation of the accused, Freddie Lee Moore, concerning his possession is satisfactory or raises a reasonable doubt of his guilt. It is for you the jury to determine if the explanation offered by the accused, Freddie Lee Moore, is reasonable and credible.

#### Instruction D-4:

The Court instructs the jury that once the presumption of guilt based upon recent possession of stolen goods is established, then if the accused, Freddie Lee Moore, gives a reasonable account or explanation of his possession, then the prosecution must show the account or explanation given by the accused, Freddie Lee Moore, is false.

The State responds that Instructions D-5, S-1A, and C-16 properly instructed the jury and covered the law sufficiently enough to warrant a denial of Instructions D-3 and D-4. Instructions D-5, S-1A, and C-16 are as follows:

#### Instruction D-5:

The Court instructs the jury that the possession of property recently stolen is a circumstance which may be considered by the jury and from which, in the absence of a reasonable explanation, the jury may infer guilt of burglary. In order to give rise to an inference of guilt from the fact of possession, the Prosecution has the burden of proving possession by the accused, Freddie Lee Moore, to have been personal, recent, unexplained, and exclusive.

#### Instruction S-1A:

The defendant, FREDDIE LEE MOORE, has been charged in an indictment.

Under the indictment, the defendant has been charged with the crime of burglary by breaking and entering the automobile of J.W. Mathis, with the intent to steal once inside.

As to the indictment, if you find from the evidence in this case beyond a reasonable doubt and to the exclusion of every reasonable hypothesis consistent with innocence that:

(1) a 1987 Toyota pick-up was an automobile owned by J.W. Mathis; and

(2) the defendant, FREDDIE LEE MOORE, on or about September 29, 1994, did break and enter J.W. Mathis' automobile by opening the door and entering through that door; and

(3) the defendant, FREDDIE LEE MOORE, intended once inside this automobile to steal, which is a crime under the laws of the State of Mississippi,

then you shall find the defendant guilty of burglary of an automobile.

If the State has failed to prove any one or more of these elements beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis consistent with innocence, then you shall find the defendant not guilty of burglary of an automobile.

#### Instruction C-16:

If you can reconcile the evidence upon any reasonable hypothesis consistent with the defendant's innocence, you should do so and find him not guilty.

The State argues that Instruction D-5 is, for all practical purposes, the same as D-3. Therefore, the State contends, there was no need to repeat the law in D-3.

As to Instruction D-4, the State argues that D-4 is an abstract instruction which did not require the jury to believe anything from the evidence. The State contends that D-4 would have required the prosecution to prove that Moore's explanation of possession, if any, was false, but only in the event the jury found his explanation reasonable. The State argues further that the language found in D-4 was the equivalent of telling the jury it must acquit Moore if it found a reasonable hypothesis consistent with his innocence. The State argues that Instructions S-1A and C-16 succinctly informed the jury of just that. Apparently, the State contends, the jury did not believe Moore's story that he did not know the gun was in his car and therefore found no reasonable hypothesis consistent with Moore's innocence.

The standard for reviewing jury instructions is well established. Mississippi law allows the trial judge to instruct the jury upon principles of law applicable to the case either at the request of a party, Miss. Code Ann. 99-17-35 (1972), or on the court's own motion, *Newell v. State*, 308 So. 2d 71, 78 (Miss. 1975). *See also* Unif. Crim. R. Cir. Ct. Prac. 5.03. The current version of this rule is contained at Rule 3.07 of the Uniform Rules of Circuit and County Court Practice. The Mississippi Supreme Court has held that the failure of a court to give a requested instruction is not grounds for reversal if the jury was "fairly, fully and accurately instructed on the law governing the case." *Smith v. State*, 572 So. 2d

847, 849 (Miss. 1990); *see also* *Murphy v. State*, 566 So. 2d 1201, 1206 (Miss. 1990) (holding that the trial court may refuse an instruction which incorrectly states the law, is without foundation in the evidence, or is stated elsewhere in the instructions); *Calhoun v. State*, 526 So. 2d 531, 533 (Miss. 1988) (holding that a trial court is not required to instruct a jury over and over on the same point of law even though some variations are used in different instructions). The standard for reviewing jury instructions is to read all instructions together, not in isolation. *Townsend v. State*, 681 So. 2d 497, 509 (Miss. 1996).

Having reviewed all of the instructions, we are of the opinion that the jury was "fairly, fully and accurately" instructed on the law. We agree with the State that Instructions D-5, S-1A, and C-16 sufficiently covered the law as it is applicable to this case. We therefore find Moore's argument to be without merit.

## II. THE TRIAL COURT COMMITTED ERROR IN DENYING MOORE'S MOTION FOR DIRECTED VERDICT BECAUSE THE PROSECUTION FAILED TO PROVE ITS CASE AGAINST MOORE, AND THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE, AND THE VERDICT EVIDENCES BIAS AND PREJUDICE AGAINST THE APPELLANT, AND WAS BASED SOLELY UPON SUSPICION AND SPECULATION.

At the conclusion of the State's case Moore moved for a directed verdict on the ground that the evidence presented was insufficient to sustain a conviction of burglary of an automobile. The motion was overruled and Moore assigns this ruling of the trial court as error.

In the present case, no evidence was presented at trial directly linking Moore to the breaking and entering of Mr. Mathis's truck on September 29, 1994. The testimony of witnesses for the State established, however, that Moore, approximately forty minutes after the burglary, was in possession of the only items stolen from Mathis's truck, a .357 pistol, holster, carrying case, and one box of bullets.

In *Rushing v. State*, 461 So. 2d 710, 711 (Miss. 1984), the Mississippi Supreme Court stated:

Under Mississippi law, possession of recently stolen property is a circumstance which may be considered by the jury and from which, in the absence of a reasonable explanation, the jury may infer guilt. In order to give rise to an inference of guilt from the fact of possession, the State has the burden of proving possession by the accused of stolen property to have been personal, recent, unexplained, and exclusive. (citations omitted).

Even more recently, the supreme court addressed a similar issue and set forth the following factors to be considered when faced with a circumstantial burglary case such as the one before us:

1. The temporal proximity of the possession to the crime to be inferred;
2. The number or percentage of the fruits of the crime possessed;
3. The nature of the possession in terms of whether there is an attempt at concealment or any other evidence of guilty knowledge;
4. Whether an explanation is given and whether that explanation is plausible or demonstrably false.

*Shields v. State*, No. 92-KA-01067-SCT, 1997 WL 80933, \*3 (Miss. Feb. 27, 1997).

Moore concedes the "recent" requirement but argues that the State failed to prove that his possession of the gun was personal, unexplained, and exclusive. Moore argues first that he gave a plausible explanation in that the gun belonged to "Joe" who had recently been in Moore's car and that he (Moore) had no idea that "Joe" had put the gun in the car. Moore contends that the State presented no evidence to dispute this explanation. Secondly, Moore contends that the State failed to show that the stolen weapon was in his *exclusive* possession. Finally, Moore argues that the State failed to show that he was in possession of the stolen weapon. Moore contends that the State merely proved that the stolen weapon was within his proximity.

Keeping in mind the holding in *Rushing* and the factors set forth in *Shields*, we find the following: The only items reported stolen from Mr. Mathis's truck were found under the front seat of Moore's car approximately forty minutes after the burglary allegedly occurred. While there was a female also in close proximity of the gun at the time it was discovered by Officers Little and Harris, Moore, by his own admission, indicated to the officers that the gun did not belong to his female passenger. Although Moore had an explanation for the presence of the gun, the events immediately preceding the discovery of the gun make his explanation less than plausible. Officer Little testified that an anonymous phone caller reported that "Freddie" had pulled a gun on someone at the Elite Club. Officers Harris and Little, upon arriving at the Elite Club, were told that the "Moore boy" had pulled a gun and had driven away in an old station wagon. The police officers then stopped Moore less than a block away from the Elite Club and found him to be in possession of the stolen weapon. Finally, Moore could give the officers no information on "Joe" nor did he produce "Joe" or his female passenger, Katrenia, at trial to corroborate his story.

A challenge to the sufficiency of the evidence requires consideration of the evidence before the court when made, so that this Court must review the ruling on the last occasion when the challenge was made at the trial level. *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993). This occurred when the trial court overruled Moore's motion for JNOV. The Mississippi Supreme Court has stated, in reviewing an overruled motion for JNOV, that the standard of review shall 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 [Moore'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).

The evidence consistent with the guilty verdict must be accepted as true. *Id.* at 778. Considering the elements of the crime along with all the evidence in the light most favorable to the verdict, the evidence is not such that reasonable jurors could only find Moore not guilty of the burglary of an automobile. We find that the trial court properly denied Moore's motion for a directed verdict.

Moore also complains that the jury verdict was against the overwhelming weight of the evidence, and

he requests a new trial. 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." *Id.* at 781; *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, the jury heard the witnesses and the evidence as presented by both the State and the defense. The State presented the testimony of the police officers as well as that of the victim. Moore testified in his own behalf and explained that the gun belonged to "Joe" but presented no corroborating evidence. Furthermore, with this being a circumstantial case, the jury was instructed as to the State's heightened burden of proof that the State must prove the elements of the crime beyond a reasonable doubt and to the exclusion of every reasonable hypothesis consistent with innocence. The testimony was clearly for the jury to evaluate. The jury's decision to believe the State's evidence and witnesses was well within its discretion as was the jury's decision to disbelieve Moore's explanation of how the gun got into his car. Moreover, the jury was well within its power to weigh the evidence and the credibility of the witnesses' testimony and to convict Moore. The trial court did not abuse its discretion by refusing to grant Moore a new trial based on the weight of the evidence. The jury verdict was not so contrary to the overwhelming weight of the evidence that to allow it to stand would be to promote an unconscionable injustice. The trial court properly denied Moore's motion for a new trial.

**THE JUDGMENT OF THE CIRCUIT COURT OF BOLIVAR COUNTY OF CONVICTION OF THE BURGLARY OF AN AUTOMOBILE AND SENTENCE AS A HABITUAL OFFENDER FOR A TERM OF SEVEN YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. SENTENCE IN THIS CAUSE SHALL RUN CONSECUTIVELY TO ANY AND ALL SENTENCES PREVIOUSLY IMPOSED. ALL COSTS OF THIS APPEAL ARE TAXED TO BOLIVAR COUNTY.**

**BRIDGES, C.J., McMILLIN AND THOMAS, P.J.J., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, AND SOUTHWICK, JJ., CONCUR.**