IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-01108 COA

JOE L. MATHIS **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

DATE OF JUDGMENT:	10/05/95
TRIAL JUDGE:	HON. JOSEPH H. LOPER JR.
COURT FROM WHICH APPEALED:	CHOCTAW COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	KEVIN RAY NULL
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: SCOTT STUART
DISTRICT ATTORNEY:	DOUG EVANS
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	BURGLARY OF A DWELLING, HABITUAL OFFENDER:SENTENCED TO SERVE 10 YRS; SENTENCE SHALL RUN CONSECUTIVE TO ANY PREVIOUS; SENTENCE SHALL NOT BEEDUCED OR SUSPENDED, NOR SHALL THE DEFENDANT BE ELIGIBLE FOR PAROLE OR PROBATION
DISPOSITION:	AFFIRMED - 10/7/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	3/18/98

BEFORE THOMAS, P.J., HERRING, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Joe L. Mathis was convicted by a Choctaw County jury of burglary of a dwelling house as a habitual offender. Mathis's appeal raises issues regarding the weight of the evidence, the failure to grant a

motion in limine as to certain testimony, and the propriety of the sentence. These issues do not merit reversal and accordingly we affirm.

FACTS

The evidence in support of the verdict revealed that at approximately 9:00 a.m. on July 31, 1995, the rear door of the home of Merle Gammill was forced open. The home's burglar alarm sounded, causing the burglar to flee without further entry and without being seen. Mathis's wallet was found approximately ten feet from the corner of the house by a neighbor investigating the sounding of the alarm. The neighbor called the sheriff's office to report the burglary and the wallet that he had found.

About thirty minutes after the alarm was set off, Mathis was stopped by Choctaw County Sheriff Mike Hutchinson less than two miles from Gammill's house. The sheriff was on his way to investigate the burglary and was aware that Mathis's wallet had been found there. Sheriff Hutchinson asked to see Mathis's driver's license. When Mathis reached for his wallet and could not find it, he appeared surprised and began to search his car. Mathis was placed under arrest for the burglary. He was indicted on a burglary charge as a habitual offender.

At trial, Mathis produced an alibi witness who testified that Mathis had stopped at his home at about the same time as the burglary was occurring a five minute drive away. When Mathis was pulled over by the sheriff thirty minutes later, he was less than three miles from Gammill's house.

Mathis moved for directed verdict at the close of evidence, which was denied. Mathis was convicted and sentenced to serve ten years without benefit of reduction or suspension of the sentence, or possibility of parole or probation. Mathis's motion for new trial was denied.

DISCUSSION

Mathis challenges the evidence, but is not clear whether the challenge is to the weight or to the sufficiency. We will address both.

1a. Sufficiency

Mathis requested a directed verdict at the close of the State's evidence and again when the trial evidence was concluded. These two motions for a directed verdict by Mathis challenge the legal sufficiency of the evidence. Since each requires consideration of the evidence before the trial court when made, this Court properly reviews the ruling on the last occasion the challenge was made in the trial court. *Wetz v. State,* 503 So. 2d 803, 807-08 (Miss.1987). In appeals from an overruled motion for a directed verdict the sufficiency of the evidence as a matter of law is viewed and tested in the light most favorable to the State. *Esparaza v. State*, 595 So. 2d 418, 426 (Miss.1992). The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. *Wetz,* 503 So. 2d at 808. 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. *McLain v. State,* 625 So. 2d 774, 778-79 (Miss. 1993).

The crime of burglary of a dwelling house has two elements: the unlawful breaking and entering of a dwelling house and the intent to commit a crime once entry has been gained. Miss. Code Ann. §97-17-19 (Rev. 1994), *repealed by* Miss. Laws 1996, ch. 519, § 2, and *replaced by* Miss. Code Ann. § 97-17-23 (Supp. 1996) (combining three separate burglary statutes). The State presented evidence that Gammill's house had been forcibly broken into and entered, thus satisfying the first element of the crime. The intruder's intent may be inferred by the jury based on the circumstances surrounding the burglary. *Ryals v. State*, 305 So. 2d 354, 356 (Miss.1974).

Mathis argues that the State failed to prove that he was the burglar. Mathis was implicated by the unexplained presence of his wallet within a few feet of the place in which the forced entry was made that set off the burglar alarm. The jury could draw the necessary inferences from that fact.

There was credible evidence on each element of the offense. Since reasonable and fair-minded jurors could have found Mathis guilty, there are no grounds to reverse because of a lack of sufficiency of the evidence.

1b. Weight of the Evidence

A motion for new trial should be granted only if the trial judge is convinced that the verdict is so contrary to the overwhelming weight of the evidence that failure to grant a new trial would result in an unconscionable injustice. *May v. State*, 460 So. 2d 778, 781 (Miss. 1984). In determining whether a verdict is against the overwhelming weight of the evidence, this Court is required to view all of the evidence adduced at trial in the light consistent with the jury verdict. The proper function of the jury is to decide the outcome of the case. The reviewing court should not substitute its own view of the evidence for that of the jury's. *Blanks v. State*, 542 So. 2d 222, 226 (Miss. 1989).

Upon reviewing the evidence presented at trial in the light consistent with the verdict, we find that the trial judge did not abuse his discretion in denying Mathis's motion for a new trial.

2. Motion in Limine

Mathis contends that the trial court erred in denying his motion in limine intended to exclude the testimony of Dorothy Miller. We first turn to the Rules of Evidence for guidance.

"'Relevant Evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." M.R.E. 401. This rule is qualified by Rule 403 which provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." M.R.E. 403. This rule vests with the trial judge a certain amount of discretion. *Stokes v. State*, 548 So. 2d 118, 124 (Miss. 1989). The reviewing court should determine whether the trial court abused its discretion in admitting the evidence in question. *Foster v. State*, 508 So. 2d 1111, 1118 (Miss. 1987).

The court permitted Miller to testify about her knowledge of a car that passed by the store where she was working in the morning of July 31, 1995. Miller described the car, but never positively identified it as the same car Mathis was driving that morning. She stated only that it looked like the same car

that Mathis was driving. Her statement was based on the dark color of both cars, and the wheel design on the back of both the car that passed the store and the one that Mathis was driving. The evidence was relevant in that it tended to make the existence of a fact -- Mathis's passing by in his car -- more probable. The jury is to determine the weight and credibility to be given to each item of relevant evidence. *Wheeler v. State*, 560 So. 2d 171, 175 (Miss. 1990). Mathis argues that because Miller was unable to make a positive identification, her testimony was unfairly prejudicial under Rule 403. The witness's lack of certitude was evident. The trial judge balanced the probative value against the danger of unfair prejudice and found that the evidence should be admitted. We do not find an abuse of discretion.

3. Defective Indictment

Mathis argues that the indictment was defective because the habitual offender portion followed the phrase "against the peace and dignity of the State." The supreme court has frequently insisted upon compliance with the constitutional, even if technical, language that all indictments begin with "State of Mississippi" and conclude with "against the peace and dignity of the State." *McNeal v. State*, 658 So. 2d 1345, 1350 (Miss. 1995).

Mathis's indictment was two pages long. The first page set out the primary charge and the second established the sentence enhancement. Both pages concluded with the statutory "dignity" language. The supreme court has held that an attachment can be made part of the indictment by reference and does not have to conclude with the phrase. *Earl v. State*, 672 So. 2d 1240, 1244 (Miss. 1996). Nothing in *Earl* suggests that the result would have been different if the attachment also had the "dignity" phrase.

Even if the second page were not an attachment, the result would be the same. An indictment that at its conclusion informs a defendant that his actions were "against the peace and dignity of the State" is not defective if it first alerted him to that charge halfway through. The constitutional requirement speaks to what is at the beginning and end of indictments. What is in the middle is not subject to this technical constitutional requirement.

THE JUDGMENT OF THE CHOCTAW COUNTY CIRCUIT COURT OF CONVICTION OF BURGLARY OF A DWELLING AS A HABITUAL OFFENDER AND SENTENCE OF TEN YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. SENTENCE TO RUN CONSECUTIVE TO ANY

PREVIOUS SENTENCE. ALL COSTS OF THIS APPEAL ARE ASSESSED AGAINST CHOCTAW COUNTY.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., DIAZ, HERRING, HINKEBEIN, KING, AND PAYNE, JJ., CONCUR.

COLEMAN, J., NOT PARTICIPATING.