IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-01176 COA

ROBERT W. MCKINNEY A/K/A ROBERT WESLEY MCKINNEY **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:	11/03/95
TRIAL JUDGE:	HON. GEORGE B. READY
COURT FROM WHICH APPEALED:	DESOTO COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	JAMES W. AMOS
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: W. GLENN WATTS
DISTRICT ATTORNEY:	ROBERT L. WILLIAMS
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	GRAND LARCENY: SENTENCED TO SERVE 5 YRS, WITH THE LAST 4 YRS 6 MONTHS SUSPENDED PENDING FUTURE GOOD BEHAVIOR; PAY A FINE OF $1, 000.00; PAY $100.00 TO MS CRIME VICTIMS' COMPENSATION FUND; PAY ALL COSTS OF COURT; PAY WITHIN 6 MONTHS OF RELEASE
DISPOSITION:	AFFIRMED - 11/18/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	12/9/97

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

THOMAS, P.J., FOR THE COURT:

Robert W. McKinney appeals his conviction of grand larceny for the theft of Freon, raising the following issues as error:

I. THE LOWER COURT ERRED IN DENYING APPELLANT'S MOTION FOR DIRECTED VERDICT MADE AT THE CONCLUSION OF THE STATE'S CASE AND RENEWED AT THE CONCLUSION OF THE TRIAL, AND APPELLANT'S

INSTRUCTION D-M8, AND APPELLANT'S MOTION FOR J.N.O.V. OR, IN THE ALTERNATIVE, MOTION FOR NEW TRIAL.

II. THE VERDICT OF THE JURY IN FINDING APPELLANT GUILTY OF GRAND LARCENY WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Finding no error, we affirm.

FACTS

On September 18 and 19, 1995, Robert W. McKinney and Paula Ann Wasiw were tried before a DeSoto County Circuit Court jury. McKinney was tried for conspiracy to commit grand larceny and grand larceny.

John Parsons was the branch manager of Climate Supply, a wholesale and retail business involved in the sale of air-conditioning and refrigeration supplies and parts, in Southaven, Mississippi. Parsons testified that Climate Supply had experienced some prior theft, and he was aware of persons entering his store that might be suspicious. On July 5, 1994, a man that had been in his store twice before and raised Parsons's suspicions entered Climate Supply. Parsons also saw Paula Wasiw waiting in a two tone pickup, but he never saw Wasiw leave the truck on this occasion. Parsons called Frank Smith, an off-duty police officer with the Southaven Police Department, and told him about his suspicions. Smith came to the store in plain clothes and observed Robert McKinney's movements between the store and the warehouse. Smith observed the vehicle, a two tone pickup truck, that McKinney arrived in and noticed a woman waiting in the vehicle. He noticed that the pickup did not have a license plate on it. Smith waited in his car, where he could see neither McKinney or Wasiw, but had Parsons call him on his car phone when the two left.

Parsons notified Smith that McKinney and Wasiw left the store. Smith followed the truck. Smith observed Wasiw put a license plate in the back window, and he saw the pickup truck pull into Allen's Automotive Center in Memphis, Tennessee. He observed what looked like Freon being taken out of the truck cab and taken into the store.

Allen Vanlandingham testified that he worked at Allen's Automotive Center in Memphis. He testified that a guy came into his business and asked if he wanted to buy some Freon. Vanlandingham stated that he bought the fifty pound canister of Freon for $200. Vanlandingham was unable to identify McKinney in the courtroom. Vanlandingham stated that after he bought the Freon, a police officer came in and asked if he had bought a cylinder of Freon a little while ago. He said he had and let the officer see it; thereafter, the officer took it with him.

Detective Clifford Freeman testified as investigator for the case. He spoke with Vanlandingham regarding the Freon. Vanlandingham showed Freeman the fifty pound cylinder of Freon that he had purchased, which Freeman took back to Parsons for positive identification by serial number as Freon stolen from Climate Supply. Freeman also testified in regard to a signed notarized statement that Paula Wasiw had given on October 5, 1994. In this statement Wasiw took full responsibility for having stolen the fifty pound canister of Freon. She claimed that the only role McKinney played was in helping her sell what she had lead him to believe was Freon her husband had left her. She claimed

in her statement that she did this to pay McKinney for his helping her move some of her things.

Wasiw testified in her own behalf. She testified that she had stolen the Freon without McKinney's knowledge. She stated that the truck license plate kept falling off, which was the reason the police officer observed her putting the license back up. During the trial, Wasiw demonstrated her ability to pick up a canister of Freon that was approximately the same weight as the cannister that was stolen.

Robert McKinney did not testify in his defense. Following deliberations, the jury returned a verdict of guilty of grand larceny, but not guilty of conspiracy.

ANALYSIS

I. THE LOWER COURT ERRED IN DENYING APPELLANT'S MOTION FOR DIRECTED VERDICT MADE AT THE CONCLUSION OF THE STATE'S CASE AND RENEWED AT THE CONCLUSION OF THE TRIAL, AND APPELLANT'S INSTRUCTION D-M8, AND APPELLANT'S MOTION FOR J.N.O.V. OR, IN THE ALTERNATIVE, MOTION FOR NEW TRIAL.

McKinney argues that the evidence presented at trial was not sufficient enough for reasonable people to find beyond a reasonable doubt that he was guilty of grand larceny and that his conviction and the sentence should be reversed and he should be discharged. First he states that the circuit court erred in denying his motion for directed verdict at the close the State's case. Since McKinney put on proof after the State rested, his challenge to the sufficiency of the evidence must be considered in light of "the evidence before the court . . . on the last occasion when the sufficiency of the evidence was challenged before the trial court." ***McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993); *Wetz v. State*, 503 So. 2d 803, 807-08 n.3 (Miss. 1987).** "A defendant waives the appeal of an overruled motion for a directed verdict made at the end of the state's case when the defendant chooses to go forward with its case." ***Esparaza v. State*, 595 So. 2d 418, 426 (Miss. 1992) (citing *Wetz*, 503 So. 2d at 808).** Put another way, the motion for a directed verdict is a

> procedural vehicle[] for challenging the sufficiency of the case for the prosecution. . . . When the sufficiency of the evidence is challenged on appeal, this Court properly should review the Circuit Court's ruling on the last occasion when the sufficiency of the evidence was challenged before the trial court. . . .

***Wetz*, 503 So. 2d at 808 n.3.**

Since McKinney went forth with his case, he is procedurally barred from raising the denial of his directed verdict at the end of the State's case. However, like a motion for a directed verdict, a J.N.O.V. challenges the sufficiency of the evidence supporting a guilty verdict. ***Butler v. State*, 544 So. 2d 816, 819 (Miss. 1989).** Since McKinney did move for a J.N.O.V., we review the evidence on the last occasion when McKinney challenged the sufficiency of the evidence before the trial court, at the time of his motion for J.N.O.V. ***McClain*, 625 So. 2d at 778; *Wetz*, 503 So. 2d at 807-08.**

To test the sufficiency of the evidence of a crime:

> [W]e must, with respect to each element of the offense, consider all of the evidence - not just the evidence which supports the case for the prosecution - in the light most favorable to the

> verdict. The credible evidence which is consistent with guilt must be accepted as true. The prosecution must be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. Matters regarding the weight and credibility to be accorded the evidence are to be resolved by the jury. We may 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.

***Wetz*, 503 So. 2d at 808 (citations omitted).**

McKinney also argues that he should have been granted his peremptory instruction, D-M8. The standard of review when looking toward the propriety of a peremptory instruction, "requires that the prosecution's evidence be taken as true, together with all reasonable inferences that may be drawn from that evidence, and if the evidence is sufficient to support the guilty verdict, then the motion[] [was] properly overruled by the trial court." ***Strong v. State*, 600 So. 2d 199, 201 (Miss. 1992) (citing *Lewis v. State*, 573 So. 2d 713, 714 (Miss. 1990)); *Edwards v. State*, 615 So. 2d 590, 594 (Miss. 1993); *Rogers v. State*, 599 So. 2d 930, 934 (Miss. 1992)).** "Where an instruction is not supported by evidence, it should not be given." ***Rogers*, 599 So. 2d at 934 (citations omitted).** Only when the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal. ***Benson v. State*, 551 So. 2d 188, 193 (Miss. 1989).**

There was sufficient evidence to support the trial court's decision to deny McKinney's motions for a directed verdict and J.N.O.V. and his peremptory instruction. McKinney was seen in the warehouse where the Freon was stolen; he had been seen in Climate Supply three other occasions; his truck had no license plates on it when he was at the store; he was followed by an off-duty police officer to Allen's Automotive Center in Memphis where the stolen Freon was sold. With this evidence, taken as true, there was sufficient credible evidence for the trial court to have denied McKinney's motions for a directed verdict and J.N.O.V. and peremptory instruction.

II.THE VERDICT OF THE JURY IN FINDING APPELLANT GUILTY OF GRAND LARCENY WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

On appeal, this Court does not retry the facts but must take the view of the evidence most favorable to the State and must assume that the fact-finder believed the State's witnesses and disbelieved any contradictory evidence. ***McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993); *Griffin v. State*, 607 So. 2d 1197, 1201 (Miss. 1992).** On review, we accept as true all evidence favorable to the State, and the State is given "the benefit of all favorable inferences that may reasonably be drawn from the evidence." ***Griffin*, 607 So. 2d at 1201 (citations omitted).** The Court will reverse such a ruling only for an abuse of discretion. ***McClain*, 625 So. 2d at 781.**

The trial court also denied McKinney's motion for a new trial which he brought with his motion for judgment of acquittal notwithstanding the verdict. A motion for new trial tests the weight of the evidence rather than its sufficiency. ***Butler*, 544 So. 2d at 819.** The Mississippi Supreme Court has stated:

> As to a motion for a new trial, the trial judge should set aside the jury's verdict only when, in

> the exercise of his sound discretion, he is convinced that the verdict is contrary to the substantial weight of the evidence; this Court will not reverse unless convinced the verdict is against the substantial weight of the evidence.

***Id.* (quoting *Russell v. State*, 506 So. 2d 974, 977 (Miss. 1987)).**

"A jury may accept the testimony of some witnesses and reject that of others." ***Doby v. State*, 532 So. 2d 584, 591 (Miss. 1988).** The lower court has the discretionary authority to set aside the jury's verdict and order a new trial only where the court is "convinced that the verdict is so contrary to the weight of the evidence that to allow it to stand would be to sanction an unconscionable injustice." ***Roberts v. State*, 582 So. 2d 423, 424 (Miss. 1991) (citations omitted).** Based upon the evidence elicited at trial, there was ample, credible evidence supporting McKinney's conviction.

THE JUDGMENT OF THE DESOTO COUNTY CIRCUIT COURT OF CONVICTION OF GRAND LARCENY AND SENTENCE OF FIVE YEARS WITH FOUR YEARS SIX MONTHS SUSPENDED PENDING GOOD BEHAVIOR IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND FINE OF $1,000 IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO APPELLANT.

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