

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-KA-00175 COA**

TOMMY LINDSEY A/K/A TOMMY LEE LINDSEY **APPELLANT**

v.

STATE OF MISSISSIPPI **APPELLEE**

PER CURIAM AFFIRMANCE MEMORANDUM OPINION

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED,
PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	1/24/96
TRIAL JUDGE:	HON. JOHN HATCHER
COURT FROM WHICH APPEALED:	COAHOMA COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	AZKI SHAH
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: DEWITT ALLRED III
DISTRICT ATTORNEY:	GLENN ROSSI
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	CONVICTED OF BURGLARY, SENTENCED AS A HABITUAL OFFENDER TO 7 YEARS W/O PAROLE.
DISPOSITION:	AFFIRMED - 12/2/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	12/23/97

BEFORE BRIDGES, C.J., PAYNE, AND SOUTHWICK, JJ.

PER CURIAM:

Tommy Lee Lindsey was convicted of burglary for which he was sentenced as an habitual offender to serve a term of seven years in the custody of the Mississippi Department of Corrections. On appeal, Lindsey challenges the trial court's denial of his motion for JNOV and argues that the evidence was insufficient to support the verdict of the jury.

FACTS

On the morning of November 30, 1995, Bill Holloway, the manager of Martin Brother's Scrap Metal, arrived at work to find that there had been a break-in. Holloway testified that he observed that the padlock chain at the door had been broken and the office looked as if someone had been rummaging

through it. Holloway determined that a cordless phone and 183 pounds of copper tubing were missing. Holloway testified that he then contacted the police. Officer Shaw arrived shortly thereafter, and Holloway indicated that he and Officer Shaw observed wheelbarrow tracks and discovered that a hole had been cut in the fence.

Holloway indicated that the copper tubing was distinctive in that it had been cut with a hacksaw and it was discolored because of oxidation. Holloway testified that he contacted several other scrap yards and asked that they be on the lookout for the copper tubing. On December 4, Terry Quadlebom, the manager of Friedman's Scrap Materials, called Holloway and told him that Tommy Lee Lindsey had sold him 183 pounds of copper tubing matching the description of the tubing that had been stolen. Thereafter, Holloway and a police officer took some of the tubing that had not been stolen and compared it to the tubing that Quadlebom had purchased. Holloway testified that the pieces matched.

Lindsey was subsequently arrested. Following his arrest, Lindsey told Officer Hill that he had gotten the copper tubing from his stepson. Later, Lindsey told Officer Hill that he had found the tubing while on his garbage collection route. At trial, Lindsey testified that he had gotten the tubing from someone named Fred Smith which was the name Lindsey had signed on one of two tickets when he sold the tubing to Quadlebom. Lindsey denies making any statements to Officer Hill. After hearing the evidence, the jury found Lindsey guilty of burglary.

ANALYSIS

I. WHETHER THE TRIAL COURT ERRED IN DENYING LINDSEY'S MOTION FOR JNOV AND WHETHER THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE VERDICT.

Directed verdict and JNOV motions challenge the legal sufficiency of the evidence. *McClain v. State*, 625 So. 2d 774, 781 (Miss. 1993). With regard to the legal sufficiency of the evidence, all credible evidence consistent with the defendant's guilt must be accepted as true, and the prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. *Id.* This Court is 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. *Wetz v. State*, 503 So. 2d 803, 808 (Miss. 1987).

In the present case, Lindsey argues that the case against him was purely circumstantial in that there was no direct proof that he broke and entered Martin Brother's Scrap Metal. Lindsey argues further that at trial Holloway could not positively identify the copper tubing that was recovered as being the same copper tubing that was stolen.

We agree with Lindsey that the evidence indicating that he burglarized Martin Brother's Scrap Metal was circumstantial. However, "[i]t has long been the law in this state that the unexplained possession of recently stolen property is prima facie, although by no means conclusive, evidence of the guilt of the defendant." *Weaver v. State*, 481 So. 2d 832, 834 (Miss. 1985).

In the present case, it is undisputed that Lindsey sold the copper tubing to Quadlebom. There was also sufficient evidence that Lindsey gave three very different explanations of how he came to be in possession of the copper tubing. The discrepancies in the explanations, the fact that Lindsey sold 183 pounds of copper tubing to Friedman's four days after the burglary, and evidence that the tubing sold to Friedman's matched the tubing left at Martin Brother's is sufficient evidence to create a question for the jury of whether Lindsey was guilty of burglary. We therefore find that the evidence was sufficient to support a verdict of guilty, and the trial court's denial of Lindsey's motion for JNOV was properly denied.

THE JUDGMENT OF THE CIRCUIT COURT OF COAHOMA COUNTY OF CONVICTION OF BURGLARY AND SENTENCE AS A HABITUAL OFFENDER OF SEVEN YEARS TO BE SERVED IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. SENTENCE IMPOSED IN THIS CAUSE SHALL RUN CONSECUTIVELY TO ANY AND ALL SENTENCES PREVIOUSLY IMPOSED. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.

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