IN THE COURT OF APPEALS 12/17/96

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00076 COA

DARILE LEE JOHNSON a/k/a RONNIE THOMAS

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. EUGENE BOGEN

COURT FROM WHICH APPEALED: WASHINGTON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

CHERYL C. GRIFFIN

ATTORNEYS FOR APPELLEE:

OFFICE OF ATTORNEY GENERAL

BY: DEWITT ALLRED

ASSISTANT DISTRICT ATTORNEY: JOYCE I. CHILES

NATURE OF THE CASE: CRIMINAL

TRIAL COURT DISPOSITION: CONVICTED OF CONSPIRACY TO COMMIT BURGLARY AND BURGLARY, SENTENCED AS HABITUAL OFFENDER TO 5 AND 7 YEARS RESPECTIVELY, TO RUN CONSECUTIVELY AND WITHOUT PAROLE

BEFORE THOMAS, P.J., BARBER, McMILLIN, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Darile Johnson was convicted in Washington County Circuit Court of conspiracy to commit burglary and burglary as a habitual offender. He received a five year and a seven year sentence, to be served consecutively and without the possibility of parole. Johnson appeals arguing that the verdict was against the overwhelming weight of the evidence, that the jury was not properly instructed, and that he was denied a fair trial due to the cumulative effect of the errors. Finding these arguments without merit, we affirm.

FACTS

Calvin Gales often slept inside of the T & G game room, an establishment in Greenville which Gales managed. He slept there because of frequent burglaries occurring in that area. Gales hoped that if criminals found out he was sleeping in the game room, they would not attempt to burglarize it. Unaware that Gales was inside the game room, Johnson and two teenage boys went to the game room to burglarize it on May 13, 1993 at about 5:00 a.m. Gales testified that he had gotten up to go to the restroom when he heard noises as if someone was breaking into the building. As he headed to the telephone to call the police, Johnson and one of the other boys had already opened the door to the game room. Johnson was holding a tire iron. Upon seeing Gales, the boys started backing out of the door. As the boys tried to run, Gales shot at them. One of the bullets struck Johnson, who was arrested later that day at a hospital in Cleveland. Gales positively identified Johnson as the burglar who had come in the business carrying the tire iron. There was dispute as to whether Johnson ever entered the building, but there was testimony he opened the door.

DISCUSSION

1. Overwhelming Weight of Evidence

Johnson argues that because there were inconsistencies in testimonies at trial concerning whether or not he entered the game room, the state failed to prove every element of burglary, namely "entering." He contends, therefore, that the most he could have been convicted of is attempted burglary and that because attempt to commit a crime is an offense separate from the completed offense, the court erred in overruling his motion for directed verdict because he was indicted for burglary and not attempt. However, Section 99-19-5 reads:

> On an indictment for any offense the jury may find the defendant guilty of the offense as charged, or of any attempt to commit the same offense, or may find him guilty of an inferior offense, or other offense, the commission of which is necessarily included in the offense with which he is charged in the indictment, whether the same be a felony or misdemeanor, without any additional count in the indictment for that purpose.

Miss. Code Ann. § 99-19-5 (1972).

Therefore, on this indictment the jury could have found him guilty of attempted burglary. The evidence may have better supported a conviction for attempted burglary. Accordingly, the state offered an attempted burglary instruction. Johnson's attorney objected, stating that the indictment said burglary and "it's not amendable at this time." There was no need to amend, and the attempt instruction would have been proper. The evidence was sufficient to support a conviction for attempted burglary, and such a verdict would not have been against the overwhelming weight of the evidence. The failure to have an instruction for attempt was solely due to the defendant's refusal of the instruction. We also point out that the sentence range for burglary and for attempted burglary is the same, so no harm arose from this trial court disagreement. Miss. Code Ann. § 97-1-7 (1994).

2. Lesser-included Offense Instruction on Trespass

Johnson argues that the trial court erred in refusing to give a lesser-included offense instruction on trespass. He contends that the jury could have found that he opened the door to the game room, but did not enter. Johnson argues that the fact that the two alleged co-conspirators stated that there was no entry, the police officer's report documented an attempted burglary, and the fact that Gales had been charged with a serious crime, were all reasons that supported a trespass instruction.

Johnson testified that he wasn't at the game room at all the morning in question. He claims that he got shot in the leg during an argument that broke out in a park. Thus his defense was there was no guilt of any crime arising out of the allegations involving the game room. The State's evidence, including testimony from one of the would-be burglars, that Johnson and others were carrying tools for breaking into the game room and stealing money. Unless Johnson can show some evidence in the record that would have made him guilty of trespass, but not of burglary, then the instruction was properly refused. *Toliver v. State,* 600 So. 2d 186, 192 (Miss. 1992). The only evidence that placed Johnson at the game room, showed that he was there with the intent to enter and commit a crime. We find that there was no evidentiary basis in the record to grant a lesser included instruction of trespass. Not only was there evidence that Johnson actually entered the building with the intent to steal, but Johnson's own testimony adds nothing to the argument that a trespass instruction should have been given. Therefore, this issue is without merit.

3. Cumulative Error

Because we found the individual points of error alleged by Johnson to be without merit, there is no cumulative error to weigh.

THE JUDGMENT OF THE CIRCUIT COURT OF WASHINGTON COUNTY OF CONVICTION OF COUNT I, CONSPIRACY TO COMMIT BURGLARY, AND COUNT II, BURGLARY AS A HABITUAL OFFENDER AND SENTENCE ON COUNT I, FIVE YEARS, AND COUNT II, SEVEN YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, TO BE SERVED CONSECUTIVELY AND WITHOUT THE POSSIBILITY OF PAROLE IS AFFIRMED. ALL COSTS ARE ASSESSED TO WASHINGTON COUNTY.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.