

**IN THE COURT OF APPEALS  
OF THE  
STATE OF MISSISSIPPI  
NO. 96-KA-00049 COA**

**CAROL BROWN A/K/A CAROL B. BROWN**

**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:	12/12/95
TRIAL JUDGE:	HON. LAMAR PICKARD
COURT FROM WHICH APPEALED:	COPIAH COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	LEWIS J. WEEKS, JR.
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: JEAN SMITH VAUGHAN
DISTRICT ATTORNEY:	ALEXANDER C. MARTIN
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	FELONY SHOPLIFTING (3RD OFFENSE): SENTENCED TO SERVE A TERM OF 3 YRS WITH THE MDOC & SAID SENTENCE TO RUN CONSECUTIVELY TO ANY PRIOR SENTENCES
DISPOSITION:	AFFIRMED - 2/10/98
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	3/30/98

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

PAYNE, J., FOR THE COURT:

**PROCEDURAL HISTORY**

This is a criminal appeal from the Circuit Court of Copiah County, Mississippi, wherein Carol Brown was tried and convicted of felony shoplifting and sentenced to serve a term of three years with the Mississippi Department of Corrections. Prior to this conviction, Brown was accused and convicted of

two prior shoplifting offenses. Feeling aggrieved from this last conviction, she filed a motion for a new trial and a motion for a JNOV. Both motions were denied. From the denial of these motions, she timely perfected her appeal to the Court seeking relief in the form of a reversal of her conviction. After a close review of the record and the law, we affirm the conviction below.

## **FACTS**

Carol Brown had previously pled guilty on February 15, 1995 to a first offense misdemeanor shoplifting charge in Brookhaven, Mississippi in cause number 11, 508, recorded at Docket Number 2, Case Number 95023898. She pled guilty on June 27, 1995 to a second count of misdemeanor shoplifting in Ridgeland, Mississippi in Docket Number M95-010043, recorded at Case Number 95-6B-0014. The offense in this present case occurred on May 25, 1995 in Copiah County, Mississippi, when Brown placed a Optimus car audio cassette stereo between her legs and under her skirt while inside Rose's Discount Store. She was tried for this crime on December 12, 1995. It was the third offense that raised the charge to the level of a felony.

## **ARGUMENT AND DISCUSSION OF THE LAW**

### **I. WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT THE DEFENDANT'S MOTION FOR A JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE THE VERDICT OF THE JURY IS CONTRARY TO THE CREDIBLE EVIDENCE AND THE LAW APPLICABLE THERETO.**

The defendant cites errors in the indictment: failure to state the dates of the two previous convictions; failure to conform to the requirements of the Mississippi Uniform Criminal Rules of Circuit Court practice; failure to include the dates of the prior offenses and failure to list the date of the prior convictions; the defendant was not given a fair and impartial trial because the indictment was erroneous, and the error resulted in evidence being introduced that was not correct; the charge of felony shoplifting was not supported by credible evidence to justify a conviction.

The State insists that the indictment is not fatally flawed as the defendant would have us believe. According to the State, by looking at the record, the defendant's argument is meritless because her objection to the indictment was raised at the point in her motion for a directed verdict, and because she failed to demur to the indictment prior to the impaneling of the jury. Thus, she is procedurally barred on this issue. **Miss. Code Ann. § 99-7-21 (Rev. 1994)**. This section of the Mississippi Code states:

All objection to an indictment for a defect appearing on the face thereof, shall be taken by demurrer to the indictment, and not otherwise, before the issuance of the venire facias in capital cases, and before the jury shall be impaneled in all other cases, and not afterward. The court for any formal defect, may, if it be thought necessary, cause the indictment to be forthwith amended, and thereupon the trial shall proceed as if such defect had not appeared.

Either defendant's counsel purposefully failed to interject his objection because he saw no defect of the face of the indictment or he was engaged in intentional trial strategy. Whatever be the case, we agree with the State that Brown is procedurally barred. Nonetheless, we will address this issue.

Without waiving the procedural bar, the State asserts that it is unnecessary to set out all of the evidence against the defendant as long as the indictment adequately informs of the specific charge. *State v. Hoffman*, 508 So. 2d 669 (Miss. 1987). In this case, not only does the indictment set out the two prior crimes, but it also specifically sets out the cause numbers and the specific clerk's office in which a record of each of these prior convictions may be found. While it is true that the indictment does not give the dates of the two prior offenses, it is apparent that notice of the nature and the cause of the accusations against Brown is readily cognizable. The facial sufficiency of an indictment is governed by Rule 7.06 (formerly Rule 2.05 UCRCCP) which states that the indictment must be a "plain, concise and definite written statement of the essential facts constituting the offense charged."

In the instant case, any defects in the indictment could have been cured by an amendment at trial had the appellant demurred to the indictment prior to the jury's impaneling.<sup>(1)</sup> The State also argues that the pre-verdict test of legal sufficiency of the evidence, her motion for directed verdict made at the close of the State's case, was waived when she presented evidence in her own behalf. Under settled precedent, such testimony had the effect of waiving the previous motion for a directed verdict. *Whitehurst v. State*, 540 So. 2d 1319, 1327 (Miss. 1989).

The defendant states that she should have been granted a judgment notwithstanding the verdict. She fails to cite any legal authority for this proposition other than she should receive it. The Mississippi Supreme Court in *Holloman v. State* 656 So. 2d 1134, 1143 (Miss. 1995) stated that an argument is procedurally barred when the defendant fails to cite any legal authority in support of her proposition. We find Brown's argument to be devoid of merit.

The State put on proof of the two prior convictions through Milton Twiner. He presented certified copies of the shoplifting convictions. His testimony reflected that the convictions occurred on February 15, 1995 and on June 27, 1995. It was also brought out on direct examination of Twiner that Brown pled guilty on June 27, 1995 to the June 2, 1995 charge. Both documents were tendered into evidence.

The State further asserts that Brown's intent to convert the merchandise on display at Rose's for her own use is evident. Carol Montgomery, the store pharmacist, testified that on May 25, 1995, she observed Carol Brown carrying a car stereo out of the store, holding it between her legs. From a review of the record, we find Brown's assignment of error to be devoid of merit.

## **II. WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT THE DEFENDANT[']S MOTION FOR A NEW TRIAL BECAUSE THE VERDICT IS CONTRARY TO THE EVIDENCE AND WITHOUT CREDIBLE EVIDENCE TO SUPPORT IT.**

The defendant argues that the indictment did not specify the date of the previous convictions, and therefore did not meet the requirements and conform to the Mississippi Uniform Rules of Circuit Court practice. As of the date of May 25, 1995, the date of the crime as alleged in the indictment, Brown says she had been convicted of only *one* charge of shoplifting. She insists that she should be granted a new trial based upon the erroneous indictment. A time frame reference of the charges and convictions may be beneficial here to understand her argument:

Found guilty on February 15, 1995 First Violation

Date of violation: May 25, 1995 *Subject of this action.*

Date of violation: June 2, 1995 Brown pled guilty on June 27, 1995. (Second Violation)

Date of indictment November 10, 1995 for May 25, 1995 violation

It is interesting to note that the indictment says at the time she committed this act which is the subject of this action, she "had heretofore been convicted twice previously of shoplifting." Nothing is further from the truth as the defense points out. Clearly, at that time Brown had been convicted of only one offense, that is the February 15, 1995 charge and conviction.

However, the State contends by analogy that *Jordan v. State*, 383 So. 2d 495 (Miss. 1980) controls the issue. In *Jordan*, the defendant was indicted on May 4, 1979, for trafficking a controlled substance on September 29, 1978. He was also charged under the habitual criminal statute. **Miss. Code Ann. § 99-19-81 (1972)**. It was also charged that, on February 1, 1973, he had been convicted of burglary in the Circuit Court of Rankin County; further, it was charged that he had pled guilty to burglary on March 19, 1979, and that he had also been convicted on March 19, 1979, in the same county for the same type charge, burglary. The principal contention of that case centered on the fact that the March 1979, conviction, having occurred after September 29, 1978, the date on which it was charged that Jordan had feloniously sold and delivered the controlled substance, did not meet the requirements specified in § 99-19-81, that the defendant, to be punished as an habitual criminal, must "have been convicted twice previously" of a felony. *Jordan*, 383 So. 2d at 495-96. The trial court rejected this argument, and Jordan's conviction was affirmed by the Mississippi Supreme Court on appeal. *Id.* at 497.

In addition to the above argument, the State asserts that no reasonable juror could have believed differently based on the evidence as presented by the State that Brown was guilty of the crime charged. In addition to the damaging testimony of the pharmacist who observed her taking the stereo and putting the property under her skirt, Brown admitted to the act on the witness stand.

The act of concealment is prima facie proof of her intent to appropriate the property to her own use. **Miss. Code Ann. § 97-23-93 (2) (a) (Rev. 1994)**. Brown was simply caught in the act.

Addressing the prior convictions, the State put on witnesses. The investigator presented certified copies of the shoplifting convictions in Brookhaven and Ridgeland, Mississippi. The jury was free to evaluate and assign any or no credibility to the evidence presented. The Mississippi Supreme Court has stated in *Gloseclose v. State*, 440 So. 2d 297, 300 (Miss. 1983), that a new trial should be granted only when the "verdict is so contrary to the overwhelming weight of the evidence that, to allow it to stand would be to sanction an unconscionable justice."

In sum, Brown's arguments seem to be based upon the cumulative errors cited within the indictment, and therefore she should be given a new trial. We disagree.

## CONCLUSION

The defendant's argument to the contrary notwithstanding, we find that the defendant was amply notified about the charge lodged against her. Likewise, we find that the evidence was supportive of

the jury's verdict. Brown has simply failed to demonstrate the lack of evidence to support the jury's findings or to show that upholding the conviction would be a manifest injustice.

**THE JUDGMENT OF THE COPIAH COUNTY CIRCUIT COURT OF CONVICTION OF FELONY SHOPLIFTING (3RD OFFENSE) AND SENTENCE OF THREE YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITH SAID SENTENCE TO RUN CONSECUTIVELY TO ANY PRIOR SENTENCES IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO COPIAH COUNTY.**

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

1. See **Miss. Code Ann. § 99-7-21 (Rev. 1994)**, as stated above.