

IN THE COURT OF APPEALS 4/22/97

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-01002 COA

TOMMY LEE WASHINGTON

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. JAMES W. BACKSTROM

COURT FROM WHICH APPEALED: JACKSON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

TANYA L. HASBROUCK

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: DEIRDRE MCCRORY

DISTRICT ATTORNEY: DALE HARKEY

NATURE OF THE CASE: CRIMINAL (FELONY) - BURGLARY OF A DWELLING

**TRIAL COURT DISPOSITION: WASHINGTON CONVICTED OF BURGLARY OF A
DWELLING AND SENTENCED TO A TERM OF FIVE YEARS IN THE CUSTODY OF THE
MDOC**

BEFORE McMILLIN, P.J., COLEMAN AND PAYNE, JJ.

McMILLIN, P.J., FOR THE COURT:

Tommy Lee Washington appeals his conviction for burglary of a dwelling rendered by the Jackson County Circuit Court. Washington claims the following errors require us to reverse his conviction: (1) the trial court erred in denying his motion for directed verdict, peremptory instruction and motion for new trial; (2) the trial court erred in denying his motion for a mistrial after the key prosecution witness testified that she had examined certain photos not produced during discovery; and (3) the trial court erred in permitting the State to file its proposed jury instructions in an untimely manner.

We have considered the issues raised by Washington and conclude that they do not require a reversal of his conviction. We, therefore, affirm.

I.

FACTS

On October 14, 1992, Moss Point police responded to a call from Mrs. Bernice Cole reporting a burglary in progress at the home of her neighbor, Joyce White Blango. Cole, who lived in the adjoining duplex to Mrs. Blango, told officers that about 11:00 p.m., she heard someone knocking loudly on Blango's door. Cole knew that Blango had gone to visit her mother for a few hours, and went to her door to see if there was a problem since it was so late in the evening. The young man knocking on Blango's door told Cole that he was looking for Stevie, Mrs. Blango's son. Cole informed the young man that Stevie did not live there, and he left. About fifteen minutes later, Mrs. Cole heard noise in Mrs. Blango's apartment, went back to her door and saw the same young man coming from around the corner. When he insisted this time that he was waiting for Stevie, who was inside, Mrs. Cole called out several times for Stevie, who never answered. Suddenly, the door to Mrs. Blango's apartment opened, and another young man, who was later identified as Tommy Lee Washington, walked out. He told Mrs. Cole that he, too, was waiting for Stevie. Mrs. Cole told both young men that Stevie did not live there and she was going to call police. The two young men turned and left, and Mrs. Cole placed a call to the Moss Point Police.

Cole gave a description of the suspects, which was quickly broadcast over the radio, and officers in the surrounding area began their search for the two men. Meanwhile, officers met with Mrs. Blango, who had returned from visiting her mother, to determine what, if anything, was taken from her home. Officers discovered that the back window was broken and found a boot print on top of the air conditioning unit outside that window. There was nothing taken from inside the home.

Within fifteen to twenty minutes, Officer Raymond Brown saw three young men walking on a street about two blocks from the scene. Officer Brown requested identification from the three men because two of them fit the description given by Mrs. Cole, including the fact that one was wearing boots. The three men were taken in police cars to Mrs. Cole's house. She identified two of them as being the men she had encountered earlier in the evening. One of the men she identified was the defendant, Tommy Lee Washington. He was also the one who was wearing boots.

Washington was arrested and tried for the burglary of Mrs. Blango's residence. Mrs. Cole identified

Washington at trial and in certain pictures introduced into evidence at the trial which were taken on the night of the arrest. Washington was convicted and sentenced to five years. It is from this conviction and sentence that Washington appeals.

II.

Sufficiency of the Evidence

Washington argues that the trial court erred in refusing to grant his motion for a directed verdict, a peremptory instruction, or his motion for JNOV because the State failed to prove that Washington, at the time of entry into the dwelling, harbored the requisite intent to commit a crime once inside. Washington asserts that the State's evidence did not support a finding of larcenous intent because the proof showed that nothing was moved or taken from inside the home. Additionally, he claims that there was no evidence of flight to indicate that he was interrupted from his intended purpose before it could be accomplished.

This Court reviews the sufficiency of the evidence in the "light most favorable to the State." *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993). All credible evidence which is consistent with Washington's guilt "must be accepted as true," and the State is "given the benefit of all favorable inferences that may be reasonably drawn from the evidence." *Id.* (citations omitted). Because matters concerning the weight and credibility of the witnesses are resolved by the fact finder, this Court will reverse when, "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." *Id.* (citations omitted).

The elements necessary to convict Washington of the crime of burglary of a dwelling are: (1) an unlawful breaking and entering, and (2) an intent to commit a crime inside the building. *See* Miss. Code Ann. § 97-17-19 (1972); *Jackson v. State*, 483 So. 2d 1353, 1354 (Miss. 1986). Taking the evidence in the light most favorable to the State, there was sufficient proof to establish a breaking and entering on the part of Washington. Testimony indicated that entry into the home was through a back window, which had been forcibly broken. A boot print was discovered on the air conditioning vent outside that window, and Washington was wearing boots at the time he was arrested. Bernice Cole positively identified Washington as the person who exited Blango's apartment through the front door. Proving the element of intent, however, is often a more difficult task because it "is a state of mind seldom susceptible of direct proof absent a confession." *Williams v. State*, 512 So. 2d 666, 669 (Miss. 1987). "Intent is an emotional operation of the mind, and is usually shown by acts and declarations of the defendant coupled with facts and circumstances surrounding him at the time." *Jackson*, 483 So. 2d at 1355. We may infer intent "from the time and manner in which entry was made and the conduct of the accused after entry." *Williams*, 512 So. 2d at 669. The Mississippi Supreme Court has stated, "Some presumptions are to be indulged in against one who enters a building unbidden, at a late hour of night" *Jackson*, 483 So. 2d at 1354.

The jury was presented with the following evidence from which they could infer a larcenous intent in Washington's actions. Washington was identified as the person who exited the home of Joyce Blango late in the evening, after 11:00 p.m. Despite the fact that nothing was taken from the home, testimony from Bernice Cole established that she heard noises in Blango's apartment and went to her own door to discover James McDaniel coming from around the side of the house. When McDaniel stated that

he was waiting for Stevie, Mrs. Cole called out loudly for Stevie to answer. At that point, Washington exited the house and stated that he, too, was waiting for Stevie. Testimony from Mrs. Cole and Mrs. Blango informed the jury that Stevie had not lived with his mother for three years. Mrs. Cole testified to relaying essentially the same information to Washington's associate that evening. Under these facts, the jury could reasonably infer that Washington entered the home with the intent to steal items from inside, but was interrupted prior to completing his objective by Mrs. Cole's activities outside Mrs. Blango's door.

Giving the State the benefit of all reasonable inferences and bearing in mind that the jury is responsible for determining the credibility of the witnesses, we cannot say that "reasonable and fair-minded jurors could only find the accused not guilty." *McClain v. State*, 625 So. 2d at 778.

III.

Denial of a Motion for Mistrial

During the course of Bernice Cole's testimony, she indicated that she had, at the request of investigating officers, reviewed certain photographs and identified the defendant on the night the break-in occurred. According to her testimony, the photographs she had seen were different from the ones introduced into evidence at trial.

At the close of her testimony, defense counsel moved for a mistrial, alleging a discovery violation on the part of the State for its failure to disclose the existence of these additional photographs. The prosecuting attorney disclaimed any knowledge of the existence of such photographs. The trial court ordered a recess and directed the State to inquire of the investigating officers regarding the use of other photographs during the investigation of the case. The prosecutor reported back to the court that, in so far as he could determine, no other photographs existed.

Washington, in his brief, ignores the assertion of the State of the non-existence of such photographs and claims that he should have at least been given time to investigate whether such photographs existed. He says a possibility existed that Mrs. Cole may have misidentified the defendant in these photographs, thereby casting doubt on her in-court identification. He cites the procedures set out in *Box v. State* as support for his entitlement to time to investigate the matter. *Box v. State*, 437 So. 2d 19, 23 (Miss. 1983) (Robertson, J., specially concurring).

Washington's reliance upon the principles of *Box v. State* in support of his contention is without merit. *Box* deals with attempts by the State to introduce into evidence matters that were not disclosed during discovery. It does not deal with claims that the State has withheld exculpatory information from the defense. *Box* provides for the possibility of a continuance to permit the defense to review previously undisclosed evidence but does not suggest the propriety of a mid-trial recess to permit investigations by the defense to attempt to unearth additional exculpatory evidence.

The real issue, thus, involves the proposition that the State, by allegedly withholding information concerning other photographs, may have been keeping exculpatory evidence from the defendant. The duty of the State, upon proper request, to disclose exculpatory information is not subject to question. *See* U.R.C.C.P. 9.04.A.6. This Court notes the pronouncement of the supreme court that the State, in fulfilling its obligation under discovery rules to disclose exculpatory information, should not serve

as the judge of whether a particular piece of evidence is exculpatory or not. *Welch v. State*, 566 So. 2d 680, 682-83 (Miss. 1990) (citing *Hentz v. State*, 489 So. 2d 1386, 1388 (Miss. 1986)). Rather, the supreme court urged, the common-sense approach is to make known all pertinent information and let the defendant make his own determination as to whether the information might be useful. *Id.*

With that in mind, we agree in principal with the defense that, had Washington shown the existence of additional photographs used in the investigatory process, the State's failure to disclose them in discovery would be error. Whether it would be reversible error or not would, of course, require further analysis since not every error committed in the conduct of a trial requires reversal. *See Nixon v. State*, 641 So. 2d 751, 755 (Miss. 1994) (trial was not perfect but was fair); *Sand v. State*, 467 So. 2d 907, 910 (Miss. 1985) (although defendant did not receive perfect trial, it was a fair trial).

The defense was unable to show with any degree of certainty the existence of such other photographs. The only evidence was the direct testimony of Bernice Cole, and the issue was not developed to any great extent during cross-examination by defense counsel. A subsequent court-directed inquiry indicated that no such photographs existed, leading to a reasonable hypothesis that Cole may have been confused in her recollection. The trial court, satisfied that no additional photographs existed, ordered the trial to continue. The trial judge very properly observed that, if additional information came to light concerning other photographs, the matter could be dealt with at that time. The record indicates that no such additional information was developed at trial or in the post-verdict period during which the matter could have been raised by post-trial motion.

We cannot conclude that the trial court was in error in its handling of this issue. By doing so, we are not condoning the withholding of information by the State. We are, instead, simply finding that the defendant has failed to convince this Court that such improper activity was taking place.

IV.

Submission of Jury Instructions

Washington's final argument centers around the State's submission of jury instructions less than twenty-four hours before trial in violation of Rule 5.03 of the Uniform Criminal Rules of Circuit Court Practice. Washington did not raise this objection until the close of the evidence.

We do not construe the twenty-four hour pre-filing rule in a criminal case to be a device to arbitrarily deny either the prosecution or the defense an opportunity to have the jury fully instructed on the law. The violation of the rule by either side, if wilfully done, may subject the offending party to appropriate sanctions by the trial court. However, once the court is reasonably satisfied that both sides have had ample opportunity to review all proposed instructions and be heard on the propriety of each one offered, it is essential to the orderly administration of justice that the court proceed to properly instruct the jury. Whether a particular instruction was pre-filed more than twenty-four hours before the trial commenced is not, standing alone, a proper basis to deprive the jury of its benefit.

We also note that the defense was certainly aware when it announced ready for trial that it had not received the State's proposed instructions in a timely manner. If the defense had intended to insist upon a strict application of the rule, it was incumbent upon counsel to bring the matter to the court's attention at that time, rather than stand mute and permit supposedly reversible error to be committed

before the first witness was called. We conclude that Washington waived any right to insist upon strict compliance with the rule when he failed to assert his objection until the end of the trial -- a time when considerable judicial resources had been expended and the error had become incurable.

The court allowed Washington's attorney as much time as needed to review the State's instructions. During the ensuing proceedings, several instructions requested by the State were altered and others were refused in response to defense counsel's objections.

There is nothing in the record to indicate that Washington suffered any prejudice because of the late filing. The decision of the lower court to consider proposed instructions filed in violation of the twenty-four hour filing deadline did not, on the facts, constitute reversible error. *See Carter v. State*, 493 So. 2d 327, 330 (Miss. 1986); *see also Shaw v. State*, 540 So. 2d 26, 29 (Miss. 1989) (failure to follow the dictates of Rule 5.03 will not lead to reversal absent actual prejudice).

THE JUDGMENT OF THE CIRCUIT COURT OF JACKSON COUNTY OF CONVICTION OF BURGLARY OF A DWELLING AND SENTENCE OF FIVE YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO JACKSON COUNTY.

BRIDGES, C.J., THOMAS, P.J., DIAZ, HERRING, PAYNE, AND SOUTHWICK, JJ., CONCUR. COLEMAN, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY KING, J. HINKEBEIN, J., NOT PARTICIPATING.

IN THE COURT OF APPEALS 4/22/97

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-01002 COA

TOMMY LEE WASHINGTON

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

COLEMAN, J., DISSENTS:

With all deference to the scrivener of the majority opinion and my colleagues who join him, I dissent because I believe that *Alford v. State*, 656 So. 2d 1186, 1190-91 (Miss. 1995), requires that this Court reverse the trial court's judgment of Washington's guilt of burglary, affirm his guilt of the misdemeanor of trespass, and remand for the trial judge's resentencing Washington for the misdemeanor of trespass. My dissent rests upon the fact, which the majority notes, that "nothing was moved or taken from inside the home."

In *Alford*, the appellant, Michael Joe Alford, had been convicted of burglary of an inhabited dwelling in violation of Section 97-17-21 of the Mississippi Code of 1972. *Id.* at 1187. The State had charged that Alford intended to commit the crime of simple assault as defined by Section 97-3-7 of the Mississippi Code of 1972. *Id.* at 1191. The Mississippi Supreme Court found that the State had wholly failed to prove that Alford had intended to commit simple assault when he broke into the dwelling house and, therefore, had "failed to prove all elements required for burglary of a dwelling." *Id.* at 1191. It so held even though it was clear that Alford had broken into the home and had, in fact, tugged or pushed one of its inhabitants. *Id.* at 1190. However, because the trial judge had granted a jury instruction which would have allowed the jury to convict Alford of trespass, the supreme court reversed Alford's conviction of burglary of a dwelling house, affirmed that he was guilty of the lesser offense of trespass, and remanded the case with instructions to sentence Alford for trespass. *Id.* at 1192.

In the case *sub judice*, nothing was stolen from within the apartment of Joyce White Blango, from which Mrs. Cole observed Washington emerge. The record contains no evidence of the rummaging or ransacking of the apartment's interior. In *Alford*, the supreme court opined:

In *Davis v. State*, 611 So.2d 906 (Miss. 1992), the Court stated that to "justify a conviction of burglary, it is necessary not only to show that a person entered a building of another person, but in addition that at the time he did so, he intended to commit a crime therein. The intent to commit a crime therein must co-exist with the physical act of entry." *Id.* at 911, citing *Brumfield v. State*, 206 Miss. 506, 40 So. 2d 268 (1949); *Gross v. State*, 191 Miss. 383, 2 So.2d 818 (1941).

In the case at bar there is no showing of evidence of intent on Alford's part to commit a crime.

Alford, 656 So. 2d at 1190.

In any criminal prosecution, the burden of proving the defendant's guilt of the crime with which he or she is charged rests on the State. In *Hickson v. State*, 472 So.2d 379, 383 (Miss. 1985), the Mississippi Supreme Court summarized the State's burden of proof in a criminal prosecution as follows:

Though not expressly written into the Bill of Rights, the presumption of innocence has long been recognized as the logical corollary of the principle that the prosecution bears the burden of proof beyond a reasonable doubt, a proposition which has been accorded federal constitutional status.

(citations omitted). Moreover, "[B]efore [a] defendant can be convicted of felonious 'breaking and entering' it must be shown that such 'breaking and entering' was done 'with intent to commit some crime therein.' *That crime must be named and described in the indictment.*" *Newburn v. State*, 205 So. 2d 260, 263 (Miss. 1967) (emphasis added). Therefore, the State had the burden of proof to establish that Washington had broken and entered Joyce White Blanco's apartment with the intent to commit the crime of larceny inside the apartment.

The majority concludes: "Under these facts, the jury could reasonably infer that Washington entered the home with the intent to steal items from inside, but was interrupted prior to completing his objective by Mrs. Cole's activities outside Mrs. Blanco's door." Again with deference to the majority's evaluation of the sufficiency of the evidence to establish that Washington entered the apartment with the intent to steal items from inside, and in keeping with my understanding of *Alford*, I respectfully submit that the State only established that Mrs. Cole's activities interrupted whatever Washington's activities were inside. The State's evidence did nothing to define Washington's intent, whether to commit larceny or any other crime, when he entered Mrs. Blanco's apartment.

Therefore, the State failed to muster its burden of proof to establish the nature of the crime that Washington intended to commit when he broke and entered Mrs. Blanco's apartment. It was essential for the State to prove, even if only by circumstantial evidence, beyond a reasonable doubt that it was larceny that Washington intended to commit when he broke and entered Mrs. Blanco's apartment. According to *Newburn*, not just any crime would suffice to establish Washington's guilt of the crime of burglary. It had to be larceny, the crime which the State charged that Washington intended to commit when he entered the apartment.

The supreme court reversed and remanded *Alford* with instructions to the trial court to sentence Alford for trespass. *Id.* at 1192. It relied on *Anderson v. State*, 290 So. 2d 628 (Miss. 1974) for its authority to do so. In *Anderson*, the Mississippi Supreme Court explained:

Trespass is necessarily a component of every burglary. Implicit in the verdict finding defendant guilty of burglary is the finding that he was guilty of the constituent offense of trespass, Section 97-17-87, Mississippi Code Annotated (1972). Inasmuch as the jury has found the defendant guilty of the greater crime, and the evidence of defendant's guilt of trespass is conclusive, the judgment is affirmed as a conviction of trespass, and the case is remanded for sentencing on that charge.

Id. at 628-29. In the case *sub judice*, Mrs. Cole's testimony that she saw Washington emerge from Mrs. Blanco's apartment was equally conclusive of Washington's guilt of trespass. Thus, I would reverse Washington's conviction of burglary, affirm his guilt of trespass, and remand this case for Washington's resentencing for trespass as the supreme court did in *Alford*. *See Alford*, 656 So. 2d at 1192.

KING, J., JOINS THIS SEPARATE WRITTEN OPINION.

