

IN THE COURT OF APPEALS 02/13/96

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00451 COA

RANDY ALLEN PERRY

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. GEORGE C. CARLSON, JR.

COURT FROM WHICH APPEALED: DESOTO COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT:

JACK R. JONES III

SUSAN M. BREWER

ATTORNEY FOR APPELLEE:

W. GLENN WATTS

ATTORNEY GENERAL'S OFFICE

DISTRICT ATTORNEY: ROBERT L. WILLIAMS

NATURE OF THE CASE: CRIMINAL-ARMED ROBBERY, BURGLARY, AND KIDNAPING

TRIAL COURT DISPOSITION: DEFENDANT CONVICTED AND SENTENCED AS A
HABITUAL OFFENDER TO FIFTEEN YEARS FOR BURGLARY, THIRTY YEARS FOR
ARMED ROBBERY, AND THIRTY YEARS FOR KIDNAPING--ALL SENTENCES TO RUN
CONCURRENTLY.

BEFORE THOMAS, P.J., DIAZ, AND McMILLIN, JJ.

McMILLIN, J., FOR THE COURT:

Randy Allen Perry was tried and convicted in the Circuit Court of DeSoto County of burglary, kidnaping, and armed robbery. Perry now appeals to this Court claiming that the evidence presented at trial on the burglary and kidnaping charges was legally insufficient to support the convictions. Perry also argues that the armed robbery conviction cannot stand because it merges with the burglary charge. Finding no error, we affirm.

I.

FACTS

On April 13, 1993, Diane Ault was at her home in Hernando. Ault was home alone because her husband had gone out of town turkey hunting. That evening, while eating supper, Ault's doorbell rang. She went to the door and opened it slightly. Suddenly, Randy Perry forced his way into the house through the open door, put a gun to Ault's throat, said that he wanted money, and threatened to shoot her. Perry forced Ault to take him through the entire house, keeping the gun to her throat and threatening to rape and kill her. Perry made Ault give him about \$170.00 that she had hidden in a dresser drawer in the master bedroom.

They ended up in Ault's den where, out of fear and the hope of postponing rape, Ault began talking to Perry about anything that she could think of. During the course of the conversation, Perry developed a certain trust in Ault. Ault told Perry that she had never been to Splash Casino and Perry said that he would take her. They left in Ault's car, because Perry had no car, and headed for Splash Casino. Ault was driving, and Perry was in the passenger seat, still holding the gun. On the way, Ault missed a turn and had to turn around at a nightclub called the Roadrunner. Ault said that they needed cigarettes and that they should get them while they were right there at the Roadrunner, so Perry exited the car, putting the gun in his pants, to get some cigarettes. Once Perry went inside, Ault immediately drove to the DeSoto County jail to report the crime.

II.

SUFFICIENCY OF THE EVIDENCE

Perry did not put on any evidence after the State rested. He now asserts that the evidence put on by the State in support of the offenses of burglary and kidnaping was insufficient to sustain a conviction against him. The Mississippi Supreme Court stated in *McClain v. State*, the familiar standard of review for reviewing a sufficiency of the evidence question:

[T]he sufficiency of the evidence as a matter of law is viewed and tested in a light most favorable to the State. The credible evidence consistent with [Green's] guilt must be accepted as true. The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. Matters regarding the weight and credibility of the evidence are to be resolved by the jury. We are 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.

McClain v. State, 625 So. 2d 774, 778 (Miss. 1993) (citations omitted).

A.

BURGLARY

Perry argues that the evidence presented at trial was not sufficient to support a conviction of burglary under section 97-17-21 of the Mississippi Code of 1972 because there was no proof of a "breaking." Section 97-17-21 provides in pertinent part:

Every person who shall be convicted of breaking and entering . . . either by forcibly bursting or breaking the wall, or an outer door, window or shutter, of a window of such house, or the lock or bolt of such door, or the fastening of such window or shutter, *or by breaking in in any other manner* . . . shall be guilty of burglary

Miss. Code Ann. § 97-17-21 (1972) (emphasis supplied).

The manner in which Perry achieved entry into Ault's home, by physically forcing his way in while brandishing a deadly weapon, falls within the language of the statute. The Mississippi Supreme Court dealt with this very situation in *Ross v. State*, 603 So. 2d 857 (Miss. 1992). In that case, Ross knocked on the victim's door. She came to the door, opened the wooden door and partially pushed open the outside screen door. Ross grabbed her arm, displayed a weapon, and forced himself in through the open door. Following Ross' conviction for burglary, Ross contended on appeal that he could not be guilty of burglary because the evidence showed that he entered the house through an open door, thus no "breaking" occurred. The Court held that the "breaking and entering" portion of the statute is satisfied either by the act of displaying the weapon to gain entry, or the act of physically forcing himself into the house by grabbing the victim's arm and pushing. *Ross*, 603 So. 2d at 865. "It does not matter how much [the victim] had opened the door to speak with Ross. She did not let him in. He forced his way in." *Id.*

B.

KIDNAPING

Perry also contends that the State's evidence was insufficient to convict him of kidnaping. The germane part of Mississippi's kidnaping statute provides that a person will be guilty of kidnaping when that person "shall without lawful authority forcibly seize and confine any other person . . . with intent to cause such person to be secretly confined or imprisoned against his or her will . . ." Miss. Code Ann. § 97-3-53 (1972). Perry argues that there was no proof that Ault was "secretly confined or imprisoned" as required by the statute. Perry cites *Aikerson v. State*, 274 So. 2d 124, 128 (1973), which states that, "in order for one to be guilty of the crime of kidnaping, the victim must be unlawfully removed from a place where he [or she] has a right to be, to another place."

However, in *Cuevas v. State*, 338 So. 2d 1236 (Miss. 1976), the Mississippi Supreme Court set out to clear up any confusion caused by *Aikerson*. In that case, Cuevas, convicted of kidnaping, also quoted *Aikerson*, arguing that reversal was warranted because the victim was never removed from the premises. *Cuevas*, 338 So. 2d at 1238. The *Cuevas* Court held that, despite the language of *Aikerson*, a kidnaping nonetheless has occurred even when the kidnaper does not or cannot, due to circumstances, transport his victim to a location other than the one in which he is forcibly detained. *Id.* The Court went on to explain:

[It] is not the distance of asportation in kidnaping, but rather the fact of asportation as it relates to the unlawful activity [As long as] the confinement or asportation be not merely incidental to a lesser crime, but a constituent part of the greater crime, the fact of confinement or asportation is sufficient to support kidnaping without regard to distance moved or time of confinement.

Id.

In this case, as in *Cuevas*, the purpose for detaining Ault in her den revolved around Perry's escape. The evidence showed that Perry, through the use of a gun, forcibly detained Ault in her home. Perry compelled Ault to move from room to room whereby he committed the robbery in the bedroom. Perry kept Ault in the den for over an hour after the burglary and armed robbery had occurred, stating to her repeatedly, "You're going to turn me in. I know you're going to turn me in." Perry's detention of Ault in the den was not incidental to the burglary or the armed robbery, because those crimes had already been committed. Therefore, under *Cuevas*, there was sufficient evidence to sustain Perry's conviction of kidnaping.

III.

ARMED ROBBERY

In Perry's final claim, he asks this Court to adopt the "merger doctrine," thereby reversing the conviction for armed robbery because it merges with the burglary charge. The Mississippi Supreme Court has yet to deal with the merger doctrine in this particular context. In addition, the Fifth Circuit has addressed this question only once but failed to answer it, resolving that dispute on other, procedural grounds. *See Moyer v. Anderson*, 203 F. 881, 882 (5th Cir. 1913). However, many other jurisdictions have been faced with this precise problem.

In looking at the law in other jurisdictions, we find that many states have held that robbery and burglary do not merge with one another. *See United States ex rel. Smith v. Johnson*, 403 F. Supp. 1381, 1393 (E.D. Pa. 1975); *Stowe v. State*, 857 P.2d 15, 16-17 (Nev. 1993); *State v. Martes*, 628 A.2d 817, 819 (N.J. 1993); *State v. McAfee*, 428 P.2d 647, 649-50 (N.M. 1967); *Williams v. State*, 344, S.E.2d 247, 257 (Ga. 1986). The crime of burglary is complete upon the breaking and entering of a dwelling with the intent to commit a crime therein. *Stowe*, 857 P.2d at 17. If, in fact, the intended offense, including robbery, is committed after the unlawful entry, then that offense is separately punishable. *E.g., Martes*, 628 A.2d at 819. The key here is that the crimes of burglary and robbery have one or more separate and distinct elements. *See, e.g., United States ex rel. Smith*, 403 F. Supp. at 1393; *McAfee*, 428 P.2d at 649-50.

In *Smith v. State*, 429 So. 2d 252 (Miss. 1983), the Mississippi Supreme Court implemented this same reasoning in a slightly different set of circumstances. In that case, Ronnie Smith broke into the home of Melissa Darnell Williams and raped her. Smith was prosecuted and convicted of the burglary of an occupied dwelling with the intent to commit rape once therein. However, prior to the burglary indictment, Smith had already been indicted, tried, and convicted of the intended rape arising out of the same set of events. Smith complained that his burglary conviction was in error as it violated the double jeopardy provisions of the State and Federal Constitutions. The *Smith* Court held that the burglary conviction did not violate Smith's constitutionally protected right against double jeopardy. *Smith*, 429 So. 2d at 257. The Court based its decision on the familiar rule set out in *Blockburger v. United States*, that as long as the elements of each crime "require[] proof of an additional fact which the other does not," then there is no error in convicting the defendant for both. *Blockburger v. United States*, 284 U.S. 299, 304 (1932). Therefore, a defendant may properly be convicted for burglary and the underlying crime set out in the indictment. *See Smith*, 429 So. 2d at 257; *But see Newburn v. State*, 205 So. 2d 260, 263-64 (Miss. 1967) (when burglary and larceny are charged in the same count of an indictment with no separate count for the underlying larceny, then the defendant may be convicted of either crime, but not both).

In the present case, the underlying crime in the burglary indictment was robbery. The crimes of burglary and robbery involve the proof of wholly dissimilar elements. Burglary requires the breaking and entering of a dwelling with the intent to commit a crime. *See Miss. Code Ann. § 97-3-79* (1972). On the other hand, robbery requires that the defendant take the personal property of another, from the person or in his presence. *See Miss. Code Ann. § 97-17-21* (1972). Accordingly, Perry's armed robbery conviction does not merge with his conviction for burglary.

IV.

CONCLUSION

For the reasons stated above, we find that there was sufficient evidence to support Perry's convictions of burglary and kidnaping. In addition, we find no merit to the argument that a charge of armed robbery must merge with a charge of burglary. We, therefore, affirm.

THE JUDGMENT OF THE CIRCUIT COURT OF DESOTO COUNTY OF COUNT I, CONVICTION OF BURGLARY OF AN INHABITED DWELLING AND SENTENCE OF FIFTEEN (15) YEARS; COUNT II, CONVICTION OF ARMED ROBBERY AND SENTENCE OF THIRTY (30) YEARS; AND COUNT III, CONVICTION OF KIDNAPING

AND SENTENCE OF THIRTY (30) YEARS ALL SENTENCES TO RUN CONCURRENTLY AND TO BE SERVED AS AN HABITUAL OFFENDER IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS ARE TO BE ASSESSED TO DESOTO COUNTY.

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