

IN THE COURT OF APPEALS 12/03/96

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00586 COA

OTIS CHRISTIAN

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

TRIAL JUDGE: HON. ROBERT G. EVANS

COURT FROM WHICH APPEALED: SIMPSON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

BRUCE B. SMITH

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY BY: CHARLES W. MARIS, JR.

DISTRICT ATTORNEY: DEWITT FORTENBERRY, JR.

NATURE OF THE CASE: CRIMINAL - BURGLARY

TRIAL COURT DISPOSITION: CONVICTED OF BURGLARY; SENTENCED TO SEVEN
YEARS IN MDOC AS HABITUAL OFFENDER

BEFORE THOMAS, P.J., BARBER, AND MCMILLIN, JJ.

PER CURIAM:

Otis Christian was indicted and convicted of burglary of a building pursuant to section 97-17-33 of the Mississippi Code. He was sentenced as a habitual offender to serve a term of seven years in the custody of the Mississippi Department of Corrections. On appeal, it is unclear as to whether Christian challenges the verdict as being without sufficient evidence to support it or as being against the weight of the evidence. Reviewing Christian's assignment of error by either standard nonetheless renders it without merit because both assignments of error are procedurally barred.

Christian moved for a directed verdict at the conclusion of the State's case in chief. This motion was subsequently denied. Christian then put on evidence on his own behalf. Christian did not thereafter renew his motion for a directed verdict at the close of all the evidence, nor did he request a peremptory instruction or move for a J.N.O.V. Christian, likewise, never moved for a new trial. Therefore, his only challenge against the evidence presented by the prosecution was made at the close of the State's case. Christian waived any right to assign error to the court's denial of his motion for a directed verdict at this juncture when he elected to go forth with his defense. "A motion for a directed verdict at the conclusion of the State's case in chief is waived if the defendant elects to go forward with testimony for the defense. *Anselmo v. State*, 312 So. 2d 712, 714 (Miss. 1975).

When the defendant proceeds with his case after the State rests and the court overrules the defendant's motion for a directed verdict, the defendant has waived the appeal of that directed verdict. Furthermore, the defense [fails] to test the sufficiency of the evidence [without] a request for peremptory instruction or a motion for j.n.o.v. Generally, failure to make a contemporaneous objection at trial waives the issue on appeal. In the absence of a renewal of the directed verdict, a request for peremptory instruction, or a motion for a judgment notwithstanding the verdict, [the appellant waives] the sufficiency error on appeal.

Holland v. State, 656 So. 2d 1192, 1197 (Miss. 1995) (citations omitted).

Assuming that Christian's assignment of error is that the verdict is against the overwhelming weight of the evidence, his claim is equally without merit. Motions for a new trial challenge the weight of the evidence. *McClain v. State*, 625 So. 2d 774, 781 (Miss 1993). Because he failed to move for a new trial, Christian has waived his assignment of error on this point and is procedurally barred from raising this issue on appeal. We find accordingly that Christian's assignment of error is without merit and affirm the decision of the trial court.

THE JUDGMENT OF THE SIMPSON COUNTY CIRCUIT COURT OF CONVICTION OF BURGLARY OF A BUILDING AND SENTENCE AS A HABITUAL OFFENDER TO SERVE A TERM OF SEVEN YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. SENTENCE IMPOSED SHALL RUN

CONSECUTIVELY TO ANY OTHER SENTENCE CHRISTIAN IS PRESENTLY SERVING. COSTS ARE ASSESSED TO SIMPSON COUNTY.

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