

**IN THE COURT OF APPEALS  
OF THE  
STATE OF MISSISSIPPI  
NO. 95-KA-01218 COA**

**HOWARD GOODIN**

**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:	11/17/95
TRIAL JUDGE:	HON. MARCUS D. GORDON
COURT FROM WHICH APPEALED:	NESHOBA COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	EDMUND J. PHILLIPS, JR.
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: DEWITT T. ALLRED III
DISTRICT ATTORNEY:	KEN TURNER
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	CONVICTED OF BURGLARY AND SENTENCED TO SIX YEARS IN THE CUSTODY OF MDOC
DISPOSITION:	AFFIRMED - 11/18/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	12/9/97

BEFORE THOMAS, P.J., HERRING, AND HINKEBEIN, JJ.

THOMAS, P.J., FOR THE COURT:

Howard Goodin appeals his conviction of burglary, raising the following issues as error:

**I. THE DISTRICT ATTORNEY'S ARGUMENT TO THE JURY THAT THE APPELLANT WAS NO LONGER ENTITLED TO THE PRESUMPTION OF INNOCENCE WAS PROSECUTORIAL MISCONDUCT DEPRIVING APPELLANT OF A FUNDAMENTAL RIGHT.**

**II. APPELLANT'S VOLUNTARY ABANDONMENT OF THE BURGLARY**

**RENDERED HIM GUILTY ONLY OF ATTEMPTED BURGLARY.**

**III. THE UNCOUNSELED PRE-TRIAL IDENTIFICATION OF THE APPELLANT WAS IMPERMISSIBLY SUGGESTIVE AND DEPRIVED APPELLANT OF DUE PROCESS.**

Finding no error, we affirm.

**FACTS**

On June 23, 1995, Albert Craig was working as a clerk at a gas station and convenience store around 11:00 p.m. when he heard the sound of breaking glass. Craig did not check on the noise until he was about to leave the store around midnight. While Craig was leaving, he noticed that the light was still on in the storage room. Craig went back to the storage room to turn off the light and noticed that a window had been broken out and cases of beer had been stacked in front of the broken window both inside and outside the storage room. Craig then saw a person crawling on his hands and knees behind some boxes. That person was later determined to be Howard Goodin. Craig shouted at Goodin. Goodin stood up, threatened to shoot Craig, and then demanded money from Craig. Craig told Goodin that he had no money, and then stated that Goodin better get out of the building. Goodin then jumped through the broken window and fled the scene. Craig testified that when he got to work the window was not broken and that the cases of beer were not stacked in front of the broken window.

Craig called the police and gave them a description of the burglar. Craig stated the burglar was a tall, slender, black male, wearing a blue shirt with lightning bolts on it, blue jeans, a baseball cap, and also had a goatee and mustache. Craig testified that the light was on in the storage room; he was about two or three feet away from Goodin; he had the opportunity to view Goodin for about two minutes; and Goodin was not wearing anything to conceal his face. Shortly after Craig gave the description to police, Goodin was picked up by police Deputy Kenny Moore. Deputy Moore testified that Goodin was wearing jeans and a shirt that had lightning bolts on it. Deputy Moore also stated that Goodin had a baseball cap in his hands and that Goodin had facial hair. Craig went to the police station and identified Goodin as the burglar from a closed circuit television monitor. Craig also identified Goodin in court as the burglar.

**ANALYSIS**

**I. THE DISTRICT ATTORNEY'S ARGUMENT TO THE JURY THAT THE APPELLANT WAS NO LONGER ENTITLED TO THE PRESUMPTION OF INNOCENCE WAS PROSECUTORIAL MISCONDUCT DEPRIVING APPELLANT OF A FUNDAMENTAL RIGHT.**

Goodin argues that the prosecutor denied Goodin a fair trial when the prosecutor argued to the jury during closing arguments, "He can't hide behind the presumption of innocence anymore." Goodin contends that the prosecutor not only committed misconduct in making this argument, he denied Goodin a protection that is a fundamental right. The State contends that since Goodin did not object

to the comment, he is procedurally barred from raising the issue on appeal. Also, the State contends that the prosecutor's comment was in response to defense counsel's closing argument.

During closing argument, defense counsel stressed to the jury that Goodin is presumed to be wholly innocent, until the State can prove that he is not innocent. In response, during the State's closing argument, the prosecutor argued to the jury that Goodin did, in fact, come into court with the presumption of innocence in his favor, but that the State has put on its proof and shown that Goodin was guilty beyond a reasonable doubt. The prosecutor then commented, "He can't hide behind the presumption of innocence anymore."

Goodin failed to make a contemporaneous objection to the comment which he now asserts was error. Therefore, he is procedurally barred from raising the issue on appeal. *Walker v. State*, 671 So. 2d 581, 614 (Miss. 1995); *Davis v. State*, 660 So. 2d 1228, 1255-56 (Miss. 1995); *Foster v. State*, 639 So. 2d 1263, 1270 (Miss. 1994). A contemporaneous objection to the allegedly prejudicial remarks is required. *Handley v. State*, 574 So. 2d 671, 679 (Miss. 1990).

Without waiving the procedural bar, we find Goodin's assertion has no merit. The prosecutor's statement to the jury was argument that the State had proven beyond a reasonable doubt that Goodin was guilty of the crime. Furthermore, the court granted Instruction D-3 which stated:

The Court instructs the jury that at the outset of a trial a defendant is presumed to be wholly innocent of the whole crime charged, he is not required to prove himself innocent or put on any evidence at all. In considering testimony in the case you must look at the testimony and view it in the light of that presumption which the law clothes the defendant with, that he is wholly innocent, and it is a presumption that abides with him throughout the trial of the case until the evidence convinces you to the contrary beyond all reasonable doubt of his guilt.

Therefore, the jury was properly instructed on the presumption of innocence remaining with Goodin, and the prosecutor's statement did not amount to misconduct.

## **II. APPELLANT'S VOLUNTARY ABANDONMENT OF THE BURGLARY RENDERED HIM GUILTY ONLY OF ATTEMPTED BURGLARY.**

Goodin argues that since he voluntarily abandoned the crime scene, this rendered his crime an attempted burglary rather than a burglary. The State contends that all of the elements of burglary were proven by credible evidence and Goodin's abandonment of the building is irrelevant to the charge of burglary.

The crime of burglary consists of two elements: (1) the burglarious breaking and entering of the house or building and (2) the felonious intent to commit a felony therein. *Faust v. State*, 221 Miss. 668, 674, 74 So. 2d 817, 819 (1954). Burglary of a store building is a felony. *McCullum v. State*, 197 So. 2d 252 (Miss. 1967). Here, when Goodin broke in the building, he had the intent to steal. This is evidenced by the cases of beer stacked both inside and outside the broken window. The burglary was completed at this time. Goodin left the storage room only after he was confronted by Craig. The fact that Goodin changed his intent and left before actually taking anything out of the storage room does not change the fact that at some point, he intended to steal from the storage room. *Ross v. State*, 603

**So. 2d 857, 865 (Miss. 1992).** Therefore, Goodin had already committed the burglary before being confronted by Craig, and any abandonment on Goodin's part would have occurred too late to make a difference as to his guilt. This issue has no merit.

### **III. THE UNCOUNSELED PRE-TRIAL IDENTIFICATION OF THE APPELLANT WAS IMPERMISSIBLY SUGGESTIVE AND DEPRIVED APPELLANT OF DUE PROCESS.**

Goodin argues that the uncounseled identification of himself through a television monitor was impermissibly suggestive and denied him due process. The State contends that Goodin failed to object at trial to the in-court identification of Goodin, and therefore the issue is waived. The State also argues that the even if an objection had been made, that there would have been no basis for excluding the in-court identification based on the totality of the circumstances.

As the State notes, Goodin did not object to the in-court identification at trial. Goodin also failed to object to the pre-trial identification. "[A] failure to object is fatal for purposes of preserving error." ***Fleming v. State*, 604 So. 2d 280, 302 (Miss. 1992) (citations omitted).** No objections were made at trial concerning the testimony surrounding Goodin's identification. Therefore, all claims regarding Goodin's identification are procedurally barred. ***Livingston v. State*, 519 So. 2d 1218, 1221 (Miss. 1988).**

Without waiving the procedural bar, the Court finds the issue has no merit. After Goodin was picked up by the police, he was detained at the police station. Craig was brought to the station that night where he identified Goodin as the burglar. Goodin was the only person in the police lineup, and Craig picked him out from viewing a television monitor. Craig identified Goodin in court as the man he saw in the storage room that night and also testified that he identified Goodin at the police station that night.

The Mississippi Supreme Court has followed the independent factor analysis as set out in ***Neil v. Biggers*, 409 U.S. 188, (1972)**, to consider whether the pre-trial identification is impermissibly suggestive. These factors include the opportunity of the witness to view the suspect during the commission of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the suspect, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. ***Id.* at 199-200; *Nicholson v. State*, 523 So. 2d 68, 72-3 (Miss. 1988); *York v. State*, 413 So. 2d 1372, 1381 (Miss. 1982).**

Applying these factors to the present case:

#### 1. Opportunity to view the accused.

Craig testified that he had the opportunity to view the burglar for two minutes. Goodin was two or three feet away from Craig during this time. The light was on in the storage room, and Craig had an unobstructed view of Goodin. Goodin was not wearing a mask or hood to cover his face. This testimony shows ample opportunity for Craig to observe the burglar.

#### 2. Degree of attention.

During his observation of Goodin, Craig noticed that Goodin was a tall, slender, black male, wearing a blue shirt with lightning bolts on it, blue jeans, a baseball cap, and also had a goatee and mustache.

3. Accuracy of prior description.

Craig gave Investigator Richard Sistrunk a description of the burglar. Sistrunk delineated into the record the actual physical characteristics given to him by Craig. Sistrunk broadcasted the description of the suspect over the police radio. Less than two minutes later, Deputy Moore picked up Goodin. Moore testified that he detained Goodin based on the physical description given by Craig and Sistrunk.

4. Level of certainty exhibited by the witness at the confrontation.

At the police station, Craig quickly identified Goodin as the burglar. Craig stated that he identified Goodin before the police could ask him anything about the suspect.

5. Length of time between the crime and the confrontation.

The lineup in which Goodin was identified was held the night of the burglary. The trial was less than five months from the time of the burglary.

Under these circumstances, we conclude ample evidence existed to support the pre-trial identification.

**THE JUDGMENT OF THE NESHOPA COUNTY CIRCUIT COURT OF CONVICTION OF BURGLARY AND SENTENCE OF SIX YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO NESHOPA COUNTY.**

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