

**9IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-KA-01081 COA**

**JIMMY TUCKER A/K/A JIMMY HOWARD
TUCKER**

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

DATE OF JUDGMENT:	09/26/96
TRIAL JUDGE:	HON. WILLIAM F. COLEMAN
COURT FROM WHICH APPEALED:	HINDS COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	DAN W. DUGGAN, JR.
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: BILLY L. GORE
DISTRICT ATTORNEY:	EDWARD J. PETERS
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	BURGLARY-HOUSE 97-17-19 (HABITUAL OFFENDER): SENTENCED TO SERVE A TERM OF 10 YRS IN THE CUSTODY OF THE MDOC WITHOUT PAROLE, PROBATION, REDUCTION OR SUSPENSION OF SENTENCE
DISPOSITION:	AFFIRMED - 12/16/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	2/4/98

BEFORE BRIDGES, C.J., PAYNE, AND SOUTHWICK, JJ.

PER CURIAM:

Jimmy Tucker was convicted of burglary for which he was sentenced as a habitual offender to serve a term of ten years in the custody of the Mississippi Department of Corrections. On appeal, Tucker challenges the trial court's denial of his motion for JNOV arguing that the evidence was insufficient to

support the verdict.

FACTS

On April 1, 1995, the town home of Kelvin Brown located in the Timber Ridge apartment complex was burglarized. Brown's neighbor, Patrick Kelly, testified that on the night in question he heard glass breaking. Kelly indicated that when he looked out of his window he saw Jimmy Tucker leaving the area carrying a white bag which contained what appeared to be a VCR. Kelly testified that he recognized Tucker as someone he had seen before but did not know his name at the time. Kelly stated that he shouted at Tucker and instructed him to drop the bag and leave. Kelly indicated that Tucker responded that he did not have anything and continued walking toward the interstate. Kelly also testified that he saw a black female sitting on a brick ledge near the town homes and that he questioned her. Kelly testified that he then had his nephew contact the police and that Kelly drove his car across the interstate in the direction that Tucker had gone. Kelly testified that he discovered a white bag containing a VCR which was hidden in the bushes. Subsequently, Kelly and a police officer went to a nearby motel room, and the female Kelly had seen earlier opened the door. Kelly and the police officer both testified that they heard a noise in the ceiling and upon investigating, they discovered Tucker hiding in the crawl space above the ceiling. Tucker was then arrested. Kelly testified that Tucker admitted to him that he broke into the town home and took the VCR.

Tucker was subsequently taken to the police station and Sergeant Steve Renfroe advised him of his Miranda rights. Renfroe testified that after he read Tucker his rights, Tucker blurted out "Hey, y'all have caught me. I did it. There's no sense in lying about it.

Also testifying for the State was the manager of the town home, Janet Tucker, who stated that a man fitting Tucker's description ran in front of her vehicle as she and her husband were traveling down the frontage road near the motel. Janet testified that the man was carrying a white bag and that she saw him place the bag in some bushes next to the health spa and tattoo parlor (this is the same location in which Kelly discovered the VCR).

Tucker testified in his own behalf and stated that he found the VCR lying on the ground outside the Timber Ridge apartment complex. Tucker indicated that after he picked up the VCR, someone yelled at him and that when he turned around he saw Patrick Kelly holding a handgun. Tucker testified that he fled and hid in the crawl space in his motel room because he was scared of Patrick Kelly.

ANALYSIS

I. WHETHER THE TRIAL COURT ERRED IN DENYING TUCKER'S MOTION FOR JNOV.

Directed verdict and JNOV motions challenge the legal sufficiency of the evidence. *McClain v. State*, 625 So. 2d 774, 781 (Miss. 1993). With regard to the legal sufficiency of the evidence, all credible evidence consistent with the defendant's guilt must be accepted as true, and the prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. *Id.* This Court is 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. *Wetz v. State*, 503 So. 2d 803, 808 (Miss. 1987).

In the present case, Tucker argues that the evidence was insufficient because no one saw him break and enter the town home of Kelvin Brown. Tucker admits that he used bad judgment in picking up the VCR that he found on the ground but contends that this bad judgment is not a sufficient basis for a finding of guilt beyond a reasonable doubt.

We agree with Tucker that there were no witnesses that actually saw him burglarize the town home, but as the State correctly points out, it is rare for a burglary to take place in plain view for all to see. Tucker does not dispute that he was in possession of the VCR on the night in question. The only explanation Tucker can offer is that he exercised poor judgment in picking up the VCR. Unfortunately for Tucker, "[i]t has long been the law in this state that the unexplained possession of recently stolen property is prima facie, although by no means conclusive, evidence of the guilt of the defendant." *Weaver v. State*, 481 So. 2d 832, 834 (Miss. 1985).

In the present case, there was eyewitness testimony that Tucker was in the apartment complex carrying a VCR on the night of the burglary. There was also evidence of not one, but two confessions by Tucker that he burglarized the town home and took the VCR. The aforementioned evidence coupled with Tucker's admitted poor judgment in possessing the VCR is more than sufficient to create a question for the jury of whether Tucker was guilty of burglary. We therefore find that the trial court did not err in denying Tucker's motion for JNOV.

THE JUDGMENT OF THE HINDS COUNTY CIRCUIT COURT OF CONVICTION OF BURGLARY OF A DWELLING AND SENTENCE AS A HABITUAL OFFENDER TO TEN YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO HINDS COUNTY.

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