

**IN THE COURT OF APPEALS 2/25/97**  
**OF THE**  
**STATE OF MISSISSIPPI**  
**NO. 94-KA-01058 COA**

**MELVIN ESCO**

**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. JOHN B. TONEY

COURT FROM WHICH APPEALED: MADISON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

RICHARD FLOOD

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JEFFREY A. KLINGFUSS

DISTRICT ATTORNEY: JOHN KITCHENS

NATURE OF THE CASE: FELONY: BURGLARY OF OCCUPIED DWELLING

TRIAL COURT DISPOSITION: CONVICTION AND SENTENCE OF 15 YEARS IN THE  
CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS PAY ALL COURT  
COSTS, FEES, AND ASSESSMENTS

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

KING, J., FOR THE COURT:

The Circuit Court of Madison County sentenced Esco to serve fifteen years in the custody of the Mississippi Department of Corrections subsequent to his conviction for burglary of an occupied dwelling. Aggrieved, Esco appeals and contends the following:

I. The trial court erred by denying his motion for directed verdict, request for peremptory instruction, and motion for JNOV;

II. The trial court erred by submitting to the jury an erroneous jury instruction and by denying his request for a circumstantial evidence instruction.

We find no error and affirm the conviction and sentence.

### **FACTS**

Calvin Lewis was awakened at approximately 4:00 a.m. on December 25, 1993 by a toothache. While awake, Lewis heard footsteps and noise on the stairs of the apartment complex where he resided. Lewis peered out the window and saw a male running with something in his hands. Thereafter, Lewis dressed and went outside. Lewis saw that his neighbor, Calvin Prophet's door was open and peered inside. Upon peering inside, Lewis observed that the Christmas gifts, including a big wheel, which he had earlier helped Prophet assemble, were missing.

Lewis awakened Prophet and advised him that his home had been burglarized and then began to search for the individual he had seen running from the apartment. During the search, Lewis encountered the defendant and a comrade near a garbage dumpster opening packages. Lewis chastised the defendant and his comrade, and they ran.

Lewis returned to the apartment and advised Prophet to telephone the police. Prophet telephoned the police and upon the police's arrival, Lewis advised the police that he had observed the defendant and his comrade opening packages near the dumpster. When the police arrived at the dumpster, the defendant and his comrade had departed with the packages. Thereafter, the police went to Esco's home and arrested him.

After the arrest, the police took Esco to the apartment complex where Lewis and Prophet confronted him and inquired about the location of the packages. Esco told Prophet that he did not break into his house, but he was present. Esco also told Prophet that some of the packages were located near a dumpster east of his apartment complex.

Esco directed the police to the location of the dumpster and upon arrival at the dumpster, the police saw a radio and big wheel tricycle. The police returned the radio and big wheel tricycle to Prophet; however, no other packages were recovered.

At trial, Lewis identified Esco as the individual he had seen opening packages at the dumpster, and Officer Eddie Clark testified that Esco led him to a dumpster located east of the apartment complex

where Prophet resided. In addition, Officer Clark testified that when he arrived at the dumpster, he saw a big wheel tricycle and radio, which he returned to Prophet.

Esco moved for a directed verdict at the close of the State's case in chief, and the court denied the motion. Thereafter, the defense rested without presenting evidence. Esco's subsequent request for peremptory instruction and motion for JNOV were denied.

I.

DID THE TRIAL COURT ERR BY DENYING ESCO'S MOTION FOR DIRECTED VERDICT, REQUEST FOR PEREMPTORY INSTRUCTION, AND MOTION FOR JNOV?

Esco contends that the trial court should have granted his motion for directed verdict, request for peremptory instruction and motion for JNOV because the State failed to prove that he participated in the planning, breaking, entering or theft of property from Prophet's residence. By moving for a directed verdict, peremptory instruction and JNOV, Esco challenged the legal sufficiency of the evidence supporting the verdict. *Hart v. State*, 639 So. 2d 1313, 1318 (Miss. 1994). Whenever such a challenge is made:

We must, with respect to each element of the offense, consider all of the evidence--not just the evidence which supports the case for the prosecution--in the light most favorable to the verdict (citations omitted). The credible evidence which is consistent with the guilt must be accepted as true (citations omitted). We may 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 (citations omitted).

*Hart*, 639 So. 2d at 1318 (citing *Wetz v. State*, 503 So. 2d 803,808 (Miss. 1987)). Because defendant rested without presenting any evidence or testimony, the only evidence we consider in the instant case is that introduced by the State in its case in chief.

The State's primary witness, Calvin Lewis, testified that he saw a man running from the apartment complex with packages in his arm. Lewis further testified that he went outside and discovered that Prophet's apartment had been burglarized and begin to search for the individual he had seen running. During his search, Lewis encountered two individuals, who were opening packages near a dumpster. At trial, Lewis identified the defendant as one of the individuals he had seen opening packages near the dumpster. Lewis also testified that he had known the defendant five or six years.

In addition to Lewis's testimony, Officer Clark testified that on the morning of December 25, 1993, Prophet reported that his home had been burglarized. Clark testified that he responded to the call and upon his arrival, Lewis told him that he had seen the defendant and a comrade opening packages near a dumpster. Lewis directed Clark to the dumpster; however, when they arrived at the dumpster, the defendant and his comrade had left with the packages. Clark further testified that he arrested the defendant, and the defendant denied breaking into the apartment, but he led him to the location of the big wheel tricycle and radio.

When we consider this evidence in a light most favorable to the verdict with all reasonable inferences to be drawn therefrom, we cannot say that reasonable and fair-minded jurors could only find the defendant not guilty. Thus, the trial court did not err when it denied defendant's motion for directed verdict, peremptory instruction, and JNOV. This assignment of error lacks merit.

II.

DID THE TRIAL COURT ERR BY GRANTING THE STATE AN ERRONEOUS JURY INSTRUCTION AND BY DENYING DEFENDANT'S REQUEST FOR A CIRCUMSTANTIAL EVIDENCE INSTRUCTION?

Defendant contends that the court erred when it granted the State's request for the following jury instruction:

The court instructs the jury that each person present at the time, and consenting to or encouraging the commission of a crime, and knowingly, wilfully and feloniously doing any act which is an element of the crime or immediately connected with it, or leading to its commission, is as much a principal as if he had with his own hand committed the whole offense; and if you believe from the evidence beyond a reasonable doubt, that the Defendant, Melvin Esco, did wilfully, unlawfully, knowingly, and feloniously do any act which is an element of the crime of burglary of an occupied dwelling, or any act immediately connected with it, or leading to its commission, then and in that event, you shall find the Defendant, Melvin Esco, guilty of burglary of an occupied dwelling.

If the State has failed to prove any one or more of the above listed elements, then you shall find the defendant not guilty.

Esco argues that the instruction should not have been submitted to the jury because the instruction is a variation of a conspiracy instruction, and the evidence did not show that Esco had conspired with another to commit the offense. In addition, Esco states that the indictment did not charge him with conspiracy to commit burglary; therefore, the instruction was improper. The instruction may have been improvidently given; however, absent the aiding and abetting instruction, the evidence was sufficient to support Defendant's conviction for the substantive offense. Therefore, the error was harmless.

Esco also contends that the court erred when it refused his request for a circumstantial evidence instruction. Circumstantial evidence instructions are required when the prosecution is without a confession and without eyewitnesses to the gravamen of the offense charged. *Simpson v. State*, 553 So. 2d 37, 39 (Miss. 1989) (citations omitted). Although the prosecution lacked a confession to the crime, the prosecution was able to produce a witness, Calvin Lewis, who testified that he saw an individual leaving Prophet's apartment with several packages. The witness further testified that he began to search for the individual he had seen leaving Prophet's apartment and encountered the Defendant within the vicinity opening several packages. In addition to Lewis's testimony, Officer Clark testified that the defendant led them to the location of the big wheel tricycle and radio. This evidence is more than mere circumstantial; therefore, we cannot say that the trial court erred when it denied defendant's request for a circumstantial evidence instruction. This assignment of error lacks merit.

In conclusion, we find no merit to defendant's appeal. Therefore, we affirm the conviction and sentence.

**THE JUDGMENT OF THE CIRCUIT COURT OF MADISON COUNTY OF CONVICTION OF BURGLARY OF AN OCCUPIED DWELLING AND SENTENCE OF FIFTEEN YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS OF THIS APPEAL ARE TAXED TO MADISON COUNTY.**

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

**HERRING, J., NOT PARTICIPATING.**