

IN THE COURT OF APPEALS 03/25/97

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00692 COA

JESSIE J. MONTGOMERY A/K/A JESSIE JAMES MONTGOMERY

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. FRANK G. VOLLOR

COURT FROM WHICH APPEALED: WARREN COUNTY CIRCUIT COURT

FOR APPELLANT:

W.B. DUGGINS, JR.

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JEFFREY A. KLINGFUSS

DISTRICT ATTORNEY: G. GILMORE MARTIN

NATURE OF THE CASE: CRIMINAL (FELONY) - COUNT I, BURGLARY OF A BUSINESS
AND CT II, GRAND LARCENY

TRIAL COURT DISPOSITION: CONVICTED AND SENTENCED TO MDOC AS HABITUAL
OFFENDER W/OUT PAROLE TO CT I, BURGLARY OF BUS.-7 YRS; CT II, GRAND
LARCENY--5 YRS. TO RUN CONSEC.

EN BANC

McMILLIN, P.J., FOR THE COURT:

Jessie James Montgomery brings this appeal from the jury verdict in the Warren County Circuit Court finding him guilty of burglary of a business and grand larceny. Montgomery was sentenced as a habitual offender to serve a term of seven years for the burglary of the Ponderosa Steakhouse in Vicksburg with a consecutive term of five years for grand larceny arising out of the same incident.

Montgomery, on appeal, attacks the weight of the evidence to support his convictions. He also questions the propriety of the trial court's decision to give a particular jury instruction requested by the State. We find that the issues raised by Montgomery do not require us to reverse the conviction.

I.

FACTS

On April 18, 1993, police responded to a call from Terry Deck, the manager of the Ponderosa Steak House on Frontage Road in Vicksburg, Mississippi. Deck reported that two thousand dollars had been taken from the filing cabinet in his office during the late hours of April 17th or early morning hours of April 18th. Apparently someone had entered the building through a ventilation window located on the south side of the building and pried the office door open with the help of a crowbar or some similar object. There were no fingerprints or other physical evidence recovered from the scene.

Based on a tip from a confidential informant, police arrested Lee Sherman Yates in connection with the crime. Yates, in turn, gave a statement implicating Curtis Garrett, and the defendant, Jessie James Montgomery, in the crime. The State dropped all charges against Yates in exchange for his testimony. Montgomery and Garrett were indicted for burglary and grand larceny. Montgomery was tried separately and, as we have already noted, was convicted on both counts.

II.

Weight of the Evidence to Support Convictions

Montgomery argues that the lower court erred in refusing to grant a new trial based on a claim that the verdicts were against the weight of the evidence. On appeal of the trial court's denial of a new trial motion, we must consider the evidence "in the light consistent with the verdict," giving the State all favorable inferences which can be drawn from that evidence. *Strong v. State*, 600 So. 2d 199, 204 (Miss. 1992). This Court may reverse "only when we are convinced that the trial court has abused its discretion in failing to grant a new trial." *Id.* (citation omitted).

As is often the case, the jury was confronted with contradictory evidence concerning Montgomery's involvement in the crimes. The State presented the testimony of John Dolan, the investigating officer, and Terry Deck, the manager of the Ponderosa, who both gave details as to the date of the incident, the point of entry, and the items which were stolen. According to them, there were indications that

the robber used a ventilation window to gain access to the building and then forced open a locked door to the office where the money was kept. Physical markings on the door were consistent with the use of some sort of metal pry bar. The Ponderosa owner testified that a white bank bag located in the office was missing along with the money, consisting of both bills and coins.

Yates then testified to facts that would tend to establish Montgomery's complicity in the crimes. He recounted that he, Garrett, and Montgomery were riding together in a car on the night of the break-in. Yates said that Garrett and Montgomery left him alone at the car and proceeded on foot in the direction of the Ponderosa Steakhouse after the car had stalled in a nearby parking lot. Yates claimed that Garrett was carrying what appeared to be an iron bar when the two walked away. In Yates's version of the events, the two men returned in about one-half hour carrying a white bank bag. One of them gave Yates two rolls of coins, and the two men departed, claiming they were going to call a taxicab. Taxicab company records indicated that such a call came from that location on the night of the crime at approximately the same time Yates gave in his testimony.

Garrett, testifying for the defense, claimed that Yates was the one who left the group walking toward the Ponderosa building; that he went alone; and that he later returned with the white bank bag, from which he dispensed about two hundred dollars to Garrett in satisfaction of an old debt. Garrett admitted that Montgomery also left the stalled car for some period of time, but said that he went in a different direction than Yates. Montgomery, testifying in his own defense, claimed that neither version was correct because he had been at home the entire evening. Family members called by the defense corroborated Montgomery's assertions of his whereabouts on the night of the crime.

Faced with this conflicting evidence, the jury apparently concluded that Yates gave the more credible testimony. Yates's testimony was not inherently incredible; neither was he substantially impeached by the defense. Resolving conflicts in the evidence is the proper role of the jury. *Hiter v. State*, 660 So. 2d 961, 964 (Miss. 1995); *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993). There is no dispute that the jury was presented with sufficient evidence to conclude that the alleged crimes did, in fact, occur on the night in question. The sole legitimate issue to be resolved by the jury was whether the evidence was sufficient to implicate Montgomery in the crimes. Assuming that the jury believed Yates's version of events, there was evidence before the jury from which they could infer that Montgomery played an active role in the commission of this break-in and robbery. In the opinion of this Court, the exculpatory evidence presented by the defense was not of such probative value that the jury's decision to convict was against the weight of the evidence. The trial court's decision to deny a new trial, therefore, has not led to a manifestly unjust result. *See Smith v. State*, 534 So. 2d 194, 198 (Miss. 1988).

Montgomery also argues that his conviction is based upon nothing more than "guilt by association." Though not assigned as separate error on appeal, we conclude this to be a challenge to the sufficiency of the evidence. For the reasons we have already discussed, we conclude that there was sufficient evidence to establish Montgomery's involvement in this break-in. That he may have been acting in concert with Garret and that Garrett may have committed some of the essential elements of the crime does not absolve Montgomery of guilt. Yates's testimony, when considered with the physical evidence and testimony of other witnesses, was sufficient to permit the jury to infer that Montgomery and Garrett were acting in concert. The fact that the State was unable to prove which of the two accomplished each of the necessary elements of the crimes does not, of itself, diminish Montgomery's

culpability. Two or more persons acting in concert to accomplish a crime are equally guilty without regard to which one performed the various acts necessary to accomplish the crime. *See Ivey v. State*, 232 So. 2d 368, 369 (Miss. 1970); *see also Moore v. State*, 493 So. 2d 1295, 1298 (Miss. 1986) (citing *Robinson v. State*, 465 So. 2d 1065 (Miss. 1985)).

III.

Improper Jury Instruction

Montgomery claims reversible error in the trial court's decision to grant an instruction requested by the State numbered S-5. The text of the instruction is as follows:

The Court instructs the jury that each person present at the time, and consenting to and 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, Jessie J. Montgomery, did wilfully, knowingly, unlawfully and feloniously do any act which is an element of the crime of Burglary or Grand Larceny or immediately connected with it, or leading to its commission, then and in that event, you should find the defendant guilty of Burglary and Grand Larceny.

As can be seen, the instruction was an attempt to inform the jury that it was not necessary to conclude that Montgomery committed each of the elements of the crime in order to convict if they found that he was present and acting in concert with another. On appeal, Montgomery dissects the instruction and claims, among other things, that it lowered the State's burden by requiring that the jury only find that Montgomery committed one of the elements of the crimes in order to convict.

The only objection offered at trial by defense counsel was, "Judge, I object to S-5 because I don't believe that's the law." Such a generic objection is tantamount to no objection. *Barnett v. State*, 563 So. 2d 1377, 1380 (Miss. 1990). It does not meet the standard set out in Uniform Circuit and County Court Rule 3.07 that an attorney objecting to an instruction "must dictate into the record [his] specific objections to the requested instructions stating the grounds for each objection." U.C.C.C.R. 3.07. We conclude that any alleged error arising out of the trial court's decision to grant this instruction was not preserved for appellate review, and we decline to consider it.

However, because of a defendant's fundamental right to have the jury properly instructed, we have reviewed all of the instructions given in this case. Taken as a whole, the instructions fairly informed the jury as to the elements of the crimes and the findings of fact required of them in order to convict. Thus, while it may be a fair comment that Instruction S-5 was not a model of clarity, we decline to disturb the jury's verdict based on the manner in which they were instructed. *See Hornburger v. State*, 650 So. 2d 510, 514-15 (Miss. 1995) (all instructions, read together as a whole, properly and fairly instructed jury).

THE JUDGMENT OF THE WARREN COUNTY CIRCUIT COURT OF CONVICTION OF

JESSIE J. MONTGOMERY AS A HABITUAL OFFENDER OF COUNT I, BURGLARY OF A BUSINESS, AND SENTENCE OF SEVEN YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND COUNT II, GRAND LARCENY, AND CONSECUTIVE SENTENCE OF FIVE YEARS IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO WARREN COUNTY.

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