IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-KA-00513 COA

CLARENCE GOLDMAN A/K/A CLARENCE HEWLETT GOLDMAN — **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:	04/19/96
TRIAL JUDGE:	HON. CLARENCE E. MORGAN III
COURT FROM WHICH APPEALED:	MONTGOMERY COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	H. LEE BAILEY, JR.
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: DEWITT T. ALLRED III
DISTRICT ATTORNEY:	DOUG EVANS
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	CT I FELONY CRIME OF DESTRUCTION OF CHURCH PROPERTY: CT II FELONY CRIME OF ARSON, FIRST DEGREE: CT I 10 YRS WITH 4 YRS SUSPENDED FOR 5 YRS WITH 6 YRS TO SERVE; CT II 5 YRS TO RUN CONCURRENT WITH CT I
DISPOSITION:	AFFIRMED - 12/2/97
MOTION FOR REHEARING FILED:	12/9/97
CERTIORARI FILED:	2/2/98
MANDATE ISSUED:	4/8/98

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

PAYNE, J., FOR THE COURT:

Clarence Goldman was convicted of count I of destruction of church property and count II of first-degree arson of a dwelling house. The trial court sentenced Goldman in count I to serve a term of ten years with four years suspended for five years and six years to serve and payment of one-half of all

costs related to this charge and payment of restitution in the amount $1,422.82. As to count II, the trial court sentenced Goldman to serve a term of five years and to pay one-half of all costs related to this charge and to pay restitution in the amount of $2,500. The sentence in count II is to run concurrently to the sentence in count I. If Goldman has paid all restitution owed by him prior to his release from the Mississippi Department of Corrections, he shall be placed on probation for three years. If Goldman has not paid all restitution owed by him prior to his release from the Mississippi Department of Corrections, he shall be placed on probation for five years. All restitution is to be paid in full within three years of Goldman's release from prison.

Goldman's motion for JNOV or, in the alternative, a new trial was denied. Finding no error on the part of the trial court, we affirm on all issues.

FACTS

In the early morning hours of August 1, 1995, Clarence Goldman, Billy Daughtry, and James Busby, after an evening of drinking, decided to go riding in Daughtry's truck. James Busby testified that they were just driving around drinking and "itching to get into something." Busby testified that Billy Daughtry (Busby's uncle) wanted to go to the vacant house owned by Cecil Taylor and get something out of it. Apparently, several months before, Busby's grandparents had been living in the house but left suddenly leaving some things in the house. Busby stated that before going to the house they stopped at St. John's Church and Busby siphoned some gasoline from the truck into a jug. Shortly thereafter, Busby, Daughtry, and Goldman went to the vacant house. Busby indicated that he waited in the truck while Goldman and Daughtry went up to the house. Busby stated that he could not see what was happening at the house. Busby testified that Goldman and Daughtry returned to the truck a few minutes later, and they drove to the church where they broke out some windows, tore up the church sign, and Busby indicated that Daughtry backed the truck into the front column of the church.

Goldman testified in his own behalf and did not deny that he had caused the damage for which he was charged. Goldman testified that he was drunk and could not remember some of the things that happened that night. Goldman testified that he could remember Busby siphoning the gas out of the truck, he could remember going to the house where he got out and relieved himself at the side of the house, and Goldman stated that he remembered Daughtry backing the truck in to the front column of the church. Goldman, however, could not remember what, if any, part he played in the burning of the house or the vandalization of the church.

After hearing all of the evidence, the jury returned a verdict of guilty on both charges. We note that James Busby pled guilty prior to Goldman's trial, and Billy Daughtry had not been located at the time of Goldman's trial. Feeling aggrieved, Goldman filed this appeal asserting three issues.

ANALYSIS

I. WHETHER THE TRIAL COURT ERRED IN DENYING THE DEMURRER FILED BY GOLDMAN.

Goldman takes issue with the fact that he was tried for two distinct crimes in the same trial. Goldman contends that the crimes of first degree arson and destruction of church property are separate crimes which require different types of proof. Goldman also points to the fact that the structures involved were owned by two different people. Goldman contends that while the acts occurred on the same night, there was no common scheme, transaction, or plan involved with the burning of the dwelling house and the vandalization of the church. Goldman cites to ***Corley v. State*****, 584 So. 2d 769, 772 (Miss. 1991),** for the proposition that before a defendant is tried for two separate crimes in the same proceeding, "the trial court should pay particular attention to whether the time period between the occurrences is insignificant, whether the evidence proving each count would be admissible to prove each of the other counts, and whether the crimes are interwoven."

The State argues that Section 99-7-2(1)(b) of the Mississippi Code (Rev. 1994) authorizes multi-count indictments. The pertinent code section provides as follows:

> (1) Two (2) or more offenses which are triable in the same court may be charged in the same indictment with a separate count for each offense if: (a) the offenses are based on the same act or transaction; or (b) the offenses are based on two (2) or more acts or transactions connected together or constituting parts of a common scheme or plan.

Miss. Code Ann. § 99-7-2 (Rev. 1994). The State contends that the crimes were committed on the same date by the same three persons acting in concert with one another, and that the evidence proved that these three persons got drunk and went out riding with the intention of destroying property. The State argues that the three defendants formulated the plan to burn the house and tear up the church in furtherance of that intention. In addition, the State points out that Goldman offered no rebuttal tending to show that the offenses were separate and distinct.

We agree with the State. Having reviewed the record, we find that the act of destruction of church property and the act of arson were sufficiently connected together to warrant the charging of both crimes in the same indictment. We therefore find Goldman's argument to be without merit.

II. WHETHER THE TRIAL COURT ERRED IN ALLOWING STATE'S INSTRUCTIONS S-1, S-2, AND S-3.

The instructions with which Goldman takes issue read as follows:

> INSTRUCTION S-1
>
> The defendant, Clarence Goldman, has been charged in one indictment with two distinct crimes. Count One of the indictment charges the defendant with Destruction of Church Property while acting in concert with another or others, and Count Two of the indictment charges the defendant with Arson, First Degree while acting in concert with another or others.
>
> In Count One, if you find from the evidence in this case beyond a reasonable doubt that:
>
> 1. The St. John Missionary Baptist Church located on New Hope Road in Montgomery County, Mississippi, was the property of St. John Missionary Baptist Church and held by its Board of Trustees and their successors in office, Willie Liddel, George Moore, Odie B. Ringold, Charlie

Tyson, J.C. Gary, and Whit McCloud, and

2. On or about August 1, 1995, the defendant, Clarence Goldman, by his own act or while acting in concert with or aiding or abetting another or others, destroyed the work, materials; or property of Saint John Missionary Baptist Church; and

3. The cost of the damage to said church was in excess of $300.00.

then you shall find the defendant, as to Count One, guilty of Destruction of Church Property in excess of $300.00.

If the State has failed to prove any one or more of the above elements beyond a reasonable doubt, then you shall find the defendant, Clarence Goldman, as to Count One, not guilty of Destruction of Church property in excess of $300.00.

In Count Two, if you find from the evidence in this case beyond a reasonable doubt that:

1. The dwelling house located at 536 Duck Hill Ranch Road in Montgomery County, Mississippi was the property of Cecil Taylor, Jr., and

2. On or about August 1, 1995, the defendant, Clarence Goldman, by his own act or while acting in concert with or aiding or abetting another or others, did unlawfully, wilfully and maliciously set fire to or burn said dwelling house,

then you shall find the defendant as to Count Two, guilty of Arson, First Degree.

If the State has failed to prove any one or more of the above elements, then you shall find the defendant, Clarence Goldman, as to Count Two, not guilty of Arson, First Degree.

INSTRUCTION S-2

The Court instructs the jury that if two or more persons are engaged in the commission of a felony, then the acts of each in the commission of such felony are binding upon all, and all are equally responsible for the acts of each in the commission of such felony.

INSTRUCTION S-3

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.

Therefore if you find from all the evidence in this cause beyond a reasonable doubt, that the defendant, Clarence Goldman, was present, aiding, and abetting or acting in concert with Billy Daughtry or James Busby at the St. John Missionary Baptist Church and the house belonging to Cecil Taylor, Jr. and at both places did unlawfully, wilfully, knowingly and feloniously do any act which is an element of each of the charged crimes or immediately connected to them or leading to the commission of the crimes, then and in that event, you should find the defendant

guilty of the crime or crimes as the case may be.

Goldman appears to be making four contentions in regard to the above instructions: (1) that the court erred in giving instructions which referred to the house as a dwelling house and in failing to instruct the jury that it had to find that the house was being used as a dwelling house at the time of the crime in order to find guilt of first-degree arson, (2) that the court failed to instruct the jury that intent must be proven or there can be no conviction, (3) that the court improperly instructed the jury that it would convict upon a finding of "transferred intent," and (4) that the court improperly instructed the jury as to the acts of an accomplice.

The standard for reviewing jury instructions is well established. Mississippi law allows the trial judge to instruct the jury upon principles of law applicable to the case either at the request of a party, **Miss. Code Ann. § 99-17-35 (Rev. 1994),** or on the court's own motion, ***Newell v. State*, 308 So. 2d 71, 78 (Miss. 1975). *See also* URCCCP 3.07.** The Mississippi Supreme Court has held that the failure of a court to give a requested instruction is not grounds for reversal if the jury was "fairly, fully and accurately instructed on the law governing the case." ***Smith v. State*, 572 So. 2d 847, 849 (Miss. 1990); *see also Murphy v. State*, 566 So. 2d 1201, 1206 (Miss. 1990)** (holding that the trial court may refuse an instruction which incorrectly states the law, is without foundation in the evidence, or is stated elsewhere in the instructions); ***Calhoun v. State,* 526 So. 2d 531, 533 (Miss. 1988)** (holding that a trial court is not required to instruct a jury over and over on the same point of law even though some variations are used in different instructions). The standard for reviewing jury instructions is to read all instructions together, not in isolation. ***Townsend v. State,* 681 So. 2d 497, 509 (Miss. 1996).**

In regard to Goldman's dwelling house argument, the State is correct in its assertion that the first-degree arson statute applies expressly to unoccupied and vacant houses. **Miss. Code Ann. § 97-17-1 (Rev. 1994)**. The owner of the house, Cecil Taylor, testified that the house had been occupied in previous months, that the house contained bedrooms, a kitchen, and a bathroom, all of which are consistent with a dwelling house. The statute is clear that the house may be occupied or vacant. Thus, Goldman's dwelling house argument has no merit as it pertains to the meaning of "dwelling house" as defined in burglary cases. Had Goldman been charged with burglary, his argument might have some merit.

Goldman's intent argument also has no merit. Reading the instructions as a whole, the jury was instructed that the acts must have been done knowingly, wilfully, and feloniously. As to Goldman's transferred intent argument, Goldman seems to be reading more into the instructions than is really there as there is no transferred intent instruction. The instructions simply explain that all of the defendants are responsible for the acts of the others.

Finally, Goldman argues that the accomplice instructions, S-2 and S-3, do not require proof of personal intent on the part of Goldman to commit destruction of church property and/or arson. Goldman's point escapes us. As the State correctly argues, Instructions S-2 and S-3, when read in conjunction with the other instructions, properly instructed the jury on the law applicable to an aider and abettor.

The law pertaining to jury instructions requires that the jury be adequately instructed on the law applicable to the crimes charged. We have reviewed all of the instructions and find that the jury was properly instructed. We therefore find that the circuit court did not err in giving Instructions S-1, S-2, and S-3.

III. WHETHER THE EVIDENCE WAS SUFFICIENT TO WARRANT A GUILTY VERDICT.

Although Goldman frames this issue as a sufficiency question, his argument challenges both the weight and sufficiency. We will therefore address the issue accordingly.

A challenge to the sufficiency of the evidence requires consideration of the evidence before the court when made, so that this Court must review the ruling on the last occasion when the challenge was made at the trial level. ***McClain v. State,* 625 So. 2d 774, 778 (Miss. 1993).** This occurred when the trial court overruled Goldman's motion for JNOV. The Mississippi Supreme Court has stated, in reviewing an overruled motion for JNOV, that the standard of review shall be:

> [T]he sufficiency of the evidence as a matter of law is viewed and tested in a light most favorable to the State. The credible evidence consistent with [Goldman's] guilt must be accepted as true. The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. Matters regarding the weight and credibility of the evidence are to be resolved by the jury. We are 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.

Id. (citations omitted).

The evidence consistent with the guilty verdict must be accepted as true. ***Id.* at 778.** Considering the elements of the crimes along with all the evidence in the light most favorable to the verdict, the evidence is not such that reasonable jurors could only find Goldman not guilty of destruction of church property and arson. We find that the trial court properly denied Goldman's motion for a directed verdict.

Goldman also complains that the jury verdict was against the overwhelming weight of the evidence, and he requests a new trial. The Mississippi Supreme Court has held that "[t]he jury is charged with the responsibility of weighing and considering the conflicting evidence and credibility of the witnesses and determining whose testimony should be believed." ***Id.* at 781** (citations omitted); ***see also Burrell v. State,* 613 So. 2d 1186, 1192 (Miss. 1993)** (stating that witness credibility and weight of conflicting testimony are left to the jury); ***Kelly v. State,* 553 So. 2d 517, 522 (Miss. 1989)** (stating that witness credibility issues are to be left solely to the province of the jury). Furthermore, "the challenge to the weight of the evidence via motion for a new trial implicates the trial court's sound discretion." ***McClain*, 625 So. 2d at 781** (citing *Wetz v. State*, 503 So. 2d 803, 807-08 (Miss. 1987)) . The decision to grant a new trial "rest[s] in the sound discretion of the trial court, and the motion [for a new trial based on the weight of the evidence] should not be granted except to prevent an unconscionable injustice." ***Id.*** This Court will reverse only for abuse of discretion and on review will

accept as true all evidence favorable to the State. ***Id.***

In the present case, the jury heard the witnesses and the evidence as presented by both the State and the defense. The State presented the testimony that Goldman, Busby, and Daughtry got drunk, went riding around, and decided to "get into something." The evidence indicated that that "something" was the burning of the house and the destruction of the church property. Goldman, testifying in his own behalf, could not deny the allegations against him. The best he could do was testify that he could not remember all of the events of the night in question. The testimony was clearly for the jury to evaluate. The jury's decision to believe the State's evidence and witnesses was well within its discretion. Moreover, the jury was well within its power to weigh the evidence and the credibility of the witnesses' testimony and to convict Goldman. The trial court did not abuse its discretion by refusing to grant Goldman a new trial based on the weight of the evidence. The jury verdict was not so contrary to the overwhelming weight of the evidence that, to allow it to stand, would be to promote an unconscionable injustice. The trial court properly denied Goldman's motion for a new trial.

THE JUDGMENT OF THE MONTGOMERY COUNTY CIRCUIT COURT OF CONVICTION OF COUNT I OF DESTRUCTION OF CHURCH PROPERTY AND SENTENCE OF TEN YEARS WITH FOUR YEARS SUSPENDED AND PAYMENT OF RESTITUTION IN THE AMOUNT OF $1,422.82; COUNT II OF FIRST-DEGREE ARSON AND SENTENCE OF FIVE YEARS TO RUN CONCURRENTLY WITH THE SENTENCE IN COUNT I TO BE SERVED IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND PAYMENT OF RESTITUTION IN THE AMOUNT OF $2,500 IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO MONTGOMERY COUNTY.

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