IN THE COURT OF APPEALS 08/06/96

OF THE

STATE OF MISSISSIPPI

NO. 93-KA-01349 COA

VERNON E. BROWN a/k/a "HASH" BROWN

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. THOMAS J. GARDNER

COURT FROM WHICH APPEALED: ITAWAMBA COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

CAROLYN R. BENSON

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY SCOTT STUART

DISTRICT ATTORNEY: JOHN R. YOUNG

NATURE OF THE CASE: FELONY-BURGLARY AND LARCENY OF A COMMERCIAL BUILDING

TRIAL COURT DISPOSITION: SENTENCED TO SERVE A TERM OF SEVEN (7) YEARS IN MDOC; SENTENCE SHALL NOT BE REDUCED OR SUSPENDED, NOR SHALL BE ELIGIBLE FOR PAROLE OR PROBATION

BEFORE FRAISER, C.J., DIAZ, AND McMILLIN, JJ.

FRAISER, C.J., FOR THE COURT:

Vernon E. "Hash" Brown (Brown) was indicted, tried, and convicted for burglary and larceny of a commercial building. He was sentenced to serve seven years in the custody of the Mississippi Department of Corrections (MDOC) without the possibility of suspension, parole, or reduction of sentence. On appeal, Brown presents the following issues:

> I. THE TRIAL COURT ERRED IN DENYING BROWN'S MOTION FOR DIRECTED VERDICT AT THE CLOSE OF THE STATE'S CASE AND IN DENYING HIS MOTION FOR JNOV. SINCE THE VERDICT WAS BASED UPON EVIDENCE INSUFFICIENT TO ESTABLISH EACH ELEMENT OF THE CRIME.
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> II. THE TRIAL COURT ERRED IN GRANTING STATE'S INSTRUCTION NO. S-2-A OVER BROWN'S OBJECTION.

These issues are without merit, and we affirm.

FACTS

On the morning of November 5, 1992, Billy Wallace (Wallace) entered the office of his car dealership to find everything turned upside down. Glass from a broken window was strewn everywhere; papers from his files were knee-deep on the floor. Two guns, several knives, cash and a check writing machine had also been stolen. Wallace described one of the stolen guns that was later found by police as a chrome-plated .22 caliber pistol with a pearl handle and built in Germany on a .45 frame. Wallace owned the gun for about thirty years. He also described a check writing machine that he had owned for fifteen years.

Mrs. Paul Underwood (Underwood) testified at trial that Brown was her nephew, and she had helped raise him since he was a boy. She stated that she had been like a mother to him, and he had a room at her house whenever he needed it. According to her testimony, Brown came and went freely to her residence. She left a key hidden outside for him to use. She related that Brown had one place, her home. Twice widowed, Underwood testified that after the death of her second husband, she disposed of all the guns in the house. She was terrified of firearms and did not want them in her abode. She did not own any guns. However, when the police conducted a consensual search of her home, they found the pearl-handled .22 caliber pistol stolen from Wallace's business in a desk drawer. Underwood did not own the gun and had not seen it before then. She could not account for its presence.

In November, 1992, Officer Tiptoe Norris, an investigator with the Boonville Police Department, became aware of a warrant issued for Brown's arrest. Brown was out of the state, and on November 24, 1992, law enforcement officials made arrangements to lure him back to this jurisdiction. Brown

was apprehended while driving his aunt's car. He was placed under arrest, and the car was searched. In the vehicle's trunk, the police found the check writing machine stolen from Wallace's office.

> I. THE TRIAL COURT ERRED IN DENYING BROWN'S MOTION FOR DIRECTED VERDICT AT THE CLOSE OF THE STATE'S CASE AND IN DENYING HIS MOTION FOR NOV. SINCE THE VERDICT WAS BASED UPON EVIDENCE INSUFFICIENT TO ESTABLISH EACH ELEMENT OF THE CRIME.

Brown claims that the State failed to prove the essential elements of the charge and thus challenges the sufficiency of the evidence. The standard of review for challenges to the sufficiency of the evidence is set forth in *McClain v. State*:

> The three challenges by McClain (motion for directed verdict, request for peremptory instruction, and motion for NOV.) challenge the legal sufficiency of the evidence. Since each requires consideration of the evidence before the court when made, this Court properly reviews the ruling on the last occasion the challenge was made in the trial court. This occurred when the Circuit Court overruled McClain's motion for NOV.. In appeals from an overruled motion for NOV. the 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 McClain'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.

McClain v. State, 625 So. 2d 774, 778 (Miss. 1993). We review the ruling on the last occasion the challenge was made: Brown's motion for JNOV. Brown claims that the State failed to prove the elements of burglary of a business beyond a reasonable doubt. The indictment charged Brown with "wilfully, feloniously and burglariously" breaking and entering Wallace's business "with the felonious and burglarious intent to take, steal and carry away the . . . personal property of the said Wallace" . . . "and did then and there wilfully, feloniously and burglariously take, steal and carry away . . . one .22 caliber pistol . . . and one check writing machine."

There was no direct evidence of Brown's burglary and larceny. However, the State presented several witnesses who testified that Wallace's gun was found in the home that Brown shared with his aunt, and Wallace's check writing machine was found in the trunk of the car Brown was driving when he was arrested. The case of *Rushing v. State* is factually similar the case at hand. In *Rushing,* the appellant was convicted of burglary of an inhabited dwelling and sentenced as a habitual offender. *Rushing v. State*, 461 So. 2d 710, 711 (Miss. 1984). "No evidence was presented at trial directly linking the appellant to the breaking and entering of Mr. Brinson's home on March 26, 1983. The testimony of witnesses for the State established, however, that appellant Rushing was in possession of Brinson's television approximately one month after the burglary." *Id.* at 172. The Mississippi

Supreme Court explained the law pertaining to possession of such stolen goods:

> Under Mississippi law, possession of recently stolen property is a circumstance which may be considered by the jury and from which, in the absence of a reasonable explanation, the jury may infer guilt. In order to give rise to an inference of guilt from the fact of possession, the State has the burden of proving possession by the accused of the stolen property to have been personal, recent, unexplained, and exclusive.

Id. (citations omitted). The court in *Rushing* affirmed the conviction. Brown did not present any witnesses at trial and therefore failed to provide a reasonable explanation for his possession of the gun and the check writing machine. We are satisfied that the verdict of the jury was undergirded by sufficient evidence. This issue lacks merit.

> II. THE TRIAL COURT ERRED IN GRANTING STATE'S INSTRUCTION NO. S-2-A OVER BROWN'S OBJECTION.

Instruction S-2-A reads as follows:

> The Court instructs the Jury that the possession of property recently stolen is a circumstance which may be considered by the Jury and from which in absence of a reasonable explanation, the jury may infer guilt of Burglary and Larceny.
>
> Thus, if you find from the evidence in this cause beyond a reasonable doubt that the defendant, Vernon E. "Hash" Brown, was in possession of recently stolen property and there is an absence of a reasonable explanation therefor, then you may consider such in determining the guilt or innocence of the Defendant, Vernon E. "Hash" Brown on the charge of Burglary and Larceny.

At trial, Brown objected to this instruction on the ground that the State had not proved possession and asked that the court include a statement that mere possession is not enough. On appeal, Brown raises a new objection that was not presented at trial. He argues that the instruction should have included the phrase "and to the exclusion of every reasonable hypothesis consistent with his innocence." It is well established that an objection different from the one raised at trial cannot be argued on appeal. "*Conner* held that the defendant was procedurally barred from arguing a different ground on appeal than that argued at trial. . . .the *Conner* Court stated that '[A]n objection on one or more specific grounds constitutes a waiver of all other grounds.'" *Doss v. State*, No. 93-DP-00509-SCT, 1996 WL 272348, at *6 (Miss. May 23, 1996). Therefore, Brown's issue is procedurally barred.

However, in looking to the merits, Brown's issue is without merit in light of jury instructions S-1-A

and D-4. Both instructions include the language that there must be proof beyond a reasonable doubt and "to the exclusion of every reasonable hypothesis consistent with his innocence." "Furthermore, all instructions are to be read together and if the jury is fully and fairly instructed by other instructions the refusal of any similar instruction does not constitute reversal error." *Laney v. State*, 486 So.2d 1242, 1246 (Miss.1986). "This Court assumes that juries follow the instructions given to them by the trial court." *Collins v. State*, 594 So. 2d 29, 35 (Miss. 1992). Because the jury's verdict was undergirded by sufficient evidence, and Brown's second issue is procedurally barred as well as lacking merit, we affirm the trial court.

THE JUDGMENT OF THE ITAWAMBA COUNTY CIRCUIT COURT OF CONVICTION OF BURGLARY AND LARCENY OF A COMMERCIAL BUILDING AND SENTENCE OF SEVEN YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, SENTENCE NOT TO BE REDUCED OR SUSPENDED, NOR SHALL BE ELIGBLE FOR PAROLE OR PROBATION IS AFFIRMED.

BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.