

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**ANTWOINE ESTERS****APPELLANT****V.****No. 2017-KA-01300-COA****STATE OF MISSISSIPPI****APPELLEE****MOTION FOR REHEARING**

COMES NOW the Appellant, Antwoine Esters, in the above-styled matter, by and through counsel, pursuant to Rule 40 of the Mississippi Rules of Appellate Procedure, and files this Motion for Rehearing of the decision handed down by this Honorable Court on January 8, 2019, and in support thereof, would respectfully show unto the Court the following:

STANDARD OF REVIEW

Pursuant to Rule 40 of the Mississippi Rules of Appellate Procedure “[a] motion for rehearing should be used to call attention to specific errors of law or fact which the opinion is thought to contain[.]” M.R.A.P 40. Rule 40 also provides that “[t]he motion shall state with particularity the points of law or fact which, in the opinion of the movant, the court has overlooked or misapprehended. . .” *Id.*

ISSUES**I. Sufficiency of the evidence**

The Court’s analysis in this case shifted the burden to Esters to show that the car he was convicted of burglarizing was open, rather than pointing to evidence in the record proving the car was closed.

Esters was convicted of automobile burglary. On appeal, he argued that the State failed to prove each element of the offense of burglary; specifically, the State failed to show that Esters committed a “breaking” in order to steal the items from the car. There was no evidence at trial to show that the car doors and windows were closed when Bowens, the car’s owner, got out of it the night before.

Although the State and Esters presented evidence that Bowens’s car was unlocked, there is nothing in the record to indicate that the doors to the car were closed or that the windows were not down overnight. Bowens never testified whether she left her windows down the night before or whether they were up. She never testified that she had closed her car doors, or that her passengers had closed their doors. While any act or force, however slight, can be considered a breaking, where no force has been exerted to enter a building or car, then there has been no burglary. “To constitute burglary, a structure must generally be closed. Otherwise the entry is merely a trespass, not a ‘breaking’ and a burglary.” *Harris v. State*, 68 So. 3d 754, 757 (Miss. Ct. App. 2011) (quoting *Hill v. State*, 929 So. 2d 338, 340 (¶5) (Miss. Ct. App. 2005)).

“However, ‘any effort, however slight, such as the turning of a [doorknob] to enter, constitutes a breaking.’” *Id.* (quoting *Templeton v. State*, 725 So. 2d 764, 766 (¶5) (Miss. 1998)). “Even if the door was unlocked or if only slight force was needed to gain entry, such entry has been viewed as forcible for the purposes of our burglary statute.” *Wheeler v. State*, 826 So. 2d 731, 735 (¶12) (Miss. 2002).

Officer Crockett testified that there was no forced entry into Bowens's car. While it is possible that Esters exerted force to open an unlocked car door, thereby "breaking" into the car, *there is no evidence to support that possibility*. It is also possible that Bowens left her windows rolled down, or that the back liftgate had been left open when she and her friends unloaded the car. If Esters was able to gain entry by merely reaching into an already open door, he has not committed a burglary.

This Court relied on *Busby v. State*, 160 So. 3d 233, 235 (¶7) (Miss. Ct. App. 2014) to show that sufficient evidence supports the conviction because certain circumstances – temporal proximity, possession of stolen property, and whether he could explain away his possession of the items – indicate that he is guilty. (Opinion at ¶¶13-14). While those factors may indicate that Esters was guilty of larceny, they do not answer the question of whether he committed a "breaking" in order to steal the items from Bowens's car. Breaking is an essential element of burglary; larceny is not.

The burden is on the State to prove each element beyond a reasonable doubt. The State simply did not present any evidence that an actual breaking occurred before Esters gained entry into the car. This Court, instead of pointing to evidence of a breaking, noted that Bowens "never indicated that she or her friend had left any windows or doors open when they exited the vehicle[.]" (Opinion ¶12). Respectfully, it is the State who bears the burden of showing that the car was closed and that Esters had to commit a "breaking" in order to enter the car.

This Court's analysis put the burden on Esters to show that he did not commit a breaking, an essential element of burglary. There is no evidence in the record that a burglary was committed, because there is no evidence that *anybody* committed a breaking in order to steal items from Bowens's car. Accordingly, Esters requests this Court grant his motion for rehearing and reverse his conviction and sentence for automobile burglary.

II. Jury Instruction S-1A

In his second assignment of error, Esters argued that the State's elements instruction omitted an essential element of the crime of automobile burglary. Because the jury was not instructed on all the essential elements of automobile burglary, the jury did not adequately find Esters guilty of that crime. Specifically, the jury instruction omitted the element that Esters broke into an automobile "in which any goods, merchandise, equipment[,] or valuable thing shall be kept for use, sale, deposit, or transportation" Miss. Code §97-17-33(1).

The omission of an essential element of the crime from the jury instructions affects the accused's constitutional right to have a jury decide his guilt on each element of the offense. Miss. Const. art. 3, §31. Further, "a circuit court commits plain error if it does not instruct the jury on the essential elements of the crime." *White v. State*, 195 So. 3d 801, 804 (Miss. Ct. App. 2015) (citing *Bolton v. State*, 113 So.3d 542, 544 (¶ 4) (Miss.2013)); see also, *Daniels v. State*, 107 So. 3d 961 (Miss. 2013).

This Court held that because the instruction referenced another essential element of burglary, the intent “to take, steal, and carry away the personal property therein. . . ,” the instruction was sufficient. This Court found that the jury necessarily found that the car contained personal property that Esters intended to steal and that there is no material difference between a finding that Esters intended to steal personal property and a finding that the car contained goods or other valuables. (Opinion ¶19). Esters urges this Court to reconsider this finding.

There is a clear difference between a finding that Esters had the intent to steal when he entered Bowens’s car and a finding that the car contained goods or valuables for use or sale. The jury could easily have determined that Esters *intended* to steal without finding that there were items of value in the car. Had the car been completely empty, the jury may have found he had an intent to steal based on his entry into the car. Had the instruction required the jury to find that Esters *actually* stole items from the car, a finding that the jury necessarily found that goods and valuables were kept there might be appropriate. However, the jury was only tasked with finding that Esters *intended* to steal from the car once inside. Thus, there has been no implicit finding by the jury that the car contained goods or valuables.

That there were goods or other valuables kept in the car is an essential element of the offense that must be found by the jury. The omission of the essential element was not called to the attention of the trial court. However, this Court has held that the procedural bar does not apply in cases where the trial court has failed

to properly and fully instruct the jury. Rather, the supreme court has recognized that it is the responsibility of the trial court “to assure that the jury is fully and properly instructed on all issues of law relevant to the case.” *Harrell v. State*, 134 So. 2d 266, 270 (Miss. 2014) (quoting *Kolberg v. State*, 829 So. 2d 29, 46 (Miss. 2002)). While the trial court is responsible for instructing the jury, even sua sponte, the State also bears the responsibility for assuring the jury is instructed on the essential elements of the crime. *Id.* (citing *Hunter v. State*, 684 So. 2d 625, 635 (Miss. 1996)).

The supreme court’s ruling in *Harrell* overruled its prior holding in *Kolberg* to the extent that *Kolberg* allowed the appellate court to apply a harmless error analysis to cases where the jury has not been instructed on the elements of a crime. *Id.* at 271 (¶18). The supreme court held that allowing the court to engage in a harmless error analysis violates Section 31 of the Mississippi Constitution, which provides, “The right of trial by jury shall remain inviolate.” *Id.* (citing Miss. Const. art. 3, §31).

In overruling *Kolberg*, the supreme court stated, “We hold that it is always and in every case, reversible error for the courts of Mississippi to deny an accused the right to have jury decide guilt as to each and every element” of a crime charged. *Id.* at 275 (¶30) (emphasis added). Because the jury in this case was never instructed on all the elements of auto burglary, Esters’s fundamental right to a jury trial was violated. The finding that Esters *intended* to steal from the car does not equate to a finding that there were valuables kept in the car. The jury was not

properly instructed and did not find each and every element of the offense of car burglary beyond a reasonable doubt. Accordingly, Esters's respectfully requests this Court grant his motion for rehearing and reverse his conviction and sentence.

WHEREFORE, PREMISES CONSIDERED, Esters respectfully requests this Court grant his Motion for Rehearing, reverse his conviction and sentence, and remand his case for a new trial.

Respectfully Submitted,

ANTWOINE ESTERS, APPELLANT

By: /s/ Mollie M. McMillin
Mollie M. McMillin, Appellant Counsel

CERTIFICATE OF SERVICE

I, Mollie M. McMillin, Counsel for Antwoine Esters, do hereby certify that on this day I electronically filed the foregoing MOTION FOR REHEARING with the Clerk of the Court using the MEC system which sent notification of such filing to the following:

Honorable Jason L. Davis
Attorney General Office
Post Office Box 220
Jackson, MS 39205-0220

Further, I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above to the following non- MEC participants:

Antwoine Esters, MDOC #L7662
South Mississippi Correctional Institution
Post Office Box 1419
Leakesville, MS 39451

This the 22nd day of January 2019.

BY: /s/ Mollie M. McMillin
Mollie M. McMillin, Appellant Counsel

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