IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-KA-00267 COA

GLORIA HARRIS AND JAKE HARRIS **APPELLANTS**

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:	03/07/96
TRIAL JUDGE:	HON. ELZY JONATHAN SMITH JR.
COURT FROM WHICH APPEALED:	COAHOMA COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANTS:	AZKI SHAH
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: W. GLENN WATTS
DISTRICT ATTORNEY:	LAWRENCE Y. MELLEN
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	CT I COMMUNICATION FRAUD: SENTENCED TO 3 YRS MDOC, CT II CREDIT CARD THEFT, MISDEMEANOR: SENTENCED TO 1 YR MDOC, CT III'S & CT IV FRAUDULENT USE OF ATM SENTENCED TO 1 YR MDOC PAY A FINE OF $1,000.00
DISPOSITION:	AFFIRMED - 2/10/98
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	3/30/98

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

THOMAS, P.J., FOR THE COURT:

Gloria Harris and Jake Harris appeal their convictions of communication fraud, credit card theft, and ATM fraud raising the following issues as error:

I. THE TRIAL COURT ERRED IN NOT GRANTING APPELLANTS' MOTION FOR A DIRECTED VERDICT OF ACQUITTAL AT THE CLOSE OF THE STATE'S CASE IN CHIEF AND THE CLOSE OF ALL OF THE EVIDENCE.

II. THE TRIAL COURT ERRED IN NOT GRANTING APPELLANTS' MOTION FOR DIRECTED VERDICT OF ACQUITTAL AS TO COUNT II AT THE CLOSE OF THE STATE'S CASE IN CHIEF AND THE CLOSE OF ALL OF THE EVIDENCE AND THE COURT ERRED IN SENTENCING APPELLANT TO ONE (1) YEAR IN JAIL.

III. THE TRIAL COURT IMPROPERLY ALLOWED THE ADMISSION OF THE PHOTOGRAPHS GENERATED BY THE ATM MACHINE IN CONJUNCTION WITH A COMPUTER.

Finding no error, we affirm.

FACTS

In November of 1994, Kermit Stanton requested and received an ATM card from the Sunburst Bank branch of Shelby, Mississippi where he maintained a checking account. He picked up his card from his post office box located at the Shelby Post Office. Shortly thereafter, he received his PIN number at the same box. Stanton thereby laid his ATM card to the side and never used it. He did not return to it until he received his next bank statement. His statement contained two ATM withdrawals of $300 each, which he had not made. These unauthorized expenditures were promptly reported to Sunburst Bank.

Bobby and Gloria Burton had a checking account at the Sunburst Bank branch of Cleveland, Mississippi. They too requested and received ATM cards for this account in November of 1994. The cards and PIN statements were received at their post office box at the Shelby Post Office. Neither Bobby or Gloria Burton ever used their ATM cards. However, when their statement from the bank arrived, they too had unauthorized ATM withdrawals.

When each of these unauthorized transactions took place, the ATM machine used recorded the date and time of the transaction as well as video taping the transaction. However, one transaction, in which the Burtons' ATM card was used, was not video taped since that particular ATM site did not have a video camera. Based on the date and time of these unauthorized transactions, still photos from the video tape corresponding to those dates and time were made and shown to the parties involved. Stanton could not identify the individual in the photos which coincided with the dates and times his card was used. However, the individual was later identified as Jack Harris by Deputy Floyd Williams, who was assisting in the investigation of this matter. Bobby Burton, however, after being shown the video and photos corresponding to when his ATM card was used, identified Gloria Harris as the individual using his card. He recognized her as someone he knew from the Shelby Post Office. Gloria Burton was shown the video tape and she too recognized and identified Gloria Harris. Gloria and Jake Harris are brother and sister.

Gloria Harris worked at the Shelby Post Office since 1987. Her duties included sorting the mail and

placing it in the appropriate post office boxes. Both she and her brother denied using Stanton's or the Burtons' ATM cards. However, they both identified themselves from the still photos but claimed they were in fact using Evelyn Hatchett, their sister's, ATM card. Furthermore, Gloria Harris's fingerprints were found on the inside contents of the letter which contained Stanton's ATM card. Following deliberations, the jury returned a verdict of guilty on various counts of communication fraud, ATM fraud, and credit card theft.

ANALYSIS

I.

THE TRIAL COURT ERRED IN NOT GRANTING APPELLANTS' MOTION FOR A DIRECTED VERDICT OF ACQUITTAL AT THE CLOSE OF THE STATE'S CASE IN CHIEF AND THE CLOSE OF ALL OF THE EVIDENCE.

Gloria and Jake Harris's motions for directed verdict and for a judgment notwithstanding the verdict all test the legal sufficiency of the evidence. ***Johnson v. State,* 642 So. 2d 924 (Miss. 1994)** (citing *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993)). They argue that the evidence presented at trial was insufficient to support a guilty verdict by the jury on Count I of the indictment, communication fraud, and as such the charge should be reversed.

When the legal sufficiency of the evidence is challenged we will not retry the facts but must take the view of the evidence most favorable to the State and must assume that the fact-finder believed the State's witnesses and disbelieved any contradictory evidence. ***McClain*, 625 So. 2d at 778; *Griffin v. State*, 607 So. 2d 1197, 1201 (Miss. 1992).** On review, we accept as true all evidence favorable to the State, and the State is given "the benefit of all favorable inferences that may reasonably be drawn from the evidence." ***Griffin*, 607 So. 2d at 1201** (citations omitted). We will reverse such a ruling only where "reasonable and fairminded jurors could only find the accused not guilty." ***McClain*, 625 So. 2d at 778** (citing *Wetz*, 503 So. 2d 803, 808 (Miss. 1987); ***Harveston v. State*, 493 So. 2d 365, 370** (Miss. 1986); ***Fisher v. State*, 481 So. 2d 203, 212 (Miss. 1985)).**

Count I of the indictment in which both Gloria and Jake Harris were eventually found guilty reads as follows:

> That GLORIA AND JAKE HARRIS, individually or while aiding and abetting or acting in concert with each other, late of Coahoma County, Mississippi, on or about and between November 10, 1994 and November 26, 1994, in the County and State aforesaid and within the jurisdiction of this Court, having devised a scheme for obtaining money and for the purpose of executing said scheme, did unlawfully, wilfully and feloniously cause to be transmitted by person, data, to-wit: Sunburst Bank Automatic Teller Machine (ATM) bank card number 560486 9410001959 on the account of Kermit Stanton at Sunburst Bank, a corporation, across county lines from Shelby, Bolivar County, Mississippi, to Clarksdale, Coahoma County, Mississippi, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State of Mississippi.

Gloria and Jake Harris contend that the State failed to prove essential elements of the charge as laid out in Count I. They base their argument on a reading of Miss. Code Ann. § 97-19-83 (Rev. 1994)

(fraud by mail or other means of communication), from which Count I is taken. Their argument can be summarized as follows: (1) the State of Mississippi failed to prove "any scheme" to defraud; (2) the State of Mississippi did not offer any evidence that the mail was used to deceive or trick Stanton in parting with his money; (3) the State of Mississippi offered no evidence to suggest a plot or scheme was communicated to Stanton so as to convince Stanton to turn over monies to Appellants; and (4) the State of Mississippi failed to show that there was any communication between Appellants and Kermit Stanton either by "mail, telephone, newspaper, radio, television, wire, electromagnetic waves, microwaves, or other means." As will be shown, this is a complete misreading of Miss. Code Ann. § 97-19-83 (Rev. 1994).

Miss. Code Ann. § 97-19-83 (Rev. 1994) states as follows:

> (1) *Whoever, having devised* or intending to devise *any scheme* or artifice to defraud, or *for obtaining money,* property or services, or for unlawfully avoiding the payment or loss of money, property , or services, or for securing business or personal advantage by means of false or fraudulent pretenses, representations or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, *for the purpose of executing such scheme* or artifice or attempting so to do, transmits or *causes to be transmitted* by mail, telephone, newspaper, radio, television , wire, electromagnetic waves, microwaves, or other means of communication or *by person,* any writings, signs, signals, pictures, sounds, *data,* or other matter *across county* or state jurisdictional *lines,* shall, upon conviction, be punished by a fine of not more than Ten Thousand Dollars ($10,000.00) or by imprisonment for not more than five (5) years, or both such fine and imprisonment.

(emphasis added).

As stated before, Count I of Gloria and Jake Harris's indictment was taken from this statute. As can be readily seen, the points of contention raised are not required elements of this statute. Appellants offer no cases in which the Mississippi Supreme Court has interpreted this statute as requiring what Appellants contend, and we have found none. By addressing each one of Appellants' arguments they can be shown to be without merit.

Appellants first argue that the State failed to prove "any scheme" to defraud. But Gloria Harris would have had access to both the letter containing Stanton's ATM card and the letter containing his PIN number, since she worked at the Shelby Post Office. Although she denied having seen these letters or removing their contents, her fingerprints were found on the inside contents of the letter in which Stanton received his ATM card. Also, expert testimony concluded that the letter containing Stanton's ATM card had been opened and resealed. Furthermore, Jake Harris's image was recorded by the ATM machine at the exact time Stanton's ATM card was used. Finally, since the ATM machine in which Stanton's card was used was in Clarksdale, Coahoma County, Mississippi and the post office from which the card was taken was in Shelby, Bolivar County, Mississippi the card was taken across county lines in violation of the statute.

The jury could readily have concluded that Jake and Gloria Harris devised a scheme in which Gloria Harris would steal Stanton's ATM card and PIN number and then hand them over to Jake Harris,

who would use them to remove money from Stanton's account. Taking all of the State's evidence as true there was simply sufficient and credible evidence supporting such a "scheme."

Appellants next argue there was no evidence that the mail was used to deceive or trick Stanton in parting with his money and no evidence to suggest a plot or scheme was communicated to Stanton so as to convince Stanton to turn over monies to Appellants. These were simply not elements necessary to indict and convict appellants under Miss. Code Ann. § 97-19-83 (Rev. 1994). Appellants were charged and convicted under the communication fraud part of this statute and not mail fraud per se. The State offered ample evidence that a scheme existed to obtain money and for the purpose of executing this scheme data (in this instance and ATM card) was taken across county lines.

Finally, Appellants argue that there was no communication between themselves and Stanton by "mail, telephones, newspaper, radio, television, wire, electromagnetic waves, microwaves, or other means of communication." Again, this is not a necessary element under communication fraud. In order to be punished under the statute one must devise a scheme for obtaining money and for the purpose of executing such scheme cause to be transmitted by "mail, telephone, newspaper, radio, television , wire, electromagnetic waves, microwaves, or other means of communication or *by person*, ...data, or other matter across county lines." **Miss. Code Ann. § 97-19-83 (Rev. 1994)** (emphasis added). Appellants merely fail to mention the "by person" element under which they were convicted. As shown above, the evidence offered by the State meets all requirements of the statute.

The trial court also denied Appellant's motion for a new trial. A motion for a new trial tests the weight of the evidence rather than its sufficiency. ***Butler v. State*, 544 So. 2d 816, 819 (Miss. 1989).** The Mississippi Supreme Court has stated:

> As to a motion for a new trial, the trial judge should set aside the jury's verdict only when, in the exercise of his sound discretion, he is convinced that the verdict is contrary to the substantial weight of the evidence; this Court will not reverse unless convinced the verdict is against the substantial weight of the evidence.

Id. (quoting *Russell v. State*, 506 So. 2d 974, 977 (Miss. 1987)).

The lower court has the discretionary authority to set aside the jury's verdict and order a new trial only where the court is "convinced that the verdict is so contrary to the weight of the evidence that to allow it to stand would be to sanction an unconscionable injustice." ***Roberts v. State*, 582 So. 2d 423, 424 (Miss. 1991)** (citations omitted). Based on the record before us, suffice it to say that the evidence was sufficient to allow the case to go to the jury, and the jury's verdict was not against the overwhelming weight of the evidence. These assignments of error are without merit.

II.

THE TRIAL COURT ERRED IN NOT GRANTING APPELLANT'S MOTION FOR DIRECTED VERDICT OF ACQUITTAL AS TO COUNT II AT THE CLOSE OF THE STATE'S CASE IN CHIEF AND THE CLOSE OF ALL OF THE EVIDENCE AND THE COURT ERRED IN SENTENCING APPELLANT TO ONE (1) YEAR IN JAIL.

Appellants failed to raise any specific objections as to Count II either at the close of the State's case or at the close of all the evidence. Failure to make a contemporaneous objection at trial waives the issue on appeal. ***Holland v. State,* 656 So. 2d 1192, 1197 (Miss. 1995)** (citing *Ratliff v. State,* 313 So. 2d 386, 388 (Miss.1975)). In the absence of a motion for a directed verdict, a request for a peremptory instruction, or a motion for a judgment notwithstanding the verdict, Appellants have waived any sufficiency error as to Count II on appeal. ***Id.*** (citing *Griffin v. State*, 495 So. 2d 1352, 1353 (Miss. 1986); ***Peden v. State,* 425 So. 2d 1356, 1357 (Miss. 1983); *Harris v. State,* 413 So. 2d 1016, 1018 (Miss. 1982)).** We will not address issues not properly preserved for appellate review.

Appellants next argue that the sentencing under Count II was improper. Jake Harris was sentenced to serve one year under Count II, which was to run concurrently with the sentence imposed for Count I. Appellants assert the trial judge exceeded the court's statutory authority in imposing this sentence, since under Count II Jake Harris was charged and convicted under Miss. Code Ann. § 97-17-87 (Rev. 1994) (trespass; wilful or malicious; penalty), which carries a maximum penalty of six (6) months. Furthermore, Appellants assert that the State improperly charged Jake Harris with trespassing and that in fact he was indicted for receiving stolen property under Miss. Code Ann. § 97-17-70 (Rev. 1994). As will be shown, this is a complete misreading of Count II and therefore is totally without merit.

Count II reads as follows:

> That JAKE HARRIS, late of Coahoma County, Mississippi, on or about and between November 10, 1994 and November 12, 1994, in the County and State aforesaid and within the jurisdiction of this Court, did unlawfully, wilfully and feloniously receive Sunburst Bank Automatic Teller Machine (ATM) bank card number 560486 9410001959 on the account of Kermit Stanton, at Sunburst Bank, a corporation, the said Kermit Stanton being the owner of said account and the cardholder thereon, without the consent of Kermit Stanton, with the felonious intent to use said ATM card, when he, the said Jake Harris, knew that said ATM card had been obtained by wilful or malicious trespass, a method know to the criminal law of this state under section 97-17-87 of the Mississippi Code of 1972, Annotated, as amended, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Mississippi.

A simple reading of Count II shows that Jake Harris was not indicted and convicted for trespassing under Miss. Code Ann. § 97-17-87 (Rev. 1994), because the indictment mirrors Miss. Code Ann. § 97-19-13 (Rev. 1994), credit card theft. The indictment reads that Jake Harris knew the ATM card was obtained by wilful or malicious trespass, which is defined under Miss. Code Ann. § 97-17-87 (Rev. 1994).

Miss. Code Ann 97-19-13 (Rev. 1994) reads in part as follows:

> *A person* who takes a credit card from the person, possession, custody or control of another by acts constituting statutory larceny, common law larceny by trespassory taking, common law larceny by trick, embezzlement, false pretense or extortion, or by any other method known to the criminal law of this state, without the cardholder's consent, or *who, with knowledge that a credit card has been so taken, receives the credit card with intent to use it* or to sell it or to transfer it to a person other than the issuer or the cardholder or one authorized by him to

receive it is *guilty of credit card theft*.

(emphasis added).

Clearly Miss. Code Ann. § 97-19-13 (Rev. 1994) was the statute under which Jake Harris was indicted and convicted. Furthermore, since violation of this statute is a misdemeanor punishable under Miss. Code Ann. § 97-19-29 (Rev. 1994), which has a maximum sentence of one (1) year, the sentence imposed by the trial judge was proper. This assignment of error is without merit.

III.

THE TRIAL COURT IMPROPERLY ALLOWED THE ADMISSION OF THE PHOTOGRAPHS GENERATED BY THE ATM MACHINE IN CONJUNCTION WITH A COMPUTER.

Appellants final assignment of error is based on the introduction of the photographic evidence produced from video tape recorded by the various ATM machines involved in this case. Of the five ATM transactions in this case, a video tape recording was made of four. Still photographs were made from the video tape and introduced as evidence. Appellants maintain that the photographs should not have been allowed into evidence because the State did not properly authenticate the same and also likewise argue they were not the best evidence.

Appellants first attack the authentication of the photographs. The State offered Walter Garner as the sole authenticating witness for the photos. Walter Garner was, at the time of these transactions, a security officer for Sunburst Bank. It was his job to take the video tape and make still photographs of whatever particular transaction was requested. Appellants maintain that Garner was never qualified to testify "as to the calibration of the computer, VCR, ATM machine and the operation of the VCR."

Garner testified that when an ATM is used the time and date is recorded as well as the account number, PIN number, amount withdrawn, and a transactional number by the ATM itself. The time and date is also recorded by the video camera taping the transaction. To get photographic evidence of a certain transaction, the time and date recorded by the video tape and the time and date recorded by the ATM are compared. Then still photos are produced from the video tape using a thermal copier. As Garner testified, since no two clocks are exactly the same, the times between the videotape and ATM could be off as much as three minutes, with the result that the wrong person is shown during a certain transaction. Appellants question the accuracy of this process and argue the court should not have allowed the photos into evidence. Appellants are in effect arguing that the State failed under M.R.E. 901(b)(9) to provide "evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result."

But M.R.E. 901 prefaces that section with the language that it is to be used "by way of illustration only, and not by way of limitation," thereby, allowing use of the general provision of M.R.E. 901(a). The general provision states "the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Given all the evidence we are satisfied that the photos are what they are purported to be and therefore they were properly authenticated under M.R.E. 901(a).

Garner testified that he had done "probably a thousand" of these requests to produce photographs from ATM video. To ensure that the right transaction went with the right video taped image, he would look at the video tape until he could find a transaction that he could positively identify. In this way, he could then line up the video tape with the identified transaction and this would ensure that all other video images and transactions lined up properly. Furthermore, he testified that if something should malfunction in an ATM machine, the machine is designed to simply shut down. He further testified that the photographs were an accurate depiction of what had been on the video tape. Given Garner's testimony, the photos were properly authenticated and were properly allowed into evidence.

Next, Appellants argue that the original video tape should have been produced under M.R.E. 1002 as the best evidence, instead of the photographs. However, we conclude that the photographs were properly admitted either under M.R.E. 1003, Admissibility of Duplicates, or M.R.E. 1004, Admissibility of Other Evidence of Contents.

M.R.E. 1003 states that "a duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." In the present instance the photographs were properly authenticated by Garner. Furthermore, Elizabeth Langston, a bank officer of Sunburst, testified that she had viewed the video tape of the transaction in which the Burton's ATM card was used and the photographs accurately represented what she had viewed. Mr. Burton viewed the video tape in which his card was used and testified the photos accurately depicated what he had viewed. Mrs. Burton viewed the video tape in which her card was used and testified the photos accurately depicted what she saw. Finally, both Jake and Gloria Harris admitted that the photos were accurate images of themselves using the ATM machine. There is no question concerning the authenticity of these photos and since appellants admitted the photos were images of themselves using the ATM, it was not unfair to use them in lieu of the original.

Testimony was also given as to what was done with the video tape after the still photos were made. It was standard procedure for Sunburst Bank to keep such videos for ninety days and then they are re-recorded. By the date of this trial the original video tape would have been re-recorded. Since this was not done in bad faith, the photos could also have been allowed in under M.R.E. 1004(1), which allows other evidence of photographs were the original is lost or destroyed. These assignments of error are without merit.

THE JUDGMENT OF THE COAHOMA COUNTY CIRCUIT COURT OF THE CONVICTION OF JAKE HARRIS ON COUNT I FOR COMMUNICATION FRAUD AND SENTENCE OF THREE YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS TO RUN CONSECUTIVE TO ANY SENTENCE PREVIOUSLY IMPOSED; COUNT II FOR CREDIT CARD THEFT, MISDEMEANOR, SENTENCE OF ONE YEAR IN THE COUNTY JAIL TO RUN CONCURRENT WITH SENTENCE OF COUNT I; COUNT III AND IV FOR FRAUDULENT USE OF ATM CARD AND SENTENCES OF ONE YEAR ON EACH COUNT IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS TO RUN CONSECUTIVE WITH SENTENCE OF COUNT I AND TO PAY FINES OF $1,000 ON EACH COUNT IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO COAHOMA COUNTY.

THE JUDGMENT OF THE COAHOMA COUNTY CIRCUIT COURT OF THE CONVICTION OF GLORIA HARRIS ON COUNT I FOR COMMUNICATION FRAUD AND SENTENCE OF THREE YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS TO RUN CONSECUTIVE TO ANY SENTENCE PREVIOUSLY IMPOSED; COUNT V FOR FRAUDULENT USE OF ATM CARD, MISDEMEANOR, SENTENCE OF ONE YEAR IN COUNTY JAIL TO RUN CONSECUTIVE WITH SENTENCE OF COUNT I AND TO PAY FINE OF $1,000; COUNT VI AND VII FOR FRAUDULENT USE OF ATM CARD, MISDEMEANORS, SENTENCE OF ONE YEAR ON EACH COUNT IN THE COUNTY JAIL TO RUN CONCURRENT WITH SENTENCE OF COUNT I AND TO PAY FINE OF $1,000 ON EACH COUNT IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO COAHOMA COUNTY.

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