IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DARYL HAWKINS — APPELLANT

VS. — NO. 2004-KA-1204

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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DARYL HAWKINS **APPELLANT**

VERSUS **NO.2004-KA-1204-COA**

STATE OF MISSISSIPPI **APPELLEE**

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STATEMENT OF THE CASE

Procedural History

Daryl Hawkins was convicted in the Circuit Court of the Second Judicial District of Bolivar County on a charge of attempted burglary of an automobile and was sentenced as an habitual offender to a term of life in the custody of the Mississippi Department of Corrections. (C.P.44-45) Aggrieved by the judgment rendered against him, Hawkins has perfected an appeal to this Court.

Substantive Facts

Investigator Robert Graham of the Cleveland Police Department testified that on March 7, 2004, he was driving an unmarked truck, working a "special detail" at the Colony Apartments "right off of Bishop Road" in Cleveland. At approximately 3:00 a.m., Officer Graham "observed a light colored, maybe green or gold looking Nissan Altima coming into"

the parking lot. He crouched down in his vehicle to avoid being seen. After the Altima "passed by" him, he "watched ... as it slowly rolled past ... and made a left turn toward the back of the building." About two or three minutes later, Officer Graham, carrying his walkie-talkie, "eased out" of his vehicle and "started toward the back the building." At that point, he "saw headlights coming back toward" him. He then "ducked between some vehicles and watched ... the car come back around the corner, and ... watched the passenger step out of that vehicle." He recognized this passenger as Daryl Hawkins. (T.12-13)

Officer Graham then "observed the driver pull up, kill his lights, turn his car off." Hawkins walked "around to a vehicle and use[d] his hands to rub the glass, the dew on the windows, and looked inside the vehicle. ... He left that vehicle and went to the next vehicle and did the same thing." When he "made it to a light colored vehicle," a Nissan Sentra, " that's when he broke the window." (T.14-15)

Having been "peeping over the hood of a vehicle" to watch Hawkins, Officer Graham then "eased down and ... called for backup," informing the responding officer that an automobile burglary was in progress. At that point, Officer Graham "heard the alarm" and "raised back up" to see Hawkins running "[b]ack to the Nissan Altima." Hawkins "jumped in the car, and they pulled off real fast" to the edge of the driveway. Heavy traffic prevented them from going out immediately onto Bishop Road and gave Officer Graham time "to ease up on their bumper before they made the turn." After the Altima "made a right turn on Bishop headed South," Officer Graham managed to stay "on their bumper trailing them, and they started to excel [sic] their speed." Officer Graham followed them "all the way through the City of Cleveland to Boyle, Highway 446." With the assistance of

backup officers, Officer Graham "blocked them in when they turned in toward Boyle." When the car was stopped, Officer Graham observed that "Brandon James was driving, and Daryl Hawkins was sitting on the passenger side.[1] (T.15-17)

James and Hawkins were arrested and placed in a patrol car. Thereafter, Officer Graham "observed a sharp item" resembling a wooden-handled ice pick "sticking ... in the driver's side door" of the Altima. (T.20)

Kristi Ann Beachy testified that on the morning in question, she was at her boyfriend's apartment at the Colony Apartments. Her light-colored Nissan Sentra was parked in the parking lot of the complex. When her boyfriend left for work at approximately 7:00 that morning, he found that her car window had been broken. Ms. Beachy, too, observed the broken window, which had been intact the previous night when they parked the car. The vehicle contained, among other things, her boyfriend's jacket, a compact disc player and "some CD's." (T.37-39)

James testified that on the morning of of March 7, 2004, Hawkins paid him $5.00 to drive him to the Colony Apartments, where, according to James' understanding, he was simply to drop Hawkins off. James drove to the back of the building, where Hawkins got out and "walked away from the car" toward an apartment. Asked whether he had seen Hawkins do anything, or had heard the breaking of glass, James testified in the negative. According to James, "The only thing I know he just came back to the car and got back in." When Hawkins opened the car door, James "heard the car alarm." As he was getting back

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[1]At trial, Officer Graham identified this passenger as the defendant, Daryl Hawkins. (T.18)

into the car, Hawkins said, "Drive before somebody think we're trying to break into something." As the police closed in on them, Hawkins stated, "I broke the window out, man. We're fixing to go to jail." (T.41-46)

Hawkins testified it was James idea to drive to the Colony Apartments, and that it James exited the car while Hawkins remained inside it. (T.59-)

SUMMARY OF THE ARGUMENT

The indictment was legally sufficient to charge Hawkins with the crime of attempted burglary of an automobile.

The trial court properly denied Instruction D-2.

The evidence is legally sufficient to sustain the verdict.

Hawkins has failed to present a record to support his claim that his sentence is constitutionally disproportionate.

PROPOSITION ONE:

THE INDICTMENT WAS LEGALLY SUFFICIENT TO CHARGE HAWKINS WITH THE CRIME OF ATTEMPTED BURGLARY OF AN AUTOMOBILE

Hawkins contends first that the indictment returned against him was void for failure to state necessary elements of the offense, specifically, an overt act done toward its commission, and the failure to consummate its commission.

With respect to the first alleged flaw, the state points out that the indictment charged that Hawkins attempted to break and enter the automobile "by breaking out a window." (C.P.1) An "overt act" in this context is "one which manifests the intention to commit the crime." *Duke v. State*, 340 So.2d 727, 730 (Miss.1976). The act must be a direct, unequivocal act toward the commission of the intended crime, and the acts must have

progressed to the extent of giving him power to commit the offense. *Ishee v. State*, 799 So.2d 70, 73 (MIss.2001).

It is more than reasonable to conclude that this act of breaking demonstrated the intention of committing the crime of burglary of an automobile. The state at trial took the position that this act of breaking was an overt act (T.75), and we maintain this position on appeal.

The state acknowledges that an indictment charging an attempted crime must set out an overt act. *Hawthorne v. State*, 751 So.2d 1090, 1092-93 (Miss.App.1999); *Durr v. State*, 446 So.2d 1016, 1017 (Miss.1984). We maintain that the indictment at issue here did exactly that.

Next, Hawkins asserts that the indictment is fatally defective for failing to charge the third element of an attempted crime, i.e., the failure to consummate its commission. Controlling precedent holds that it is not necessary to allege failure to consummate or prevention from consummation.[2] *Ford v. State*, 218 So.2d 731, 732 (Miss.1969).

For these reasons, the state respectfully submits Hawkins' first proposition should

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[2]The indictment in this case recited the general attempt statute and thus notified Hawkins that he was charged, *inter alia*, with having failed to consummate the commission of the offense. Moreover, Instruction D-1 required the jury to find "[a] failure to consummate" the commission of the crime in order to find the defendant guilty of attempted automobile burglary. (C.P.3^6) Contrast *Henderson v. State*, 660 So.2d 220, 222 (Miss.1995)

be denied.

PROPOSITION TWO:

THE TRIAL COURT PROPERLY DENIED INSTRUCTION D-2

Hawkins argues additionally that the trial court committed reversible error in denying Instruction D-2, set out below:

> If you find from the evidence, beyond a reasonable doubt, that Daryl Hawkins freely and voluntarily abandoned his intent to commit the crime of burglary of an automobile before the defendant performed any overt act toward the commission of that crime, and if you further believe there was not an outside cause prompting the abandonment, then you shall find the defendant not guilty.
>
> (C.P.37)

When this instruction was tendered, the state objected on the ground of lack of evidentiary basis: "Your Honor, I believe an instruction has to be based on the evidence. And he said he didn't even get out of the car." (T.72) Additionally, the state argued that "the breaking of the window is the act toward the commission of a felony and that the alarm is what says, 'Don't do it.'" (T.75) Accordingly, the state's position was that the instruction had no evidentiary basis. Ultimately, the instruction was refused. (C.P.37)

The state agrees that a criminal defendant is entitled to a jury instruction embodying his theory of the case *if* such instruction has a basis in the evidence. (Brief for Appellant 10) *Slater v. State*, 731 So.2d 1115, 1118-19 (Miss.1999). The instruction may be denied if there is no evidence which, if believed by the jury, could result in resolution of the issue in favor of the party requesting the instruction. *Dear v. State*, 966 So.2d 218, 219 (Miss.App.2007), citing *Walls v. State,* 672 So.2d 1227, 1230 (Miss.1996). In this case, the court properly found that the evidence did not support this instruction.

First, the defendant testified that he had not exited James' car at all. By his own testimony, "he had no criminal intent to abandon" and thus "had no need for an abandonment instruction." *Slater*, 731 So.2d 1119.[3]

Furthermore, no rational analysis of the state's evidence would support a reasonable conclusion that Hawkins was entitled to assert the defense of abandonment. That defense is available "if the attempt to commit a crime is freely and voluntarily abandoned before the act is put in process of final execution, if there is no outside cause prompting the abandonment." *Barnes v. State*, 763 So.2d 216, 218 (Miss.App.2000), citing *Bucklew v. State*, 206 So.2d 200, 204 (Miss.1968).

"On the other hand, a voluntary abandonment of an attempt which has proceeded beyond mere preparation will not bar a conviction for the attempt." *Id.*, at 219.

The proof showed that Hawkins went beyond "mere preparation" and committed an overt act toward the commission of the crime. The sounding of the alarm was the "outside cause" prompting him to cease. See *Alexander v. State*, 520 So.2d 127, 130 (Miss.1988) (evidence supported "the conclusion that appellant's failure to rape the victim was due to her resistance and ability to sound the alarm, rather to any abandonment on appellant's part"). As the prosecutor succinctly argued at trial, "the breaking of the window is the act toward the commission of a felony and that the alarm is what says, 'Don't do it.'" Under these circumstances, the evidence did not support a rational conclusion that Hawkins

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[3]On this basis, *Hester v. State*, 602 So.2d 869, 873 (Miss.1992), is distinguishable. In *Hester*, the defendant testified that he had tried to abandon the robbery; thus, there was an evidentiary foundation for an abandonment instruction.

abandoned the attempt before the commission of the overt act, unprompted by an outside cause. In any case, he denied that he had approached the subject car at all. For these reasons, the trial court properly denied Instruction D-2.

PROPOSITION THREE:

THE EVIDENCE IS LEGALLY SUFFICIENT TO SUSTAIN THE VERDICT

Hawkins contends additionally that the evidence is legally insufficient to sustain the verdict. To prevail, he must satisfy the following formidable standard of review:

> When on appeal one convicted of a criminal offense challenges the legal sufficiency of the evidence, our authority to interfere with the jury's verdict is quite limited. We proceed by considering all of the evidence--not just that supporting the case for the prosecution--in the light most consistent with the verdict. We give [the] prosecution the benefit of all favorable inferences that may reasonably be drawn from the evidence. If the facts and inferences so considered point in favor of the accused with sufficient force that reasonable men could not have found beyond a reasonable doubt that he was guilty, reversal and discharge are required. On the other hand, if there is in the record substantial evidence of such quality and weight that, having in mind the beyond a reasonable doubt burden of proof standard, reasonable and fair-minded jurors in the exercise of impartial judgment might have reached different conclusions, the verdict of guilty is thus placed beyond our authority to disturb.
>
> *Manning v. State*, 735 So.2d 323, 333 (Miss.1999), quoting *McFee v. State*, 511 So.2d 130, 133-34 (Miss.1987).

Furthermore,

> The jury is charged with the responsibility of weighing and considering conflicting evidence, evaluating the credibility of witnesses, and determining whose testimony should be believed. [citation omitted] The jury has the duty to determine the impeachment value of inconsistencies or contradictions as well as testimonial defects of perception, memory, and sincerity. *Noe v. State*, 616 So.2d 298, 302 (Miss.1993) (citations omitted). **"It is not for this Court to pass upon the credibility of witnesses and where evidence justifies the**

> **verdict it must be accepted as having been found worthy of belief."** *Williams v. State*, 427 So.2d 100, 104 (Miss.1983).
>
> (emphasis added) *Ford v. State*, 737 So.2d 424, 425 (Miss.App.1999).

See also *Jackson v. State*, 580 So.2d 1217, 1219 (Miss.1991) (on appellate review the state "is entitled to the benefit of all favorable inferences that may reasonably be drawn from the evidence"), and *Noe*, 616 So.2d at 302 (evidence favorable to the defendant should be disregarded). Accord, *Harris v. State*, 532 So.2d 602, 603 (Miss.1988) (appellate court "should not and cannot usurp the power of the fact-finder/ jury"). "When a defendant challenges the sufficiency of the evidence to support a conviction, the evidence which supports the verdict is accepted as true by the reviewing court, and the State is given the benefit of all reasonable inferences flowing from the evidence." *Dumas v. State*, 806 So.2d 1009, 1011 (Miss.2000).

Having presented evidence after his motion for directed verdict was overruled, the defendant was obligated to renew his challenge to the sufficiency of the evidence. He did so through his motion for a peremptory instruction accompanied by this argument:

> We would also like to make an [sic] motion right now for a peremptory instruction made on the law of abandonment, basing that there's no evidence that's been presented not even from my client regarding relinquishment, the abandonment, and the attempt to commit a crime.
>
> (T.69)[4]

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[4]The court observed, "When your client denies that he did it all together, that kind of throws the abandonment in a little different twist." (T.69-70)

Hawkins is limited on appeal to the argument of these specific points.[5] All challenges not specifically raised below are procedurally barred. *Edwards v. State*, 797 So.2d 1049, 1056 (Miss. App. 2001).

Hawkins first cites *Spears v. State*, 942 So.2d 772, 775 (Miss.2006), for the proposition that the indictment charged him with burglary rather than attempted burglary, and that the state failed to prove him guilty of burglary. This argument was not raised below and is procedurally barred. Alternatively, the state contends the indictment at issue in *Spears* did not cite the attempt statute, MISS.CODE ANN. § 97-1-7 (1972). The indictment returned against Hawkins does not suffer from such ambiguity; it cites the attempt statute at the top of the first page. (C.P.1)

Additionally, Hawkins asserts that the state failed to prove intent to steal. Again, the state counters that this argument is unpreserved. Alternatively, we submit the proof and the reasonable inferences therefrom support the court's submission of this case to the jury and refusal to disturb its verdict. "Intent is a state of mind seldom susceptible of direct proof absent a confession." *Harrison v. State*, 722 So.2d 681, 685 (Miss.1998), quoting *Williams v. State*, 512 So.2d 666, 669 (Miss.1987). It "may be inferred from the time and manner in which entry was made and the conduct of the accused after entry," *Id.*; otherwise, "the burglar caught without boot might escape the penalties of the law." *Cortez v. State*, 876 So.2d 1026, 1030 (Miss.App.2003), citing *Dixon v. State*, 240 So.2d 289, 290 (Miss.1970). Accord, *Brown v. State,* 799 So.2d 870, 872 (Miss.2001).

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[5]Hawkins' motion for j.n.o.v. added no more specific challenges to the sufficiency of the evidence. (C.P.50)

The proof and the reasonable inferences therefrom showed that the defendant entered a parking lot late at night, cased two other cars before looking into the victim's car and breaking the window, and fled after the alarm sounded. From this evidence a rational juror could infer an intent to steal. Hawkins' argument to the contrary goes to the weight rather than sufficiency of the evidence, which was properly evaluated by the jury.

In light of this analysis, the state respectfully submits Hawkins' third proposition should be denied.

PROPOSITION FOUR:

HAWKINS HAS FAILED TO PRESENT A RECORD TO SUPPORT HIS CLAIM THAT HIS SENTENCE IS CONSTITUTIONALLY DISPROPORTIONATE

At the sentencing hearing, the state proved that Hawkins was an habitual offender within the meaning of MISS.CODE ANN. § 99-19-83 (1972) (as amended). (T.95-100) After the state concluded its case on sentencing, the court asked, "Anything from the defense?" Defense counsel answered, "We have no witnesses to present at this time as to the sentencing hearing." (T.100) The defense went on to argue the following:

> [W]e would ask the Court to consider the proportionality of the sentence under the Eighth Amendment under ***Solem versus Helm***, in that in this case the facts as presented was [sic] that Mr. Hawkins attempted to break into a car. We feel, based on the proportionality of the sentence, that life without parole is too extreme in this case, and we would ask the Court to consider that ... in it's [sic] decision. I understand, based on the case law in this State, that the Court has no discretion regarding sentencing, except if we ... ask for a proportionality of sentence to the crime. That's what we're doing at this time.
>
> (T.100-01)

The court held that it had "no discretion in this matter" and sentenced Hawkins to life imprisonment without possibility of parole. (T.101)

The backdrop for the disposition of Hawkins' final argument is set out below:

> "[T]he general rule in Mississippi is that a sentence that does not exceed the maximum term allowed by the statute, cannot be disturbed on appeal." *Edwards v. State*, 800 So.2d 454, 468 (Miss.2001) (citing *Fleming v. State*, 604 So.2d 280, 302 (Miss.1992)). This Court "will review a sentence that allegedly imposed a penalty that is disproportionate to the crime." Id.
>
> In *Edwards*, this Court discussed the proportionality analysis as laid out by the United States Supreme Court:
>
> > The United States Supreme Court set forth a three-prong test for an Eighth Amendment proportionality analysis in *Solem* as follows:
> >
> > (i) the gravity of the offense and the harshness of the penalty;
> >
> > (ii) the sentence imposed on other criminals in the same jurisdiction; and
> >
> > (iii) the sentences imposed for commission of the same crime in other jurisdictions.
>
> This Court noted, however, that Solem was overruled in *Harmelin v. Michigan*, 501 U.S. 957, 965-66, 111 S.Ct. 2680, 2686-87, 115 L.Ed.2d 836 (1991) **"to the extent that it found a guarantee of proportionality in the Eighth Amendment. In light of *Harmelin*, it appears that *Solem* is to apply only when a threshold comparison of the crime committed to the sentence imposed leads to an inference of 'gross disproportionality.' " *Hoops v. State*, 681 So.2d at 538 (citations omitted). The appellate courts will not apply the three-prong disproportionality test when there is a lack of this initial showing.** [citations omitted]
>
> (emphasis added) *Sumrell v. State*, 972 So.2d 572, 576 (Miss. 2008)

During the sentencing hearing, Hawkins failed to make a threshold showing that a comparison of the crime committed to the sentence imposed led to an inference of gross

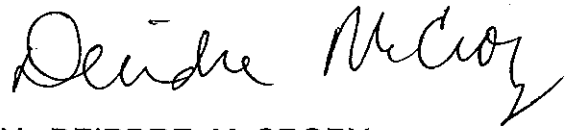
disproportionality.[6] Absent such a showing, he cannot be heard to advance a *Solem* analysis for the first time on appeal. There simply is nothing for this Court to review on this point. See also *Wallace v. State,* 607 So.2d 1184, 1189 (Miss.1992). In light of *Sumrell* and the authorities cited therein, Hawkins' final proposition should be rejected.

CONCLUSION:

For the reasons set out above, the state respectfully submits the judgment entered below should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL
STATE OF MISSISSIPPI



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[6]The state submits that a reading of the transcript does not support the inference that the court prevented the defense from making a record. Defense counsel simply requested the court to make a proportionality review and did not ask to be heard further on this issue.

CERTIFICATE OF SERVICE

I, Deirdre McCrory, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing BRIEF FOR THE APPELLEE to the following:

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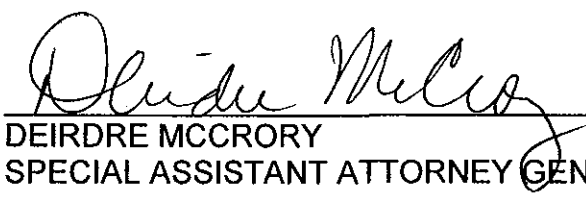
This the 10th day of March, 2008.



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