

**COPY**  
**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**GREGORY SMITH**

**APPELLANT**

**FILED**

**FEB 13 2008**

**VS.**

**OFFICE OF THE CLERK  
SUPREME COURT  
COURT OF APPEALS**

**NO. 2005-KA-1149-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

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**BRIEF FOR THE APPELLEE**

**PROCEDURAL HISTORY:**

On May 9-11, 2005, Gregory Smith, "Smith" was tried with others for conspiracy to commit armed robbery and armed robbery before a Bolivar County Circuit Court jury, the Honorable Albert B. Smith presiding. R. 1. Smith was found guilty on both counts and given a five and a twenty year consecutive sentence in the custody of the Mississippi Department of Corrections. V. 6; 9-10. From these convictions and sentences, he appealed to this Court. C.P. 198.

**ISSUES ON APPEAL**

**I.A.**

**WAS THERE SUFFICIENT CREDIBLE, SUBSTANTIAL EVIDENCE IN SUPPORT OF THE CONSPIRACY VERDICT?**

**I.B.**

**WAS THERE SUFFICIENT CREDIBLE EVIDENCE IN SUPPORT OF THE ATTEMPTED ARMED ROBBERY VERDICT?**

**II.**

**WAS SMITH ENTITLED TO A NEW TRIAL ON THE ATTEMPTED ARMED ROBBERY VERDICT?**

## STATEMENT OF THE FACTS

On September 21, 2004, Smith was indicted with three other co-defendants, Glenn, Green, and Daniels, for conspiracy to commit armed robbery and armed robbery on or about July 8, 2004 by a Bolivar County Grand Jury. C.P. 1-2.

On May 9-11, 2005, Smith was tried for conspiracy to commit armed robbery and aiding and abetting armed robbery with his co-defendants before a Bolivar County Circuit Court jury, the Honorable Albert B. Smith presiding. R. 1. Smith was represented by Mr. Raymond Wong. R. 1.

Mr. Donnell Hogan, the bank guard at Cleveland State Bank, testified that on July 8, 2004 he was shot. He was shot in the right toe. R. 12;15. This occurred during what he believed was a botched bank robbery. Hogan testified to having seen "a gold Jeep" park in front of the bank. It did so on several occasions prior to the events at issue. R. 24. No one exited the car. When he attempted to approach the car to get the license plates, it drove off. R. 24. This was a branch bank in Merigold, a small Delta town. Hogan had seen co-defendant Mr. Glenn inside the bank as "a regular customer" prior to the day in question. R. 46.

On the day of the confrontation, Hogan saw three suspicious people near the bank. They seemed disguised. R. 3-20. They moved together quickly toward the bank. Hogan went in behind them to get a better look. Two had on long black wigs. Two had what appeared to be back packs. R. 4-5. It appeared to be two men crudely dressed as women, and a woman dressed as a man. R. 12. One man, co-defendant Green, inquired about opening a bank account. Green spoke with Ms. Tribble, one of the two female bank tellers in the bank. He did not have a driver's license with him. R. 13. He talked with his disguised woman companion about whether he had a license "in the vehicle." She stood beside him and could be seen conversing with him.

The disguised woman, Daniels, followed a customer leaving the bank to the door, looked

out, and returned to stand beside Green. She spoke to Green, and gave some hand and head signals. R. 13. Green pulled a hand gun out of a purse. He moved toward the guard, and said "stop, don't move." He also fired a shot in his direction. R. 13.

When Green fired, the guard, Mr. Hogan, moved to the side, pulled his own handgun and quickly returned fire. R. 14. Hogan believed some "seventeen shots fired." R. 14. Hogan discovered that he was bleeding from being shot in the toe. R. 15. Exhibit 10 was Hogan's shoe showing bullet holes. Hogan also had a bullet hole in the back of the shirt he was wearing during the shoot out. He was fortunately not hit by the passing bullet. R. 12.

Hogan went to the hospital to have his bullet wound repaired. A suspect was brought in for medical attention. He had been shot. Hogan identified Green as being the person he saw at the hospital. R. 19. Hogan recognized him as the shooter. R. 19. Co- defendant Green claimed that "they made him do that." They allegedly "took his sister hostage." Unless he acted as he did, "they were going to kill his sister." R. 17. Green told Hogan that "he didn't mean to hurt nobody." R. 17.

Hogan identified Ms. Daniels as the female in the bank communicating with Green when shots were fired. R. 19.

Mr. Smith was identified as being the other disguised male in the bank with Green. R. 18-19. He was dressed as woman wearing a brown skirt. He "kept his head down and his hands over his mouth." R. 242. He looked out the window more than once, and communicated with both Green and Daniels while in the bank. R. 240-241. Smith came in the bank with them, and after the shooting was seen leaving with them. R. 1-25. Smith was captured in the woods behind the house where Green was arrested. Smith was wearing no shirt and still had on a skirt. An abandoned woman's "black bra" was found outside the house. R. 149; 332-333.

Ms. Tribble testified that Smith communicated with both Green and Daniels while in the

bank. R. 240-241. She testified that the female, co-defendant Daniels, communicated frequently with Green, the gun man, inside the bank. R. 226; 235. Ms. Tribble also remembered seeing a gold Jeep Cherokee parked near the bank several times with no one ever getting out. R. 236.

Officer Frazier Nash testified that he stopped "a gold Jeep." R. 130. The driver of the Jeep was co-defendant Glenn; the passenger was co-defendant Daniels. R. 132. Nash identified Glenn in the court room as being the person he stopped. R. 132.

Officer Charles Gilmer testified to following "a gold Jeep." R. 138. After the Jeep was stopped, matted grass could be seen stuck underneath the frame. R. 131. After searching the area, an abandoned house with a yard full of tall Johnson grass and weeds was located. There was a mashed down path the size of a vehicle in the front yard leading up to the house. R. 140.

Inside the house was found two backpacks. R. 141. Inside the pink handbag was found two handguns. R. 141. One was a loaded 45 caliber with a box of ammunition and another was a 9 millimeter handgun. Two long black wigs were also found in the house. See photographic exhibit 25(b) and 25© in manila envelop marked exhibits. Another back pack was found that contained "hand cuffs." R. 179.

An individual who ran from the back of the house was apprehended. R. 141. He was identified as being Mr. Green. R. 141. A second suspect was located across a field behind the house. The suspect was wearing a skirt and had no shirt on when captured. This suspect was identified as Mr. Smith. R. 142.

Mr. Glenn was arrested with co-defendant, Ms. Crystal Daniels. R. 204. He was arrested driving the gold Jeep Cherokee. R. 177. Blood was found on the floor board, and a door panel. Some strips of cloth, and a pair of dark sun glasses were present. R. 177-181. Also found in the Jeep was "a brown purse." See state's photographic exhibits 26 (d),(e),(g) and( h). The shooter at the

bank pulled a handgun out of a purse. R. 181.

Ms. Janet Free , a bank teller, identified Ms. Daniels as being the young woman in the bank with two others when the shooting started. R. 212. Mr. Green was identified by Ms. Free as being the person who fired his firearm in the bank. When he pulled out a handgun, he said, "Hold it, do not move." R. 235. Ms. Free and Ms. Tribble identified Glenn as having been a regular customer in the bank in the past. He came to cash his father's check each month. R. 221; 230.

Mr. Green decided to plead guilty to attempted armed robbery and possession of firearm by a convicted felon. R. 252; 259; 311. After advising and questioning him outside the presence of the jury, his pleas were accepted as voluntarily and intelligently entered. R. 259. Green testified that the gold Jeep belonged to his wife who lived in Columbus. R. 263. He testified that he attempted to rob the bank to avoid threats to himself. He was threatened by "Rico." Rico had convinced him to rob the bank to pay an alleged \$2,400.00 gambling debt.

While Green admitted to having prepared a plan to rob the bank, he denied that he revealed this to Smith or any of his co-defendants. According to Green, he lead them to believe that he was going to pull some kind of "prank." R. 269-270. His only explanation for what the prank was that they were dressed up as the opposite sex. R. 270.

Green admitted to being a former Black Gangster Disciple gang member. R. 320. He admitted to being out of prison for about a year. R. 321. He initially denied that he shot Mr. Hogan, claiming he must have shot himself. R. 344. He also admitted that he told FBI agents that he owed Rico \$4,700 , rather than \$2, 400. 00. R. 323. Green admitted that both Glenn and Smith were his cousins. R. 262; 313. According to Green, he had to try to rob the bank to appease the angry gangster, "Rico."

See State's photographic evidence S-26(a) and 26(b) for photo of the back and side view of

a Gold Jeep. R. 20-21. The bank guard, Mr. Donnell Hogan, identified this photo as looking like the vehicle that he has seen parked on a hill near the Cleveland State Bank, the Merigold branch bank more than once. R. 20-21. When he tried more than once to get the license plate number, the car would quickly drive off. R. 20.

Photographic exhibit 25(a) through (g) shows the outside and inside of the abandoned house where Green was apprehended. 25(a) shows the exterior of the house with the tall Johnson grass and weeds grown up around it. 25(b) and 25(c) shows what appears to be blood smears, the two long black wigs along with some plastic gloves and a pack of cigarettes. 25(d), (e) and (f) shows the pink back pack which contained two hand guns, a loaded 45 caliber and a 9 millimeter. 26(e) shows the purse in the back seat of the gold Jeep. 26(c) shows the dark glasses found in the jeep. 26(g) shows a drop of blood on the floor board of the Jeep. 26(h) shows a drop of what appears to be blood on a door panel.

Exhibit 6 (a) through (x) shows the bank crime scene with the many bullet holes in the walls, and partitions, as well as numerous empty shells and some lodged bullets. Exhibit 6(s) shows what appears to be blood splatter in the bank. R. 90. Officers Hogan and Joe Smith testified that the shells and bullets found inside the bank were 45 caliber and 9 millimeter. R. 75-76. State's video exhibit 8(a) shows what occurred while the bungling trio was inside the bank. This is as recorded by bank security cameras.

At the conclusion of the prosecution's case, the trial court denied a motion for a directed verdict for Glenn, Smith and Daniels. R. 192; 247-248.

After being advised of his right to decide to testify or not, Smith decided not to testify. R. 244.

Smith was found guilty and given a five and a consecutive twenty year sentence in the

custody of the Mississippi Department of Corrections. V. 6; R. 9-10. Co-defendants Green, Glenn, and Daniels were also found guilty of conspiracy to commit armed robbery. C.P. 142. Smith filed a motion for a J. N. O. V or a New Trial, which was denied. C.P. 185-186; 187. From these convictions and sentences, he appealed to this Court. C.P. 196.

## SUMMARY OF THE ARGUMENT

1.A. There was credible, substantial partially corroborated testimony in support of Smith's conviction for conspiracy to commit armed robbery. Smith was convicted of conspiracy along with Green, Glenn and Daniels, his co-defendants. It was reasonable to infer from all the evidence that Smith agreed to aid and abet in an attempted bank robbery. They acted together in order to carry out their plan to rob the Cleveland State Bank branch bank of United States currency.

This evidence included testimony about how Smith was disguised, his coordinated actions and communication with both Green and Daniels while in the bank. R. 2-19; 240-242. He communicated with them in the bank, including seeing that a client had left the bank prior to Green's attempt to intimidate the bank guard. R. 240-242. It also included his hiding his face in the bank, as well as how he was apprehended with Mr. Green, the wounded gun man. R. 332-333; 355. Smith arrived at the bank and left the bank with Green, and Daniels. He was disguised as they were.

The record reflects there was an unsuccessful plan to subdue and tie up the bank guard. R. 358. After the attempted armed robbery, Smith hid in an abandoned house with Green, the shooter. He abandoned his "wig" in the house; and his "black bra" in the back of the house. He was found hiding in a ditch without a shirt. R. 149-150; 332-333.

Based upon this evidence, it was reasonable to infer that Smith was not merely present in the bank but was there to assist in robbing the bank of U. S. currency.

1.B. There was credible, substantial partially corroborated evidence in support of Smith's conviction for attempted armed robbery. There was testimony and video screen images showing Smith concealing his face, looking out the window, and communicating with co-defendants Green and Daniels. See exhibit 8(a) bank video made from security cameras inside the Cleveland State Bank in Merigold. R. 240-242; 354-364.. One of the back pack's found with Smith's wig and shoes

contained hand cuffs to assist in their plan to tie up the bank guard. R. 179; 358. Smith was also seen “turning away” from the armed bank guard when he moved closer to the trio. R. 355.. This was just before co-defendant Green tried unsuccessfully to intimidate the bank guard, Mr. Hogan.

When shots were fired, Smith ran out of the bank and was captured in the skirt he wore in the bank and no shirt. R. 332-333. Smith never told police of his surprise at being unexpectedly in the middle of an attempted bank robbery. He has yet to say anything about any “prank.” In fact, by abandoning his “black bra” and shirt, Smith’s actions indicate that he did not want law enforcement to know he was dressed as a woman. R. 149-150.

In short, record evidence indicates Smith’s behavior was not consistent with the assumptions included in the self serving and contradictory testimony of Green. R. 261-364.

2. The Appellee believes there was no need for the trial court to have granted a new trial. There was no “unconscionable injustice” involved in denying the motion for a new trial. As summarized above, there was corroborated testimony, and other evidence, including video screen images in support of affirming Smith’s convictions.

It was reasonable to infer that Smith was “hiding out” with Green, the shooter, in the abandoned house. He was captured after fleeing the house in the same skirt he wore in the bank. The wig, shirt and bra he wore in the bank were abandoned there along with the 45 caliber Ruger Green fired in the bank. R. 30.

## ARGUMENT

### PROPOSITION 1A

#### **THERE WAS CREDIBLE, SUBSTANTIAL EVIDENCE IN SUPPORT OF THE JURY'S VERDICT OF GUILTY TO CONSPIRACY TO COMMIT ARMED ROBBERY.**

The appellant believes there was insufficient evidence in support of his conviction for conspiracy to commit armed robbery. He believes that there was a lack of evidence that any agreement between himself and Green, the confessed instigator of the attempted bank robbery, was ever reached. There was only evidence that Smith was "merely present" in the bank disguised as a woman as part of an alleged "prank." Appellant's brief page 5-9.

To the contrary, the record reflects there was sufficient evidence for inferring from "the totality of the evidence" presented that Smith agreed with Green, Glenn, and Daniels to assist in the robbing of Cleveland State Bank branch in Merigold. A conspiracy can be inferred to have occurred based upon corroborated "circumstantial evidence."

In *Echols v. State* 759 So. 2d 495, 499 (¶16-¶17) (Miss. App. 2000), the Court found there was sufficient evidence of a conspiracy based upon the circumstantial evidence provided by the testimony in that case. It can be inferred from "the declarations, acts and conduct of the alleged conspirators."

¶ 16. Conspiracy agreements need not be formal or express, but may be inferred from the circumstances, particularly by declarations, acts and conduct of the alleged conspirators. *Franklin v. State*, 676 So.2d 287, 288 (Miss.1996). In *Watson*, which is similar to the case at bar, the co-conspirator entered a guilty plea, but then testified that he did not agree to participate in a crime with Watson. Watson claimed that there was insufficient evidence of conspiracy. In supporting the trial judge's refusal to allow the peremptory instruction, the Mississippi Supreme Court held that direct evidence was not needed to establish the conspiracy. See *Watson* 722 So. 2d at 479.

¶ 17. In the case sub judice, the facts show that the two men entered the store

together. They did not buy anything. Echols went into the back area, saw the money in the office, and returned to ask Clark to keep watch for him. Clark remained in the front while Echols broke into the office and took the money. Afterwards, both men immediately left the store together in the same vehicle. Once captured, the officers found a combined total of \$2,300 in the vehicle and in Echols's and Clark's pockets. The trial court was correct in finding that sufficient evidence existed to prove a conspiracy.

Mr. Donnell Hogan, the armed bank guard, identified Smith as being present in the bank along with Green and Daniels. Smith was dressed as a woman, wearing a brown dress.

**Q. And can you tell us if they are in the courtroom?** (The two disguised men in the bank)

**A. Now that one with the white shirt on, he's the one that had that brown stripped dress on.**

**Q. All right.**

**A. And then he had a wig on his head.** And the one with the black shirt on, he had on a red shirt with some baggy jeans, and tennis shoes and some dark shades on, and a wig. R. 18-19.

...

**Mellen: And that he pointed out Gregory Smith as the one in the white shirt as being the one in the dress. The brown dress.**

**Court: The record will so reflect.** R. 19. (Emphasis by Appellee).

Ms. Mary Ann Trimble, one of the bank's two tellers, testified that Smith was moving about nervously in the bank. He looked out the window "many times." This was when a customer left the bank. He also communicated both with the female, Daniels, and Green, who initiated the threats and shot up the bank. Tribble also testified that Smith "kept his head down and hands over his mouth." R. 242.

**Q. The male I'll call male number two so we don't get them mixed up, did you watch male number two?**

**A. He was over to my left and he was not noticeable, the number two male, as Mr. Green and the girl. He more or less stood in this background.**

Q. Didn't talk to the girl?

A. Well yes, he would say something to her, but Mr. Green and the girl did most of the communicating between them

Q. Ever look out the window?

A. Yes.

Q. Many times?

A. Yes, sir.

Q. Ever communicate back to Mr. Green?

A. I don't know what he would say. They go look out the window, then come back. They had their times they were communicating, you know, talking to each other.

Q. I'm talking about male number two?

A. Maybe spoke once or twice, that was all.

Q. Look out the windows many times?

A. Yes.

Q. Ever communicate after that to Mr. Green?

A. Maybe once.

Q. The girl?

A. Several times. R. 240-241. (Emphasis by Appellee).

Q. Did male number two mostly keep his head down?

A. Kept his head down and hands over his mouth. R. 242 (Emphasis by Appellee).

On cross examination, Green was questioned about why his cousin, Smith, ran and hid from

the police. According to Green's testimony, Smith only knew he was playing a "prank." He allegedly knew nothing about any attempt to rob the bank. R. 261-346. "The prank" was that he would dress up as the opposite sex, including wearing a long wig, bra, and a brown dress. Green explained that he thought Smith ran and hid from the police because he was "afraid." He ran from police wearing no shirt and a skirt. He left his wig in the house. R. 181. He threw off his bra as he fled the house. R. 149. He tried to hid in a ditch until he was found and arrested. 173.

Q. Well, let's talk about that. After this robbery took place, can you explain why Smith was running from the police without a shirt on, wearing a skirt?

A. **Yes, Smith stayed in the house with me. After I had was shot, how I was looking he was just like, Bro, hold on, just hold on. I could tell that he was scared.**

Q. You're saying he was scared. He ran from the Sheriff's Deputies and others, helicopter, and all of that, and ran and hid in a ditch from them. Not from you who pulled a gun out and shot a fellow? You've already admitted to the armed robbery.

Q. He didn't run from you. He ran from them. Explain how that is?

A.... And second of all, when I saw the police was out there, I was like going to turn myself in and said you just wait right here....**So it's quite my opinion that it's understanding that his fear would cause him not to turn himself in.** R. 332-333. (Emphasis by Appellee).

Mr. Hogan testified that both Green and Smith had on wigs. R. 4. This was while they were in the bank. Mike Thompson, an investigator with the Bolivar, testified that he found "hand cuffs" in a black back pack that was found in the abandoned house. R. 179. The "two wigs" that matched the description of what was worn in the bank were also found in the house. R. 181. There was also a box of 45 caliber rounds for the Ruger firearm recovered, latex gloves, and additional "zip ties" that are used for tying someone's hands. R. 172.

On cross examination, Green admitted that Smith as well as Daniels "turned away" from Mr. Hogan. R. 355. This was when the armed bank guard moved closer to them. The guard was

attempting to get a better look at these disguised and jittery suspects. This was prior to any threats or shooting by co-defendant Green.

**Q. All right. Well, let's go ahead and continue this. And do you see Mr. Smith turned away from Mr. Hogan.**

**A. Yes, I see.**

**Q. Okay. Mr. Hogan is walking through there. Now what does Smith do when Mr. Hogan goes over there to his position? He's turning away from Mr. Hogan again, isn't he?**

**A. It appears that way. R. 355. (Emphasis by Appellee).**

In *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993), the Court stated that when the sufficiency of the evidence is challenged, the prosecution was entitled to have the evidence in support of its case taken as true together with all reasonable inferences. Any issue related to credibility or the weight of the evidence was for the jury to decide, not this court.

The three challenges by McClain (motion for directed verdict, request for peremptory instruction, and motion for JNOV) 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 JNOV. *Wetz v. State*, 503 So. 2d 803, 807-08 (Miss. 1987). In appeals from an overruled motion for JNOV, the sufficiency of the evidence as a matter of law is viewed and tested in a light most favorable to the State. *Esparaza v. State*, 595 So. 2d 418, 426 (Miss. 1992); *Wetz* at 808; *Harveston v. State*, 493 So. 2d 365, 370 (Miss. 1986);...The credible evidence consistent with McClain's guilt must be accepted as true. *Spikes v. State*, 302 So. 2d 250, 251 (Miss. 1974). The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. *Wetz*, at 808, *Hammond v. State*, 465 So. 2d 1031, 1035 (Miss. 1985); *May* at 781. Matters regarding the weight and credibility of the evidence are to be resolved by the jury. *Neal v. State*, 451 So. 2d 743, 758 (Miss. 1984);.. 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. *Wetz* at 808; *Harveston* at 370; *Fisher v. State*, 481 So. 2d 203, 212 (Miss. 1985).

When the testimony summarized above was taken as true together with reasonable inferences

there was sufficient credible evidence for inferring that Smith had agreed with Green and others to participate in the plan to rob the bank. The record reflects that Smith like Glenn was "the cousin" of Green. R. 262; 313. Eye witnesses testified that Smith along with Green and Daniels hurriedly arrived together at the bank. R. 6. See state's bank video showing the trio in the Cleveland State Bank. There was no car visible outside the bank when they arrived. They fled together around the side of the bank. Smith arrived dressed as a woman wearing a brown skirt and a long wig. R. 2-19. Smith covered his face with "his hands" while in the bank. He kept his "head down." R. 242. Smith "turned (his face and body) away" from the bank guard when the armed guard came close to the trio. R. 355. He also left with co-defendants Green and Daniels. This was after Green was unexpectedly shot twice by the alert bank guard. R. 13-15.

Smith was seen both looking out the window, as well as communicating with both Green and Daniels. R. 240-242. This was just prior to Green shooting and telling the guard not to move.

Smith also hid in the abandoned house with Green, his wounded cousin. R. 332.. In the abandoned house, near where both Green and Smith were captured, was a pink and black back pack containing two handguns, including a Ruger 45 caliber hand gun. R. 148. The Ruger contained live rounds of ammunition in it. Bullets and shells from a 45 caliber handgun were found inside the bank. R. 30. An additional black back pack was found in the house. That back pack contained "hand cuffs." R. 175. Green admitted that he had planned to subdue and bind the bank guard in preparation of the actual robbery of currency. R. 358.

A path through thick grass up to the door was seen. R. 140. There was grass clinging to the underside of the gold Jeep. R. 131. This was the Jeep driven by co-defendant Glenn, another of Green's cousins. R. 262. Inside the car was blood splatter as well as "a brown purse." Eye witnesses testified that Green pulled his handgun out of "a brown purse" in the bank. R. 181. He can be clearly

seen doing so in video exhibit 8(a).

It is reasonable to infer from all the evidence that Smith traveled away from the bank in the same escape car with co-defendants Green and Daniels. This was Green's wife's car that Green's cousin Glenn was driving. R. 263. And once at the abandoned house, Smith entered it with the shooter, where he left his wig, back pack, shirt, shoes and then outside his black bra. R. 179.. The back pack with Smith in the house contained "hand cuffs" to assist in their plan to tie up the bank guard. R. 358.

And rather than turning himself in, and explaining his surprise at the criminal acts he witnessed his cousin commit in the bank, Smith ran from police in a skirt and no shirt. R. 332-333. He hid in a ditch until captured and arrested. R. 173.

Such behavior does not fit the profile of one who knew nothing of any plan to rob the bank. If this were the case, why flee the bank with the man Smith just saw shoot at a bank guard? This would be as opposed to turning oneself in and forsaking any association with such a dangerous malefactor. And why go to the abandoned house with this bleeding malefactor, remain with him and then run from police? Why did the supposedly "prankster" never mention "the prank," or his total surprise at witnessing an otherwise totally unexplainable shooting by his cousin in a bank ? Green admitted and the bank video showed him pulling out a hand gun, moving aggressively toward the guard and firing first at him. This was in Smith's presence. R. 345; 358-359.

In **Groseclose v. State**, 440 So. 2d 297, 301 (Miss. 1983), the Court stated that any conflicts in the evidence created by testimony from defense witnesses was to be resolved by the jury. What the jury believes and who the jury believes as to what testimony and supporting evidence presented is solely for their determination. As stated:

Jurors are permitted, indeed have the duty, to resolve the conflicts in the testimony

they hear. They may believe or disbelieve, accept or reject the utterances of any witness. No formula dictates the manner in which jurors resolve conflicting testimony into finding of fact sufficient to support the verdict. That resolution results from the jurors hearing and observing the witnesses as they testify, augmented by the composite reasoning of twelve individuals sworn to return a true verdict. A reviewing court cannot and need not determine with exactitude which witness or what testimony the jury believed or disbelieved in arriving at its verdict. It is enough that the conflicting evidence presented a factual dispute for jury resolution. **Shannon v. State**, 321 So. 2d 1 (Miss. 1975) 373 So. 2d at 1045.

The Appellee would submit that we have cited sufficient evidence from which it was reasonable to infer that Smith conspired with co-defendants, Green, Glenn and Daniels, to participate in the armed robbery of the Cleveland State Bank in Merigold, Bolivar County. This issue is lacking in merit.

## **PROPOSITION IB**

### **THERE WAS CREDIBLE, SUBSTANTIAL EVIDENCE IN SUPPORT OF SMITH'S CONVICTION FOR AIDING AND ABETTING WITH OTHERS IN AN ATTEMPTED ARMED ROBBERY.**

The appellant also believes there was insufficient evidence in support of the trial court's denial of a directed verdict, and the jury's verdict on the attempted armed robbery charge. Since Smith was not observed actively involved in threatening anyone, or using a hand gun, he believes there was insufficient evidence for concluding that he did anything other than participate in "a prank." This was the cross dressing prank co-defendant Green testified about during the trial. Appellant's brief page 13-17.

To the contrary, based upon the evidence cited and eluded to under the previous proposition, the Appellee would submit there was credible, substantial evidence in support of the denial of all peremptory instructions. When a co-defendant is charged with aiding and abetting, or acting in concert with others in an attempted armed robbery, he is not entitled to give himself favorable inferences consistent with his innocence. C.P. 1-2. Particularly would this be true where his defense is based upon the self serving, contradictory and incredible testimony of co-defendant Green. R. 261-364. This was a co-defendant, who in the middle of the trial decided to plead guilty to two charges, attempted armed robbery and possession of a handgun by a previously convicted felon. R. 251.

Over the objection of the prosecution, Green was allowed to testify. He was still being tried with Smith and Daniels for conspiracy. And Green was being tried, unlike his co-defendants, on an aggravated assault charge. Green's testimony was an attempt at avoiding culpability for the conspiracy charge for which he and his co-defendants were also being tried. R. 261-364. Green also disingenuously tried to avoid culpability for the aggravated assault of the bank guard, Mr. Hogan.

Green went so far as to suggest that Mr. Hogan shot himself in the foot. R. 344-345.. He was contradicted not only by the testimony of Hogan, but also by video scenes captured on the bank security cameras during the confrontation and subsequent shoot out.. R. 35; and exhibit 8(a). Green admitted that he never saw Hogan shoot at himself on the bank video scenes of the shoot out. Rather he saw his own image moving toward and firing shots in the direction of the armed guard. R. 361. This corroborated Hogan's previous testimony.

Green admitted he told FBI agents he owed \$4,700.00 rather than \$2400 to Rico, as he had testified before the jury. R. 322.

Green admitted to being an alleged "former" member of the Black Gangster Disciples, and out of prison for about a year. R. 320-321.

In *Noe v. State*, 616 So. 2d 298, 302 (Miss. 1993), this Court stated that when the sufficiency of the evidence is challenged that the evidence favorable to the State must be accepted as true with all reasonable inferences. Evidence favorable to the defense must be disregarded.

In judging the sufficiency of the evidence on a motion for a directed verdict, or request for peremptory instruction, the trial judge is required to accept as true all of the evidence that is favorable to the state, including all reasonable inferences that may be drawn therefrom, and to disregard evidence favorable to the defendant. *Clemons v. State*, 460 So. 2d 835 (Miss. 1984)

The Appellee would submit that the record reflects credible, substantial partially corroborated evidence in support of the a denial of Smith's peremptory motion for attempted armed robbery. We have cited sufficient evidence above for inferring that Smith was actively involved in the coordinated plan to rob the Cleveland State Bank. R. 240-242. The robbery was prevented by the defensive actions of the bank guard. Mr. Hogan not only was not easily intimidated, but he was also quick with his .9 millimeter handgun, as well as a good marksman. He shot the hapless Green twice which was enough to force a rapid change of plans. R. 364. U. S. currency suddenly lost its

attractiveness. Smith ran out of the bank with the wounded and bleeding Green.

It is reasonable to infer that Smith road with Green in the same escape vehicle. He abandoned his “prank” wig, shirt, back pack and possibly his hand cuffs in an abandoned house owned by the family of co-defendant Glenn, the driver. R. 279. Then Smith ran with Green to avoid capture when police found the house. He took off his black bra. R. 179-180. Then in the skirt he wore in the bank, Smith was found hiding in a ditch. R. 179; 332--333. Smith has yet to express any surprise at his cousin’s shooting the bank guard. Smith has yet to mention his “cross dressing prank.” He has yet to express any surprise at witnessing his cousin shooting at a bank guard and then being shot twice after telling the armed guard not to move..

The Appellee would submit that this issue is lacking in merit.

## **PROPOSITION II**

### **THERE WAS CREDIBLE, SUBSTANTIAL EVIDENCE IN SUPPORT OF DENYING A MOTION FOR A NEW TRIAL.**

The appellant also complains that the trial court erred in denying him a motion for a new trial. He summarized his theory, based totally upon co-defendant's Green's self serving and contradictory testimony. He opines that based upon Green's testimony, he was just "a cousin" riding around with Green and others. He thinks there was evidence that he knew nothing about Green's threats from "Rico" He knew nothing about any plan by Green to rob the bank. He was allegedly merely reluctantly participating in some ill defined "prank" when it all went down hill in a violent shoot out in the bank. Appellant's brief page 13-15.

To the contrary, as shown under Proposition I(A) and (B), there was credible, substantial corroborated evidence from which it was reasonable to infer that Smith was a willing participant in the conspiracy to rob the bank as well as a willing participant assisting Green in the attempted armed robbery of the Cleveland State Bank. Appellant's brief page 13-15.

As stated under *Noe, supra*, an appellant is not entitled to give himself favorable inferences from conflicting evidence favorable to himself as presented by the self serving testimony of a co-defendant. And co-defendant Green contradicted himself more than once. He informed the FBI he owed "Rico" \$4,700, but testified that it was \$2,400. R. 265; 322. He told the bank guard, "they made him do it," and were holding his sister hostage. R. 17. Whereas, his testimony was not about what "they" did but rather about the alleged gangster "Rico." R. 264-265.

Green went so far as to deny that he shot the bank guard, Mr. Hogan. However, he reluctantly admitted that he saw himself shot in the direction of Mr. Hogan. R. 361-362. He also reluctantly admitted that he did not see Hogan fire at himself. This was as seen on the video screen

from the bank security cameras. R. 344; 361-362 . In short, Green could not explain his own actions in the bank much less the actions of his co-defendant and cousin Smith. R. 261-364.

In **Jones v. State** , 635 So. 2d 884, 887 (Miss. 1994), the Mississippi Supreme Court stated that a motion challenging the weight of the evidence was in the trial court's discretion. However, it should be denied except to prevent "an unconscionable injustice."

Our scope of review is well established regarding challenges to the weight of the evidence issue. Procedurally, such challenges contend that defendant's motion for new trial should have been granted. Miss. Unif. Crim. R. of Cir. Ct. Prac. 5.16. The decision to grant a new trial rests in the sound discretion of the trial court, and the motion should not be granted except to prevent "an unconscionable injustice." **Wetz v. State**, 503 So. 2d 803, 812 (Miss. 1987). We must consider all the evidence, not just that supporting the case for the prosecution, in the light most consistent with the verdict." **Jackson v. State** , 580 So. 2d 1217, 1219 (Miss. 1991), and then reverse only on the basis of abuse of discretion.

The Appellee would submit that the self serving testimony of Green who plead guilty to the same armed robbery charge Smith was being tried on merely created an factual issue which the jury resolved against Smith. There was no "injustice" involved in their verdict, based upon the evidence summarized in previous propositions. The Appellee would submit that this issue is also lacking in merit.

CONCLUSION

Smith's convictions and sentences should be affirmed for the reasons cited in this brief.

Respectfully submitted,

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BY:



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## CERTIFICATE OF SERVICE

I, W. Glenn Watts, 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 13th day of February, 2008.



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