

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

**COPY**

**CRYSTAL DANIELS**

**FILED**

**APPELLANT**

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SUPREME COURT  
COURT OF APPEALS**

**VS.**

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

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

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**VS.**

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

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**PROCEDURAL HISTORY:**

On May 9-11, 2005, Crystal Daniels, "Daniels" was tried for conspiracy to commit armed robbery, and attempted armed robbery with three other co-defendants before a Bolivar County jury, the Honorable Albert Smith presiding. R. 1. Ms. Daniels was found guilty and given a five and a twenty year consecutive sentence in the custody of the Mississippi Department of Corrections. V.6., 20. From these convictions, she appealed to the Mississippi Supreme Court. C.P. 219.

**ISSUES ON APPEAL**

**I.**

**WAS DANIELS PROPERLY INDICTED?**

**II.**

**WAS THERE CREDIBLE, SUBSTANTIAL  
EVIDENCE IN SUPPORT OF DANIELS'  
CONVICTIONS?**

**III.**

**DID DANIELS RECEIVE EFFECTIVE  
ASSISTANCE OF COUNSEL?**

### STATEMENT OF THE FACTS

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

On May 9-11, 2005, Daniels was tried for conspiracy to commit armed robbery and attempted armed robbery with her other co-defendants before a Bolivar County Circuit Court jury, the Honorable Albert B. Smith presiding. R. 1. Daniels was represented by Mr. Martin Kilpatrick. R. 1.

Mr. Donnell Hogan, the bank guard at Cleveland State Bank, testified that on July 8, 2004 he was shot. This was a branch bank in Merigold, a small town near Cleveland. 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" parked in front of the bank on several occasions prior to the events at issue. R. 24. When he attempted to approach the car to get the license plates, it drove off. R. 24. Hogan had seen Mr. Glenn, Daniel's co-defendant, inside the bank on regular occasions prior to the day in question. R. 46.

On the day of the confrontation, Hogan went into the bank behind three individuals. They seemed to be wearing disguises. Two had on long black wigs. Two had back packs. R. 4. It appeared to be two men dressed as women, and a woman dressed as a man. R. 12. Co-defendant Green inquired about opening a bank account. He was wearing dark glasses. R. 5. He did not have a driver's license with him. R. 13. The woman with him, Ms. Daniels, "had her hand across her mouth." R. 13. She was constantly moving around. She was communicating with Green as he talked to the bank teller, Ms. Tribble. Ms. Daniels followed a customer leaving the bank, saw her leave, and then came back beside Green. She gave him some hand and head signals. R. 13. Green

pulled a hand gun out of a purse, shot once and said to the guard, "stop, don't move." R. 13.

When Green fired , the guard, Mr. Hogan, pulled his 9 millimeter and returned fire. R. 14. Hogan believed some "seventeen shots fired." R. 14. Daniels along with Smith, a second accomplice, ran out of the bank ahead of the wounded Green. Hogan correctly believed he had shot Green, the gun man. Hogan was bleeding from being shot in the toe. R. 15. Exhibit 10 was Hogan's shoe showing bullet holes on the front and side.

While at the hospital having his toe stitched up, a wounded suspect arrived. Hogan identified co-defendant Green as being the person he saw at the hospital. R. 19. Green claimed that "they made him do it." He had to do it or his sister would be harmed. "They" allegedly "took his sister hostage." R. 17. He told Hogan he did not mean to hurt anyone. R. 17.

Hogan identified Ms. Daniels as the female in the bank communicating with Green when shots were fired. R. 19. He identified co-defendant Smith as the other disguised male with Green and Daniels in the bank during the fire fight. R. 18. Smith was captured with Green near co-defendant's Glenn's family house. R. 279..

Officer Frazier Nash testified that he stopped "a gold Jeep." R. 130. It was suspected as being involved in the attempted robbery. The driver of the Jeep was Glenn; the passenger was Ms. Daniels. R. 132. Nash identified Daniels in the court room as the female with Glenn when the Jeep was stopped. R. 132. 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.

Officer Charles Gilmer testified to following "a gold Jeep." R. 138. After the Jeep was stopped, "there was grass hanging out from underneath." R. 131. After searching the area , an abandoned house with a yard full of tall Johnson grass and weeds was located. See photographic evidence 25(a) showing abandoned house with thick grass and weeds. There was a mashed down



path the size of a vehicle leading up to the door of the house. R. 140. Inside the house two backpacks were located. R. 141. Inside the pink handbag was found two handguns. R. 141. One was a loaded 45 caliber and another was a 9 millimeter handgun. Two long black wigs were also found in the house. There was also some blood on the floor and blood on a woman's bra.

See photographic exhibit 25(b) and 25© in manila envelop marked exhibits. 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. He was wearing a skirt and had no shirt. R. 332. This suspect was identified as co-defendant Mr. Smith. R. 142.

Mr. Glenn was arrested with co-defendant, Ms. Crystal Daniels. R. 204. He was arrested as the driver of the gold Jeep Cherokee. R. 177. Inside the Jeep was found blood splatter on the floor board, a door panel, some strips of cloth, nylon hand ties and a pair of dark sun glasses. R. 177-181. Also found in the Jeep was "a purse." R. 181. 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 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 during the first days of each month. R. 221; 230.

Ms. Tribble testified that Daniels communicating frequently with Green, the gun man, inside the bank. R. 226; 235. Tribble also remembered seeing a gold Jeep Cherokee parked near the bank several times with no one ever getting out. R. 236. Tribble testified that Daniels had "ants in her pants." R. 226. She was constantly moving around, and trying to conceal her face. She followed a customer out of the bank. She returned to Green's side, and communicated with him, verbally and

with head movements. The was when Green drew out a hand gun and threatened the bank guard, who was watching Green closely with his hand on his gun belt.

After motions for a directed verdict were denied, Green decided to plead guilty. He wanted 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 plea was accepted as voluntarily and intelligently entered. R. 259.

Over the objection of the prosecution, Green was allowed to testify. He still had a charge of conspiracy to commit armed robbery, and aggravated assault before the jury. The trial court allowed Green to testify.

Green testified that he did not allegedly reveal to his co-defendants, including Daniels, his intentions when he entered the bank. According to Green, he lead them to believe that he was going to pull some kind of "prank " in their sexual identity disguises.

Green claimed he tried to rob the bank to appease someone named "Rico." He supposedly owed Rico \$2,400.00 he lost in a dice game. Green did not know Rico's last name, Brown, until the trial. Nor did he know where he lived or how old he was. R. 264. Green also admitted to telling FBI agents that he owed "Rico" \$4,700.00. R. 322.

Green admitted that he had planned to subdue the bank guard, tie him up, and then rob the bank. R. 358. He reluctantly admitted that Ms. Daniels was communicating with him just prior to his pulling his firearm and shooting in the direction of the bank guard. He claimed Daniels was nervous in the bank about "the prank." R. 337. Yet when apprehended by Officer Nash, Daniels told him that she and Glenn, the driver of the get a way car were just looking for a place "to make out". R. 131.

Ms. Daniels was shown to be hiding her face while inside the bank with Mr Glenn. R. 352-354. She was shown shaking her head while near Daniels. R. 356. Daniels was also shown "turning away" and "ducking down" behind Green when the bank guard moved closer to them. R. 358.

The bank guard, Mr. Donnell Hogan, identified photographic evidence 26(a) and (b) as looking like the vehicle that he saw parked 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 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 © shows what appears to be blood smears, 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 the 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© 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.

5-6

Photographic exhibit 6 (a) through (x) shows the bank crime scene with the many bullet holes in the walls, partitions, and windows. They also found 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.

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

After being advised of her right to decide to testify or not, Daniels decided not to testify. R. 244.

Ms. Daniels 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. 20. Green was also found guilty of conspiracy to commit armed robbery. C.P. 142. Daniels filed a motion for a J. N. O. V or a New Trial, which was denied. C.P. 180-184. From these convictions and sentences, Daniels appealed to this Court. C.P. 219.

### SUMMARY OF THE ARGUMENT

1. This issue was waived for failure to raise it with the trial court. C.P. 209-210. And the record reflects that Daniels was properly indicted with Green, Glenn and Smith for attempted arm robbery. Daniels was indicted “individually, or while aiding and abetting each other and/or acting in concert with each other” for attempting to take, steal and remove money from the Cleveland State Bank. C.P.

1. She was therefore fully informed of the charge against her. She was aware of the time, place, the names of her co-defendants and nature of the charges. C.P. 1-2. See UCCC Rules, Rule 7.06, “Indictments” and **Washington v. State** 744 So.2d 397, \*403 (Miss. App. 1999). It is not necessary to state specifically in an indictment what act each individual co-defendant did in furtherance of a common collective scheme or plan to attempt an armed robbery.

It is only necessary for the defendant to have “a plain, concise and definite written statement of the essential facts constituting the offense.” It is for the jury to determine from all the evidence if a co-defendant aided and abetting in that common scheme or plan.

2. There was credible, substantial partially corroborated evidence in support of Daniels’ convictions. The record reflects Daniels was not “merely present” in the bank. She was identified and shown on bank video scenes as “hiding” her face in the bank. See State’s Exhibit 8(a) taken from bank security cameras. R. 352-354. She was seen communicating frequently with Green and Smith inside the bank. R. 13-15; 226; 235. She provided Green with information and “head signals” just prior to his pulling his weapon. This was when he unsuccessfully threatened the bank guard.

Daniels was captured with Mr. Glenn, the driver of “the gold Jeep,” seen near the bank before the attempted robbery. R. 132; 204. Daniels never told anyone at any time about any “prank.” The Jeep contained blood drops, a purse, nylon zip tie hand cuffs and “dark glasses.” See photographic exhibits showing interior of Jeep. 26(e) shows the purse in the back seat of the gold

Jeep. 26© 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.

Mr. Green, the gunman, was shot in the leg and arm by the bank guard. R. 364. Green admitted he wore "dark glasses" and pulled his handgun out of "a brown purse." R. 268; 272. When this evidence was taken as true with reasonable inferences, it was sufficient for inferring that Daniels was an active participant in the planning and aided in the execution of the attempted bank robbery..

Mr. Green's self serving testimony about his allegedly acting alone to appease "Rico" was not found to be credible by the jury. R. 261-364. And Daniels' alleged ignorance of any plan to rob the bank is contradicted by her own actions in the bank, as well as in her flight to avoid prosecution. R.358- 361. Green's testimony merely created a conflict in the evidence the jury resolved in finding both Green and Daniels guilty of conspiracy to commit armed robbery.

There was credible substantial evidence for inferring that Daniels was guilty of aiding and abetting an attempted armed robbery. Green pled guilty to attempted armed robbery. R.251. After pleading guilty to that charge, he was also found guilty by the jury of conspiracy along with Daniels as well as for aggravated assault for shooting the bank guard.

3. Daniels received effective assistance of counsel, given the evidence against her. There were no affidavits in support of her appeal counsel's assertions about the alleged incompetence of her trial counsel. That her trial counsel only chose to cross examine co-defendant Green during the trial was presumed to be a matter of "trial strategy." The record reflects that Mr. Kilpatrick succeeded in bringing out testimony favorable to Daniels' defense. R.284-305.

Therefore, there is a lack of evidence of any deficient representation by trial counsel much less evidence of prejudice to Daniels' defense. Daniels chose not to testify and therefore had no defense other than what came from the contradictory and incredible testimony of co-defendant

Green.

The jury did not find Green's self serving testimony credible. He was contradicted not only by state witnesses, and his own answers on cross examination but also by video tape scenes taken by the bank security cameras. R. 354-364.

## ARGUMENT

### PROPOSITION I

#### **DANIELS WAS GIVEN ADEQUATE NOTICE OF THE NATURE AND CAUSE OF THE CHARGES.**

The appellant believes that her indictment for attempted armed robbery was defective. It was defective because it did not specify what conduct she contributed toward the attempted bank robbery charges brought against her. He believes that it is necessary to have a statement of the “overt act” undertaken by a defendant toward the completion of the unlawful objective, which was in this case, the attempted armed robbery of the Cleveland State Bank. Appellant’s brief page 5-7.

The record reflects that this issue, to the best of the Appellee’s knowledge, was not raised with the trial court. It was not raised in Daniels’ Motion For A J.N.O.V. or a New Trial. C.P. 209-210.

In **Griffin v. State** 918 So.2d 882, \*886 (Miss. App. 2006), the Court found that failure to object to an indictment with the trial court waived the issue on appeal.

¶ 17. Griffin maintains that the defect in his indictment requires reversal. The State counters that this issue is procedurally barred because it is raised for the first time on appeal. It is well settled under Mississippi law that “[d]efects on the face of an indictment must be presented by way of a demurrer.” **Gray v. State**, 728 So.2d 36, 70 (¶ 169) (Miss.1998) (citing **Brandau v. State**, 662 So.2d 1051, 1054 (Miss.1995); Miss. Code Ann. § 99-7-21 (Rev.2000)). “When ‘the formal defect is curable by amendment ... the failure to demur to the indictment in accordance with our statute’ will waive the issue from consideration on appeal.” Id. (quoting **Brandau**, 662 So.2d at 1055). A thorough review of the record reveals that Griffin did not object to the contents of the indictment at the trial level, and thus is barred from raising this issue on appeal. Accordingly, we find this issue is procedurally barred.

Without conceding that this issue was waived, we will also consider the merits. The record reflects that Daniels was indicted along with co-defendants, Green, Glenn and Smith. C.P. 1-2.; 4 They were indicted “individually or while aiding and abetting each other and/or acting in concert



with each other” in order to take, steal and carry away United States currency from the Cleveland State Bank. C.P. 1.

In **Washington v. State** 744 So.2d 397, \*403 (Miss. App. 1999), the Court found an indictment for acting “individually or in aiding and abetting, or acting in concert with each other,” such as we have in the instant cause, was sufficient for placing Washington on notice as to what the charges against him were. The Court relied upon **Doss v. State**, *infra*.

As to Counts II and III, grand larceny and attempted grand larceny, Vaughn's argument that there is insufficient evidence to support his conviction because he was just there to provide transportation is without merit. The indictment clearly charged him and the others “individually or while aiding and abetting and/or acting in concert with each other.” It is well-established that “[a]ny person who is present, aiding and abetting another in the commission of a crime, is equally guilty with the principal offender.” **Doss v. State**, 709 So. 2d 369, 400 (Miss. 1996). Thus, regardless of whether Vaughn actually assisted in moving the stoves from the warehouse to the truck where it had been stashed earlier in the day, the evidence that he drove his pick-up truck to the area where the merchandise was to be removed from the property and stood ready to assist in taking it away is sufficient to sustain his conviction.

The Appellant's reliance upon **White v. State**, 851 So. 2d 400, 403 (Miss. App. 2003) is misplaced. In that case White was indicted for “attempted accessory after the fact.” This was for trying to help his friend Thorpe escape being arrested. White drove from Adams county to Franklin County to find his friend. White knew law enforcement were actively pursuing his friend for two felonies. However, prior to arriving at a rendezvous destination provided by the felon's wife, White saw law enforcement and drove off. White was tried separately, rather than collectively with the felon's conspiring wife, Ms. Tracy Thorpe.

In **Henderson v. State** 660 So.2d 220, \*225 (Miss. 1995), the Court found that an attempt to commit rape was accomplished where the impediment to accomplishment of the felonious act was due to “external intervention.” This intervention could be resistance by the victim, the unexpected presence of another persons, or the unexpectedly sounding of an alarm.

The sole proof offered to the jury on this issue was that Laura “slid out from under him” on each occasion. This Court held in **Alexander v. State**, 520 So.2d 127 (Miss.1988) (Prather, J.), that where the appellant's rape attempt failed because of the victim's resistance and ability to sound the alarm, the appellant cannot establish an abandonment defense. *Id.* at 130. Laura's resistance by sliding out from under Henderson was effective for a nine year old, added to the fact that she sounded the alarm by finally awakening her younger brother, after several unsuccessful attempts and sending him to get their aunt.

**Ross v. State**, 601 So.2d 872 (Miss.1992), is of no help to Henderson or the majority. In **Ross**, an abandonment did take place, accomplished through the verbal urging of the victim, but with no physical resistance or external intervention which caused the perpetrator to change his mind. *Id.* 875.

The record reflects that Glenn and Smith were Green's cousins. R. 262; 313. Glenn was the driver of the get-a-way car. R. 204. Daniels accompanied Green and Smith into the bank. R. 12-13. Daniels was present communicating frequently with Green, the instigator, during the confrontation, and subsequent shooting, which resulted in Green being shot in the leg and arm by the alert bank guard. R. 12-13; 226-235.

Appellant's argument is premised upon accepting the fact that co-defendant Green actively attempted to rob the bank with a hand gun while Daniels had no weapon. Whereas, when the evidence presented by the prosecution was taken in its totality, there was sufficient evidence for inferring that Daniels “aided and abetted,” and “acted in concert” in attempting to assist in accomplishing the armed bank robbery.

The evidence for this was testimony about Daniels being “disguised” as a man. Daniels hid her face from the tellers in the bank. Daniels had “ants in her pants.” R. 226. She was so nervous, she could not stay still. On the bank video, Daniels can be seen “hiding her” face from Mrs. Tribble, the bank teller.

There was corroborated evidence that Daniels was actively communicating with Green before, during and after Green pulled his weapon from a purse. R. 226-227; 235. Daniels looked out

the bank many times to see if “the coast was clear.” She communicated that a prior client in the bank had left in her car to Green. R. 13; 226-227.

Mr. Green then tried unsuccessfully to subdue the alert bank guard. Green admitted on cross examination that it was his plan to intimidate the guard, tie him up and then proceed with the bank robbery. R. 358.

Unfortunately for Green, Mr. Hogan, the bank guard, was alert, armed, and did not respond submissively to threatening words and gestures. He, in fact, halted the attempted bank robbery by shooting Green twice; once in the arm and once in the leg. Daniels ran out of the bank with the bleeding Green and Smith, the other accomplice in disguise. R. 13-14; 275. She was captured with the driver of the get-a-way car. R. 131-132; 204. She has never mentioned any “prank” or any “surprise” at being in the middle of a fire fight in the bank to investigators.

In short, the indictment provided Daniels with advance notice of the attempted armed robbery charge. She knew the charges, her co-defendants, the time, the date, the place and the circumstances constituting the charges. The bank robbery for which she aided and abetted by providing surveillance was interrupted by the quick actions of the bank guard, not by any lack of specific actions on behalf of Green and Daniels acting together in the bank.

This issue was not only waived but it is also lacking in merit.

## **PROPOSITION II**

### **THERE WAS CREDIBLE, SUBSTANTIAL PARTIALLY CORROBORATED IN SUPPORT OF THE JURY'S VERDICTS.**

The appellant believes there was insufficient evidence in support of her convictions. Since Green, the gunman, admitted in his testimony that he planned to rob the bank without supposedly informing Daniels of his intention, she believes there was an inadequate basis for inferring that she was involved in reaching any agreement with Green. This would be in furtherance of any plan to rob the bank. The appellant also thinks that even if there was evidence that she agreed with Green to assist in robbing the bank, there still was no evidence that she did "any overt act" in the bank toward the attempt to commit armed robbery. Daniels believes that the evidence only showed she was "merely present" during an attempted armed robbery for which she allegedly knew nothing. Appellant's brief page 7-14.

To the contrary, the record reflects that there was sufficient testimony, exhibits and visual evidence for concluding that Daniels was actively communicating with Green inside the bank. R.226-227; 235. She was shown doing so on the bank's security video cameras played for the jury. R. 354-364. See video exhibit 8(a). She can be seen wearing her male disguise. She can be seen concealing her face from the employees in the bank. R. 354. She can be seen following the female customer out of the bank. R. 351-357. She can be seen talking to Green, and giving him "head" signals, just before he pulled out his hand gun to intimidate the bank personnel. She can also be seen "ducking" down behind Green when the armed bank guard moved closer to the cross dressing trio. R. 358.

On cross examination, Green could not explain why Daniels never told police about the armed robbery she had just allegedly been surprised to witness. R. 338. Green testified that she

was nervous in the bank about the alleged “prank” and angry after the shooting. Whereas, the record reflects that Officer Nash testified that when apprehended Daniels told him they (Daniels and Glenn) were looking “for a place to make out.” R. 131.

In **Echols v. State** 759 So.2d 495, \*499 (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.

The Appellee would submit that there was sufficient testimony and evidence for inferring from the evidence in the instant cause that Daniels agreed to aid and abet by acting in concert with others in the attempted armed robbery. We will summarize some of that evidence.

Mr. Donnell Hogan, the bank guard at Cleveland State Bank, testified that Daniels was actively communicating with Green inside the bank. R. 13-14. She “shook” her head “up and down.” R. 13-14. Hogan was corroborated by Ms. Tribble, the bank teller with whom Green was speaking to her about opening an account. R. 235. Daniels followed a customer leaving the bank to the door, looked out, and then proceeded to communicate through word and “head movements” that “the coast

was clear."R. 226-227. Immediately thereafter Green pulled out a handgun and tried to intimidate the bank guard. Fortunately for the bank, Mr. Hogan was not intimidated. When Green shot in his direction, Hogan quickly fired his 9 millimeter striking Green in the leg and arm.

Q. Mr. Hogan, tell us what happened then.

A. ..and the one that had the weapon, he asked the one that was dressed up like a man, do you think that my drivers' license or anything is in the vehicle. She told him no. So about that time the other lady that was doing business in the bank, she left out and got in her vehicle and was fixing to leave. **So the lady that was dressed up like a man, she went to the door and like looked out. And when she seen the vehicle pull off, she came back and shook her head like this.**

Q. Now how are you doing that? Up and down?

A. Yeah, up and down.

Q. Up and down.

A. **But at first while the woman was in there, she had her hand across her mouth like this, and she did her head like this, and didn't nothing happen. As soon as she did her like this, the gunman jumped across and then pulled his pistol out and shot and told me, stop, don't move. And then started shooting again. And so about that time I reached and got mine out, and we, you know, exchanged gunfire.** R. 13-14.

Officer Frazier Nash testified that Daniels was the passenger in "the gold Jeep" co-defendant Glenn was driving.

Q. Once you got them stopped, how many people were in this Jeep?

A. Two.

Q. Were they male and female.

A. One male and one female. R. . 130.

Q. And then did you ask them why they were out there?

A. Yes, I did.

**Q. What were you told?**

**A. They told me they were looking for somewhere to park and make out. R. 131.**

...

**Q. Now the people that were in this Jeep, are they in the courtroom?**

**A. Yes, they are.**

**Q. Would you point to them and describe them?**

**A. The lady on the left end of the table.**

**Mitchell: Ask the record to reflect that he had described Crystal Daniels as one of those persons.**

**Court: Let the record so reflect. R. 131-132. (Emphasis by Appellee).**

Ms. Mary Ann Tribble, the bank teller, testified that Daniels was standing by Green's side in the bank. She was communicating with him. She was also providing him with what appeared to be "signals." This occurred just before Green pulled out a handgun and told the bank guard not to move. Tribble also testified that she believed that Daniels along with Green were "in control" of what happened in the bank during the attempted bank robbery. R. 235.

**Q. All right. So that's the third one. We haven't gotten to that one yet. So this one you referred to in the dress how was he dressed?**

**A. She had something like a bandana scarf on her head, and something was tied on to that. You can't tell too much about her. She continued moving around. She acted like she had ants in her pants. She was constantly moving back and forth. She never could stay still.**

**Q. What was she doing when she was moving back and forth?**

**A. She continued looking out the window because we just had a customer to leave the bank. R. 226.**

**Q. Did you ever see the girl make any motions to him with her head?**

**A. Yes, sir.**

**Q. What was that?**

**A. She was pointing down and things, giving him signals what to do next. R. 227.**

...

**Q. At some point in time did they walk away from you and stay in the immediate area?**

**A. They kind of were shuffling around like they had little ants, and you know, acting like they didn't know if they were doing the right thing or if they were doing the wrong thing. They just appeared to be nervous.**

**Q. Did anybody appear to be in control? Did you have any impression of that.**

**A. Well two were doing most of the controlling. I would say it would all be Mr. Green and the girl. The other guy stood in the back-ground. He was there. He was not shuffling, moving around as much as they were.**

**A. Yes, sir. Nobody said anything, but Mr. Green said hold it, do not move. That's his exact words when he pulled the pistol out. R. 235. (Emphasis by Appellee).**

On cross examination, Mr. Green could not explain why Daniels did not express her surprise at having just witnessed an unexpectedly shoot-out in a bank. This occurred while she was supposedly playing an innocent "prank."

**Q. Now. I'm going to ask you, if she(Daniels) was getting nervous about the prank and then later she was angry about the armed robbery, and then there's testimony that Crystal Daniels never said anything to the law enforcement when they first pulled her over--**

**A. Well, I can't give you an explanation. ...As I said, once we left the bank, Ms. Daniels was infuriated. She was furious, and I saw that. When she saw that I was shot--uh--she panicked... R. 337-338.**

While cross examined co-defendant Green was shown bank security video. This video showed that Daniels' movements were co-ordinated with his in the bank. This was prior to and during his shooting in the direction of the bank guard, Mr. Hogan. R. 354. On cross examination Green contradicted himself more than once. He claimed that he did not shoot Mr. Hogan--that he



must have shot himself. R. 358. Hogan testified that Green shot him after telling him not to move. Hogan testified he saw Green point the gun at him and fire when he was struck in the toe. R. 35. The bank video, exhibit 8(a) shows Green moving toward and shooting in the bank guard's direction. Daniels was standing next to Green when this occurred.

Q. All right. Let's continue. What direction did you move so far as Mr. Hogan? Where did you move, towards him? Do you deny that?

A. It appears that way, yes.

Q. Where is Mr. Hogan going?

A. To the side.

Q. To the corner. What is Crystal Daniels doing? Ducking?

A. Yes.

Q. Behind you?

A. Yes.

...

Q. Did you intend to pull your gun and subdue Mr. Hogan without shooting him?

A. Yes.

Q. And tie him up?

A. Yes.

Q. Then why did you shot him?

A. I did not shoot him. R. 358. (Emphasis by Appellee).

On cross examination Donnell Hogan testified that he saw Green point his gun at him and shot him in the toe. This occurred when he was attempting to intimidate him. Hogan did not get intimidated but fired back with his 9 millimeter.

Q. ...The bullet that we're concerned about in that charge is the one that struck the foot, and I'm trying to determine how you can tell this jury with any degree of certainty where the bullet came from or the caliber that bullet was.

A. And it came from his gun, because I seen him having his gun pointed directly at me like that shooting.

Q. You just assume that?

A. No, I seen that. R. 35. (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).

There was credible, substantial, partially corroborated evidence in support of Daniels' convictions. She was identified as actively communicating with Green inside the bank. R. 12-13;

226-227. Daniels was disguised as a man. She was nervous, constantly moving around. She concealed her face from the bank tellers. R.13; 226. She followed a bank customer leaving the bank, and then communicated this to Green. This was by word and head signals. This was just prior to his drawing a pistol out of the brown purse. He pointed a firearm at the bank guard, fired in his direction and told him not to move. R.13.

Unfortunately for Mr. Green, Mr. Hogan, the bank guard, was not intimidated. Rather he returned gun fire, striking Green in the leg and arm. R. 364. Green immediately changed his plans and ran out of the bank with Daniels.

It is reasonable to infer from the evidence cited that Daniels provided Green with information and signals as part of a coordinated plan to rob the bank when there were no possible outside witnesses present. R. 13; 223-224.

She was captured with Mr. Glenn, the driver of the gold Jeep, seen near the bank before the attempted robbery. R. 132; 204. The back pack Daniels had in the bank was found in the abandoned house. R. 144-148. The record reflects that the get a way vehicle, the gold Jeep, contained blood, a purse, nylon temporary hand cuffs and dark glasses. R. 177-179. See photographic evidence exhibits 26(c)(e) and (h) in manila envelop for photos showing blood on the back floor board, side door panel, dark glasses, and a purse inside the Jeep.

Green, the gunman, was shot in the leg and arm by the bank guard. R. 364. He wore dark glasses and pulled his handgun out of a purse. R. 224 Daniels was in the car with the glasses Green wore in the bank, as well as the purse from which he drew his handgun. She never spoke to anyone about any prank, or of her amazement at just unexpectedly having witnessed a gun fight in a bank.

When this evidence was taken as true with reasonable inferences, it was sufficient for inferring that Daniels conspired with Green and others to rob the Cleveland State Bank. She was

also an active participant in the planning and execution of the attempted bank robbery. The robbery was unsuccessful not because Daniels did not contribute her part but because the bank guard was not intimidated by Green's commands. Instead he exchanged gun fire, striking Green in the leg and arm.

When captured with Glenn, a regular customer in the bank, Daniels did not tell Officer Nash about any "prank in the bank" or any where else. She never expressed any surprise about witnessing a shot out in the bank. Rather she and Glenn told Nash they were out looking "for a place to make out." R. 131.

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 while the record reflects a complicated set of facts, there was, nevertheless, sufficient corroborated credible evidence in support of Daniels convictions. This issue is lacking in merit.

### **PROPOSITION III**

#### **THE RECORD REFLECTS THAT DANIELS RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.**

The appellant Daniels believes that she did not receive effective assistance of counsel. Since her trial counsel only chose to cross examine one person during her trial, the appellant believes this was inadequate for assisting in her defense. Appellant's brief page .

For Daniels to be successful in his ineffective assistance claim, he must satisfy the two-pronged test set forth in **Strickland v. Washington**, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064-65, 80 L. Ed. 2d 674, 693-95 (1984) and adopted by this Court in **Stringer v. State**, 454 So. 2d 468, 476-477 (Miss. 1984). Daniels must prove: (1) that her counsel's performance was "deficient," and (2) that this supposed deficient performance "prejudiced" her defense. The burden of proving both prongs rests with Daniels. **McQuarter v. State**, 574 So. 2d 685, 687 (Miss. 1990). Finally, Daniels must show that there is "a reasonable probability" that but for the errors of his counsel, the sentence of the trial court would have been different. **Nicolau v. State**, 612 So. 2d 1080, 1086 (Miss. 1992), **Ahmad v. State**, 603 So. 2d 843, 848 (Miss. 1992).

Appellee would submit that based upon the record we have cited, there is a lack of evidence for holding that there is a reasonable probability that Mr. Kilpatrick erred in his representation of Ms. Daniels.

When an appeal involves post conviction relief, the Mississippi Supreme Court has held, "that where a party offers only his affidavit, then his ineffective assistance of counsel claim is without merit." **Lindsay v. State**, 720 So. 2d 182, 184 (¶6 (Miss. 1998); **Smith v State**, 490 So. 2d 860 (Miss. 1986). There was no affidavit from Mr. Kilpatrick, nor anyone else knowledgeable about appeal counsel's unsubstantiated claims of incompetence.

In **Ferguson v. State**, 507 So. 2d 94, 97 (Miss. 1987), quoting **Strickland**, 466 U S at 687, 104 S. Ct. 2052.

Although it need not be outcome determinative in the strict sense, it [deficient assistance of counsel] must be grave enough to 'undermine confidence' in the reliability of the whole proceeding.

In **Cole v. State**, 666 So. 2d 767, 777 (Miss. 1995), the Supreme Court found no evidence of ineffective assistance for failure to make certain objections during the trial. In doing so the Court also stated that failure to call certain witnesses would not be considered ineffective assistance.

Complaints concerning counsel 's failure to file certain motions, call certain witnesses, ask certain questions, or make certain objections falls within the ambit of trial strategy.

On cross examination, Mr. Kilpatrick questioned Lewis Green, Daniel's co-defendant. R. 284-305. According to Green, he did not tell Daniels or his two cousins, Glenn and Smith, that he was planning on robbing the bank. He not only did not tell her; he supposedly misinformed her. The misinformation was supposedly that by dressing up as a man and he and Smith as women that they were going to assist him in playing "a prank."

Q. Okay. All right. So you went back in the house. By then, Lewis Green, did you have a plan?

A. Yes. I had already pretty much formulated one earlier.

Q. And did you tell Crystal Daniels your intentions?

A. No.

Q. Did you give her an untrue statement of your intentions?

A. Yes, sir, I did.

Q. What was that untrue statement of your intentions?

A. I told her that I was going to go and play a prank on someone. I was going to cash my check, and then I was going to treat everyone out. R. 300.

The record reflects that trial counsel's cross examination was effective on Daniels behalf. R. 284-305. Trial counsel brought out what was favorable for Daniels. However, Daniels' problems then became based upon the shaky incredible testimony of co-defendant Mr. Green. The jury, as judge of fact and credibility, did not find Green's contradictory testimony believable. They found him guilty of conspiracy to commit armed robbery just as they did for Daniels. Daniels can be seen actively assisting Green during the bank encounter. She was also seen carrying a backpack that was used in the attempted bank robbery. See exhibit 8(a) bank security video scenes.

The record reflects that Green could not explain the purpose of "the prank." Nor could he explain how Daniels' actions in the bank were compatible with her supposedly knowing nothing about any attempt to rob the bank.

Green would not admit to shooting at the bank guard, Mr. Hogan, even though the bank security film showed him doing so. R. 344. And Mr. Hogan testified as to how Green pulled his weapon, pointed at him and then shot him in the toe. R. 12-15. Green admitted to telling FBI agents that he owed Rico \$4,700 whereas he testified that he owed \$2,4000. R. 323.

Therefore, whether Daniels was playing an innocent "prank," given her actions in the bank as well as thereafter, was for the jury to decide.

Daniels trial counsel can not be faulted for the lack of credibility of co-defendant Green. Rather he was doing the best he could, given Green's testimony. This issue is therefore also lacking in merit.

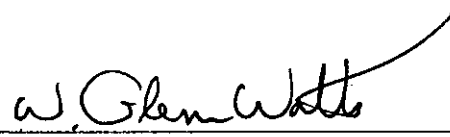

**CONCLUSION**

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

Respectfully submitted,

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## CERTIFICATE OF SERVICE

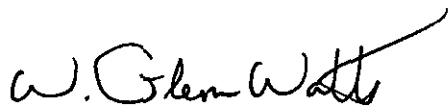
I, W. Glenn Watts, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 13th day of February, 2008.

  
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