IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JOSEPH ANTWAN GLENN,
CRYSTAL DANIELS, ET AL. — APPELLANT

VERSUS — NO. 2005-KA-01149-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT
CRYSTAL DANIELS

APPEALED FROM
THE CIRCUIT COURT OF BOLIVAR COUNTY, MISSISSIPPI
ELEVENTH JUDICIAL DISTRICT
CAUSE NO. 2004-0074-CR2

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. Their representations are made in order that the Justice of this Court may evaluate possible disqualification or refusal:

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This the 21st day of November, 2007.

RICHARD B. LEWIS

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BRIEF OF APPELLANT

COMES NOW the Appellant, Crystal Daniels, and states the following issues concerning the appeal of his convictions in the Circuit Court of Bolivar County, Mississippi and the Lower Court's denial of Appellant's Motion for Judgment Non Obstante Verdicto Or Alternatively For A New Trial.

STATEMENT OF INCARCERATION

The Appellant is presently incarcerated in the Central Mississippi Correctional Facility in Pearl, Mississippi. The Appellant was sentenced on May 19, 2005 to serve a term of 5 years in an institution under the direction and control or the Department of Corrections on Count I, Conspiracy to commit Armed Robbery and 20 years in an institution under the direction and control or the Department of Corrections on Count II, Attempted Armed Robbery. Any and all sentences were ordered to run consecutive with the sentence in Count I for a total of 25 years. (R.E.15-17)

STATEMENT OF ISSUES

I. **APPELLANT CONTENDS THE DEFENDANT'S INDICTMENT WAS DEFECTIVE AND MOVES TO VACATE HER CONVICTION BASED ON THE STATE'S FAILURE TO SET OUT WITH CERTAINTY WITHIN THE INDICTMENT THE SPECIFIC CONDUCT THAT THE STATE ASSERTS TO BE THE OVERT ACT UNDERTAKEN BY DEFENDANT.**

II. **APPELLANT CONTENDS THE COURT ERRED IN OVERRULING APPELLANT'S MOTIONS FOR DIRECTED VERDICT AND SUBSEQUENT MOTIONS FOR JUDGEMENT NON OBSTANTE VERDICTO OR ALTERNATIVELY FOR A NEW TRIALS SINCE THE VERDICTS IS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE AND NOT SUPPORTED BY SUFFICIENT CREDIBLE EVIDENCE.**

III. **APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL THROUGHOUT THE TRIAL STAGES OF THIS CASE.**

STATEMENT OF THE CASE

The Appellant was indicted on the 21th day of September, 2004, for one count of conspiracy to commit armed robbery, and for one count of armed robbery which occurred on or about July 8, 2004, in Merigold, Bolivar County, Mississippi. (R.E. 11-12) The Defendant was arraigned and represented by the Honorable Martin Kilpatrick. A trial was had on or about May 9-11, 2005. (R). A jury was empaneled and a verdict returned in finding the Defendant guilty of both counts (conspiracy to commit armed robbery and attempted armed robbery). (R.E. 13-14) In Count I, the Appellant was sentenced to 5 years in an institution under the direction and control or the Department of Corrections. In Count II, the Appellant was sentenced to 20 years in an institution under the direction and control or the Department of Corrections with any and all counts to run consecutive to Count I for a total of 25 years. (R.E. 15-17) The Appellant filed a Motion for Judgment Non Obstante Verdicto Or Alternatively For A New Trial which was denied on or about June 14, 2005. (R.E. 20). It is from this conviction and denial of a new trial that the Defendant, Appellant herein, brings her timely appeal.

The State presented proof that on July 8, 2004 the Appellant and Co-defendants entered the Cleveland State Bank and allegedly attempted to rob bank employees, Mary Ann Tribble (R. 222-

243), Donnell Hogan (R. 1-65) and Janet Free (R. 205-221), at gunpoint.. The primary witnesses were the bank employees, Mary Ann Tribble, Donnell Hogan and Janet Free, as well as Joe Smith, Frazier Nash, Charles Gilmer and Mike Thompson, all employees of the Bolivar County Sheriff's Department and Dennis Waldo, Delta Services Bank Security. (R.) There was proof presented that defendants Lewis Green, Crystal Daniels and Gregory Smith entered the Cleveland State Bank dressed in the opposite sex as defendant Joseph Antwann Glenn remained as a driver in a vehicle outside the bank. (R. 1-65, 205-243,) After apparently asking to open a checking account, Defendant Lewis Green allegedly pulled a gun and informed employees, Mary Ann Tribble, Donnell Hogan and Janet Free, not to move. (R.1-65, 205-243) After Defendant Lewis Green pulled a gun, security guard Donnell Hogan pulled his gun and shots were fired between both Mr. Green and Mr. Hogan. (R.1-65, 205-243). Mr. Hogan and Mr. Green both sustained gun shot wounds, although none were lethal. (R.1-65, 140-160). Ms. Daniels along with the other Co-Defendants fled the scene and authorities were notified. (R. 1-65, 205-243) Police were given information of a vehicle, a gold jeep, that may have been involved with the robbery. (R.129-137) As officers began searching the surrounding areas, a gold jeep was stopped with Crystal Daniels as a passenger and Joseph Antwann Glenn as the driver. (R.129-137) The other Co-Defendants were arrested at an abandoned house in Bolivar County. Crystal Daniels and Joseph Antwann Glenn were taken to the Cleveland State Bank where Joseph Antwann Glenn was identified by the bank employees as one of the bank robbers. (R.137-181) All three witnesses were able to identify the Appellant, Crystal Daniels as one of the robbers in the armed robbery at trial. (R.1-65, 205-243)

SUMMARY OF THE ARGUMENT

Appellant contends that the conviction should be vacated based on the State's failure to set

out with certainty within the indictment the specific conduct that the State asserts to be the overt act undertaken by Defendant. The State cannot cure an improper indictment for attempt by giving notice to Defendant through testimony or physical evidence introduced at trial. Also, the crime of attempt is a specific intent crime and that the State failed to prove at trial that Ms. Daniels specifically intended to commit attempted armed robbery . Further, the Appellant did not commit any overt act to assist in the crime of attempted armed robbery. Appellant contends that the verdict was against the overwhelming weight of the evidence based on the testimony of Co-Defendant Lewis Green she should have been found not guilty. (R.261-364) Co-Defendant, Lewis Green testified at trial that Crystal Daniels, the Appellant, had no knowledge of his intentions to rob the Cleveland State Bank. (R.261-364) Mr. Green testified that while at Crystal Daniels' residence he persuaded Ms. Daniels, Joseph Antwann Glenn and Gregory Smith to help him play a prank on a friend by dressing in the opposite sex. (R.261-364) Mr. Green also testified that after leaving the residence in his vehicle he asked Ms. Daniels and Mr. Smith to go inside the Cleveland State Bank so he could cash a check. Mr. Green testified that Ms. Daniels had no knowledge of his intentions to rob the bank and believed that he was going into the bank simply to cash a check. (R.261-364) Further, Mr. Green never stated the Appellant did any overt act to further the crime of attempted armed robbery. (R.261-364) Mr. Green testified that there was no plan or agreements to commit bank robbery made between himself and any of the Co-Defendants including Appellant Crystal Daniels. (R.261-364) Appellant also contends that the State failed to prove that there was a conspiracy between Ms. Daniels and any of the co-defendants or any other party to commit armed robbery and therefore the verdict of guilt as to both counts is a against the overwhelming weight of the evidence. Appellant also contends that the verdict is the result of ineffective assistance of counsel, based on Appellant's trial attorney failing

to question any witnesses of the prosecution and only questioned the Co-Defendant, Lewis Green, when he took the stand. (R. 261-364) That as a result of her trial counsel's ineffectiveness her theory of defense was not properly presented to the jury. Appellant asks that the jury's guilty verdict be vacated on grounds related to the weight of evidence, so that she might be re-tried. Appellant contends her convictions should be reversed and that she be granted a new trial as to both counts.

ARGUMENT

I. APPELLANT CONTENDS THE DEFENDANT'S INDICTMENT WAS DEFECTIVE AND MOVES TO VACATE CONVICTION BASED ON STATE'S FAILURE TO SET OUT WITH CERTAINTY WITHIN THE INDICTMENT THE SPECIFIC CONDUCT THAT THE STATE ASSERTS TO BE THE OVERT ACT UNDERTAKEN BY DEFENDANT.

Appellant contends that her conviction for attempted armed robbery should be vacated based on the State's failure to set out with certainty within the indictment the specific conduct that the State asserts to be the overt act undertaken by Defendant. There can be no doubt that some overt act aimed at the accomplishment of the intended crime is an essential element of a charge of attempt. **White v. State**, 851 So.2d 400, 403 (Miss. App., 2003) The statute establishing attempt as a crime provides that "[e]very person who shall design and endeavor to commit an offense, and shall do any overt act toward the commission thereof, but shall fail therein, or shall be prevented from committing the same ..." may be punished appropriately. **Id.** (Citing Miss.Code Ann. § 97-1-7 (Rev.2000) (emphasis added). The Mississippi Supreme Court has firmly established that, in order to indict for an attempt, the indictment must set out with certainty the specific conduct that the State asserts to be the "overt act" undertaken by the defendant. **Id.** (Citing **Maxie v. State**, 330 So.2d 277, 278 (Miss.1976) The evident purpose for this rule is the underlying general principle that one accused of a crime is entitled to know the specific nature of the allegations against him so that he can

prepare his defense, rather than be left guessing as to what specific activity the State contends is a violation of the criminal statute. However, even though the necessity for a plain statement of the facts relied upon by the State has its foundation in the concept of adequate notice to the defendant of the nature of the allegations against him, the State may not avoid the requirement by showing that the defendant had actual notice from some other source of the specific nature of the State's allegations. **Id.** (Citing **Hawthorne v. State**, 751 So.2d 1090, 1095 (Miss. App.1999). There is no acceptable substitute or cure in the law for an indictment that omits the essential charging information.

Crystal Daniels' indictment does not set out with any certainty in a plain statement of the facts the "overt act" that set out the specific conduct that the State asserts to be undertaken by Crystal Daniels at the Cleveland State Bank and/or against its employees, thus rendering the indictment void. (See **Maxie**, 330 So.2d at 278) (See R.E. 11-12) Because of the nature of the defect in the indictment, it cannot be the subject of waiver by failure to raise the issue prior to trial. **Id.** Failure to demur or otherwise object to the validity of the indictment on the ground appearing in this case does not constitute a waiver or invoke considerations of estoppel to raise the issue post-conviction without distinction as to whether the failure to raise the issue at an earlier stage was purposeful or based on lack of knowledge of the applicable law. (See **Durr v. State**, 446 So.2d 1016, 1017 (Miss.1984); **Hawthorne**, 751 So.2d at 1095)

From a review of the record, including the instructions given to the jury, it is apparent that the State considered both Ms. Daniels' act of dressing as the opposite sex and her allegedly giving instructions to the other co-defendants as well as Mr. Green's exhibition of a deadly weapon as an overt act in furtherance of the crime of armed robbery. The State further appeared to contend that

Ms. Daniels was thwarted in that purpose when security guard, Donnell Hogan exhibited his weapon and began firing. After a review of the indictment, the State has failed to draft the indictment to include what overt act or acts allegedly were done by Ms. Daniels in the alleged commission of the crime. Thus, the indictment is totally void and the conviction should be set aside. This may explain why the record is totally devoid of any evidentiary proof of any overt act by the Appellant which aided and abetted Mr. Green, who did attempt to rob the bank.

The missing critical elements from an indictment may not be supplied by proof presented at trial or by jury instructions that adequately set out the essentials of the charged crime. (See **White v. State**, 851 So.2d 400, 404 (Miss. App.2003) The State called witness Mary Ann Tribble to testify that Ms. Daniels appeared to be giving "signals" to the other co-defendants. (R 226-230) Testimony was given to show Ms. Daniels and other co-defendants had dressed in the opposite sex as well as Mr. Green exhibiting a gun and allegedly telling everyone to "not move". This testimony does not cure the improper indictment and does not show any evidentiary proof of an overt act by the Appellant and certainly shows no specific intent to commit the crime of Armed Robbery.

II. APPELLANT CONTENDS THE COURT ERRED IN OVERRULING APPELLANT'S MOTIONS FOR DIRECTED VERDICT AND SUBSEQUENT MOTIONS FOR JUDGMENT NON OBSTANTE VERDICTO OR ALTERNATIVELY FOR A NEW TRIAL SINCE THE VERDICTS ARE AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE AND NOT SUPPORTED BY SUFFICIENT CREDIBLE EVIDENCE.

Appellant contends that both verdicts finding the Appellant guilty of conspiracy and attempted armed robbery are against the overwhelming weight of the evidence. Taking the testimony of all the witnesses as a whole, Appellant asserts that her Motions For Directed Verdicts and Subsequent Motions for Judgment Non Obstante Verdicto should have been sustained because in

taking all the evidence into light, the most favorable to the State, the State has failed to meet his burden of proof in this case. The basic standard of review of the sufficiency of evidence to support a criminal conviction is set out in **Jackson v. Virginia**, 443 U.S. 307, 99 Supreme Court 2781, 61 Lawyers Ed. Second 560 (1979). When reviewing a case for sufficiency of the evidence, "the relevant question is whether, after viewing the evidence in light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. **Bush v. State**, 895 So.2d 836, 843 (Miss. 2005) (quoting **Jackson v. Virginia supra**).

Based on **Jackson v. Virginia**, the critical inquiry is not simply whether the jury was properly instructed, but also whether the record of evidence can reasonably support a finding of guilt beyond a reasonable doubt that the accused committed that act charged, and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction (see **Bush v. State supra.,** quoting **Carr v. State**, 208 So.2d 886, 889 (Miss. 1968). This inquiry does not, in preserving the fact finder's role as a weigher of evidence, require a Court to ask itself whether it believes that the evidence in trial establishes guilt beyond a reasonable doubt. The relevant question, as pointed out in this case, is whether after reviewing all the evidence in light most favorable to the government, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. **Bush v. State**, 895 So.2d 836, 843 (Miss. 2005)

It is Appellant's contention that the Judge, at the Lower Court level, must require acquittal by sustaining a Motion For Directed Verdict or at least requiring a new trial if reasonable jurors would necessarily have reasonable doubt as to his guilt in this case.

This Court pointed out in **May v. State**, 460 So.2d 778 (Mississippi 1984) as follows:

> In other words, once the jury has returned a verdict of guilty in a criminal case, we are not at liberty to direct that the Defendant be discharged short of a conclusion on our part, that given the evidence, taken in the light most favorable to the verdict, no reasonable, hypothetical juror, could find a reasonable doubt that the Defendant was guilty **Pearson v State**, 428 So.2d 1361, 1364 (Miss., 1983).

The Motion for New Trial is a different animal. While the Motion for Judgement of Acquittal Not Withstanding A Verdict presents to the trial court a pure question of law, the Motion For A New Trial is addressed to the Trial Court's sound discretion **Neal vs. State**, 451 So.2d 743, 760, (Miss. 1984) when he moves for a new trial, a Defendant in a criminal case necessarily invokes **Rule 10.05** of our **Circuit and County Court Rules** which in pertinent part provides:

The Court on written notice of the Defendant may grant a new trial on any of the following grounds:

(1) If required in the interest of justice;
(2) If the verdict is contrary to law or the weight of the evidence;...

As distinguished from the J.N.O.V. Motion, here the Defendant is not seeking final discharge. He is asking that the jury's guilty verdict be vacated on grounds related to the weight of the evidence, not it's sufficiency, and may be retired consistent with the double jeopardy clause, **Tibbs v. Florida**, 457 U.S. 31,39, 102 S.Ct. 2211, 2217, 72 L. Ed. 2d. 652, 659-60 (1982). The trial court will only disturb a jury when "it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction unconscionable injustice." **Bush v. State** supra., quoting **Herring v. State**, 691 So.2d 948, 957 (Miss. 1997). This court acts as a "thirteenth juror" and views the evidence in light most favorable to the verdict. **Bush v. State supra.,** citing **Herring v. State**, 691 So.2d at 957 (Miss. 1997). A decision to reverse and order a new trial "unlike a reversal based on insufficient evidence, does not mean that the acquittal was the only proper verdict. **Bush v. State**, quoting **McQueen v. State**, 423 So 2d 800, 803 (Miss. 1982)

That, as a matter of law, the motion for judgment of acquittal, not withstanding the verdict, must be overruled and denied and in no way affects and little informs the trial judge regarding his disposition of the motion for new trial. Cases are hardly unfamiliar wherein the Court holds that the evidence is sufficient so that one party or the other was not entitled to judgment not withstanding the verdict but, nevertheless, that a new trial in the interest of justice should be ordered. **Hux v. State** 234 So.2d 50, 51(Miss. 1970), **Quarles v. State** 199 So.2d 58, 61 (Miss. 1967); **Mister v. State** 190 So.2d 869, 871 (Miss. 1966); **Yelverton v. State** 191 So.2d 393,394 (Miss. 1966); **Heflin v. State** 178 So.2d 594 (Miss. 1938); **Conway v. State**, 177 MS. 461, 469, 171 So. 16, 17 (1936), and the court sitting as a

> hypothetical "thirteenth juror" disagrees with the jury's assessment of conflicting testimony and therefore believes a new trial is necessary. **Bush v. State**, 895 So.2d at 844 (Miss. 2005)
>
> A greater quantum of evidence favoring the State is necessary for the State to withstand a motion for a new trial as distinguished from a motion for J.N.O.V. Under our established case law, the trial judge should set aside a jury's verdict only when, in the exercise of his sound discretion, he is convinced that the verdict is contrary to the substantial weight of the evidence **Pearson v. State** 428 So.2d at 1364.

Appellant contends that the verdicts are against the overwhelming weight of the evidence, due to the testimony of the Co-Defendant Lewis Green that Crystal Daniels had no knowledge of his intention or his plan to rob the Cleveland State Bank. When testing the legal sufficiency of the State's evidence, the standard of review is as follows: "the court must review the evidence in the light most favorable to the State, accept as true all the evidence supporting the guilty verdict and give the prosecution the benefit of all favorable influences that may reasonably be drawn from the evidence." See **McClain vs. State**, 625 So.2d 774, 778 (Miss. 1993). The court will only reverse when fair-minded jurors could find the accused not guilty. **Weltz vs. State**, 503 So.2d 803, 808 (Miss. 1987). It has long been a rule that the jury "may give consideration to all inferences flowing from the testimony." **Magnum vs. State**, 762 So.2d 337 (Miss. 2000). In reviewing the proof as alleged above, Appellant should be granted a new trials as to both counts.

Crime of conspiracy is committed when two or more persons combine or agree to accomplish an unlawful purpose. **Taylor v. State** , 536 So.2d 1326 (Miss.,1988) To be found guilty of conspiracy, each conspirator must recognize that he is entering into a common plan with the other, and each must intend to further a common and unlawful purpose. **Id.** For there to be a conspiracy, there must be recognition on the part of the conspirators that they are entering into a common plan

and they must knowingly intend to further its common purpose. **Watson v. State,** 722 So.2d 475 (Miss. 1998). A conspiracy is an agreement or understanding between two or more people to commit a crime. In establishing a conspiracy, the state is never required to prove in express terms an agreement between the parties to commit a crime, but it is sufficient when the evidence proves beyond a reasonable doubt, from all of the facts and circumstances, including any acts, statements or conduct of the alleged conspirators, that there was a common design or understood purpose between the parties to commit the crime. Before any defendant may be held criminally responsible for the acts of others it is necessary that the accused deliberately associate himself in some way with the crime and participate in it with the intent to bring about the crime. **Milano v. State,** 790 So.2d 179, 185 (Miss. 2001) Of course, mere presence at the scene of a crime and knowledge that a crime is being committed are not sufficient to establish that a defendant either directed or aided and abetted the crime unless you find beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator. **Id.** In other words, you may not find any defendant guilty unless you find beyond a reasonable doubt that every element of the offense as defined in these instructions was committed by some person or persons, and that the defendant voluntarily participated in its commission with the intent to violate the law. **Id.**

Intent to commit a crime, for purposes of attempt, consists of three elements: (1) an intent to commit a particular crime; (2) a direct ineffectual act done toward its commission; and (3) the failure to consummate its commission. **Greenwood v. State** 744 So.2d 767 (Miss.,1999) The overt act for an attempt must be such as will apparently result in the usual and natural course of events if not hindered by extraneous causes, in the commission of the crime itself. **Id.** An act apparently adapted to produce the intended result is sufficient to constitute the overt act essential to constitute

an attempt of a crime. **Id.** For defendant's actions to constitute an attempt, there must be an act that goes beyond mere planning and preparation, as mere intention to commit a crime will not sustain a conviction for an attempt. **Id.** Any attempted crime is a specific intent crime. **Id.** To find the Appellant guilty of attempted armed robbery, the State must show that the Appellants actions and conduct evidenced a "specific intent to rob the Cleveland State Bank". (See **Harris v. State**, 642 So.2d 1325 (Miss. 1994) It is well settled in Mississippi that an intent to commit a crime consists of three elements: (1) an intent to commit a particular crime; (2) a direct ineffectual act done toward its commission; and (3) the failure to consummate its commission. **Edwards v. State**, 500 So.2d 967, 969 (Miss.1986) (citing **Bucklew v. State**, 206 So.2d 200, 202 (Miss.1968)). The overt act must be such as will apparently result, in the usual and natural course of events if not hindered by extraneous causes, in the commission of the crime itself, and be an act apparently adapted to produce the intended result. **Bucklew v. State**, 206 So.2d at 202. Only then is the act sufficient to constitute an overt act essential to be an attempt of a crime. **Id.** There must be an act that goes beyond mere planning and preparation, as mere intention to commit a crime will not sustain a conviction for attempt. **Jackson v. State**, 254 So.2d 876, 878 (Miss.1971); **Bucklew v. State**, 206 So.2d at 202-03. **Greenwood v. State,** 744 So.2d 767, 769 -770 (Miss. 1999)

Co-Defendant, Lewis Green testified at trial that Crystal Daniels had no knowledge of his intentions to rob the Cleveland State Bank. (R.261-364) Mr. Green testified that while at Crystal Daniels' residence he persuaded Ms. Daniels, Joseph Antwann Glenn and Gregory Smith to help him play a prank on a friend by dressing in the opposite sex. (R.261-364) Mr. Green also testified that after leaving the residence in his vehicle to play the prank on a friend, he asked Ms. Daniels and Mr. Smith to go inside the Cleveland State Bank so he could cash a check. (R.261-364) Mr. Green

testified that Ms. Daniels had no knowledge of his intentions to rob the bank and believed that he was going into the bank simply to cash a check. (R.261-364) Mr. Green testified that there was no plan or agreements to commit bank robbery made between himself and any of the Co-Defendants including Crystal Daniels. (R.261-364) The State called witness Mary Ann Tribble to testify that Ms. Daniels appeared to be giving "signals" to the other co-defendants. (R. 226-230) Testimony was submitted by the State to infer that since Ms. Daniels and the other co-defendants had dressed in the opposite sex and came into the bank that they were assisting in a bank robbery and when Mr. Green exhibited a gun and told everyone to "not move" that they, including the Appellant were aiding and abetting Mr. Green in his attempt to rob the bank . (R. 226-230) The State produced no witnesses to prove that Crystal Daniels had any knowledge or intentions of to rob the Cleveland State Bank. The State produced no witnesses to prove that Crystal Daniels had conspired to commit armed robbery. The State only produced witnesses that testified to Crystal Daniels' mere presence at the bank at the time of the attempted robbery by Mr. Green. (R. 1-65, 205-221, 222-243) The witnesses testified that Ms. Daniels came with Defendant Green as well as Defendant Smith and left the bank with the same persons, however the witnesses could not testify as to anything the Defendants said to one another while in the bank. (R. 1-65, 205-221, 222-243) They merely showed she was dressed oddly and may have been giving signals. The State offered other witnesses that testified that Ms. Daniels was a passenger along with Defendant, Glenn, and that they were stopped by officers in a gold jeep which was spotted leaving the scene of the robbery. This jeep was found to belong to Lewis Green's wife. (R.129-137) Defendant Daniels did not take the stand to defend herself because of her previous attorneys advice, however, Defendant Lewis Green did testify that neither Ms. Daniels nor any other co-defendant had any knowledge of his plan to rob the bank nor

did she commit or intend to commit any act to commit an armed robbery of the bank and its employees. Ms. Daniels did not commit any overt act to further the crime of armed robbery and the State failed to prove any overt act on her part to attempt such a crime. Ms. Daniels did not enter into a common plan to attempt to commit an armed robbery nor did she have any knowledge or intentions to further a common purpose to commit such an act. Thus, the State failed to prove beyond a reasonable doubt that the Appellant committed the crimes charged and that she did so under circumstances that indicated every element of the offenses charged. Where the state fails to meet this test it is insufficient to support a conviction. (See **Bush v. State** supra, quoting **Carr v. State**, 208 So.2d 886, 889 (Miss. 1968) The State also failed to show that Ms. Daniels committed any overt act that goes beyond mere planning and preparation. Ms. Daniels' mere presence with the other co-defendants at a bank and dressing up in the opposite sex does not constitute an overt act indicative of an attempted armed robbery. Finally, the State failed to submit proof of any conspiracy to commit armed robbery on that such common plan or scheme even ever existed between Ms. Daniels and any other co-defendant.

III. APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL THROUGHOUT THE TRIAL STAGES OF THIS CASE.

To prove ineffective assistance of counsel, a Defendant must prove: "(1) counsel's performance was defective, and (2) the defect was so prejudicial that it prevented [Defendant] from receiving a fair trial." **Strickland v. Washington**, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This standard has been adopted by the Mississippi Supreme Court. **Moody v. State**, 644 So. 2d 451, 456 (Miss. 1994). In order for a defendant to show prejudice, it is necessary that he prove that the

outcome of the trial would be different were it not for counsel's errors. **Strickland**, 466 U.S. at 699. The issue of ineffective assistance of counsel may be resolved on direct appeal if both parties (Appellant and Appellee) stipulate that the record is sufficient to determine whether the Appellant received ineffective assistance of counsel; or the record affirmatively shows ineffective assistance of counsel; if no other error is found in the record, then the Court of Appeals should "affirm without prejudice to the defendant's right to raise the ineffective assistance of counsel issue via appropriate post-conviction relief filings." **Wash v. State**, 807 So. 2d 452, 461 (Miss. Ct. App. 2001). An appellate court should reach the merits of an ineffective assistance of counsel claim on "direct appeal only if (1) the record affirmatively shows ineffectiveness of constitutional dimensions, or (2) the parties stipulate that the record is adequate to allow the appellate court to make the findings without consideration of the findings of fact of the trial judge." **Colenburg v. State**, 735 So.2d 1099, 1101 (Miss. Ct. App. 1999). "If the issue is not examined because of the state of the record, and assuming the conviction is affirmed, the defendant may raise the ineffective assistance of counsel issue in post-conviction relief proceedings." **Pittman v. State** 836 So.2d 779, 787 (Miss. Ct. App. 2002).

Appellant recognizes the case law precedent from the Mississippi Supreme Court and the Mississippi Court of Appeals regarding the necessary stipulations for such an appellate court to review a claim of ineffective assistance of counsel on direct appeal. Current counsel for Appellant would be remiss in his duties not to zealously advocate Appellant's case by not including this issue in Appellant's Brief. Appellant's trial counsel failed to question any witnesses except Co-Defendant Lewis Green at Appellant's trial thus, Appellant contends the failure to question witnesses during trial clearly shows ineffectiveness and that without this failure the outcome would have been different. Appellants trial attorney's failure to cross examine witnesses as to the lack of any overt

act on her part to commit the crimes charged prejudiced her case and failed to bring out her theory of the case that she never did any overt act to attempt the crime of armed robbery. Failure of her attorney to effectively cross examine the witnesses, especially State witnesses can not be considered "trial strategy".

Appellant was tried and convicted of one count of attempted armed robbery and one count of conspiracy to commit armed robbery. The verdict is the result of the ineffective assistance of counsel, based on Appellant's attorney failing to failing to question any witness of the prosecution except that of Co-Defendant, Lewis Green. (See R.E. 13-14).

Appellant's trial counsel's performance was deficient and that the said Appellant was clearly prejudiced by trial counsel's performance in failing to question any witness of the prosecution except that of Co-Defendant, Lewis Green at trial. That but for the Appellant's trial attorneys failing question any witness of the prosecution except that of Co-Defendant, Lewis Green, the verdict would have resulted in a not guilty verdict or possibly even a J.N.O.V. Further the attorney was deficient in not filing a pretrial motion to suppress the out of court show up lineup and the in-court identification of the defendant as the robber due to it suggestiveness of said lineup and identification which lead to the jury's verdict based on a suggestive photo lineup. Under the totality of the circumstances and the evidence presented, trial counsel's performance was deficient.

CONCLUSION

Appellant contends that the conviction should be vacated based on the State's failure to set out with certainty within the indictment the specific conduct that the State asserts to be the overt act undertaken by Defendant. Thus, the indictment is totally void and the conviction should be set aside. The testimony at trial does not cure the improper indictment and does not show any overt act by the

Appellant and certainly shows no specific intent to commit the crime of Armed Robbery. Appellant also argues that the State did not have a greater quantum of evidence favoring their version of the facts as elicited due to the testimony of Defendant Lewis Green. The State put on no proof beyond a reasonable doubt that the Appellant did any overt act to attempt the crime of armed robbery. Also, that the State failed to prove that Crystal Daniels had any knowledge of Defendant Lewis Green intentions to commit armed robbery or that any conspiracy existed. Also, the State failed to show that Ms. Daniels committed any overt act that goes beyond mere planning and preparation, since her mere presence at the scene of an armed robbery with the other co-defendants and, her dressing up as the opposite sex are not overt acts indicating a specific intent to attempt armed robbery. According to Mr. Green's testimony and due to the State not providing evidence to the contrary, no conspiracy to commit armed robbery ever existed between Ms. Daniels and any other co-defendant and resulted in the Appellant being prejudiced.

The State's case should not have been allowed to withstand the Motions For New Trial as distinguished from the Motions For J.N.O.V., under our established case law. (R. 213-218). The Trial Judge should have set aside the jury's verdicts in this case when considering all the evidence as a whole combined with the Appellant's trial attorney's ineffective assistance in questioning witnesses at trial. The Court in exercising his sound discretion, and in the interest of justice, should have ruled that the verdict was contrary to the weight of the evidence **Pearson v. State** 428 So.2d 1364, Miss. 1983).

As stated in **Hawthorne vs. State**, ***835 So.2d 14 at 21 (Miss. 2003)*** the standard for review of a Motion for a J.N.O.V., as well as a motion for a directed verdict and a request for peremptory instructions is all the same in that it challenges the legal sufficiency of the evidence. As stated in

Hawthorne, 835 So.2d at 21 ¶31 (citing McClain vs. State, 625 So.2d 774, 778 (Miss. 1993), on the issue of legal sufficiency, reversal can only occur when evidence of one or more of the elements of the charged offense is such that reasonable and fairminded jurors could only find the accused not guilty. Here, that element is the State's failure to prove Crystal Daniels had any knowledge of Co-Defendant's Lewis Green intentions to commit armed robbery and further failed to prove any overt act on her part to participate in an attempted armed robbery.

There is reasonable doubt as to Crystal Daniels knowledge of Defendant Lewis Green's intentions to commit armed robbery as well as reasonable doubt that her actions inside the bank were "overt act" evidencing a specific intent to assist in an armed robbery. Although, Defendant Daniels did not take the stand to defend herself because of her previous attorneys advice, Defendant Lewis Green did testify that she did not have any knowledge of his plan to rob the bank and that she thought that Mr. Green was entering the bank only to cash a check. The State put on no proof to indicate an overt act by the Appellant to assist Mr. Green in his attempt to rob the Cleveland State Bank.

Appellant argues that his trial counsel's performance was deficient and that the said Appellant was prejudiced by trial counsel's performance. That but for the Appellant's attorney failing to question any of the State's witnesses and to only cross examine co-defendant Lewis Green at trial the verdict would have resulted in a not guilty verdict. Had the trial attorney cross examined the witnesses the jury would have known there was no overt act committed by the Appellant. Further the trial attorney was deficient in not filing a pretrial motion to suppress the out of court show up lineup and in-court identification of the defendant as the robber due to the suggestiveness of said lineup which lead to the jury's verdict based on a suggestive out of court show up lineup and

in-court identification.

Appellant beseeches this Court, after a thorough review of the record, to conclude that the Verdicts finding the Appellant guilty as to conspiracy and attempted armed robbery should be set aside and the Appellant should be granted a new trial as to both counts in the interest of justice.

CERTIFICATE OF SERVICE

I, Richard B. Lewis, Attorney for Appellant, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellant to the following persons:

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This the 21st day of November, 2007.

RICHARD B. LEWIS