IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

GREGORY SMITH — APPELLANT

V. — NO. 2005-KA-1149-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

GREGORY SMITH **APPELLANT**

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

STATE OF MISSISSIPPI **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

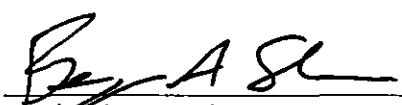
The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Gregory Smith, Appellant
3. Honorable Laurence Y. Mellen, District Attorney
4. Honorable Albert B. Smith, III, Circuit Court Judge

This the 7th day of November, 2007.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

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STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Bolivar County, Mississippi, and a judgment of conviction for the crimes Count I, Conspiracy to Commit Armed Robbery and Count II, Attempted Armed Robbery. Greg Smith was sentenced to five (5) years for Count

I and twenty (20) years for Count II in the custody of the Department of Corrections following a jury trial on May 9-11, 2005, Honorable Albert B. Smith III, presiding. Smith is presently incarcerated with the Mississippi Department of Corrections.

FACTS

On July 8, 2004, Lewis Green, hereinafter Green, attempted to rob the Cleveland State Bank in Merigold when gunfire broke out between himself and Donnell Hogan, hereinafter Hogan. [T. 13, 251-55]. Green plead guilty to armed robbery in the middle of the trial and also took the stand to tell the Court the details involving the crime he committed. [T. 251-55, 260], R.E. 32.

Green testified that a week or two before the robbery that he left Columbus and had been staying with his sister in Greenville or his aunt in Mound Bayou. [T. 262-63]. The night of July 7, 2004, Green was shooting dice with a guy named Rico. [T. 265]. Green tried to leave after he had lost around ten to fifteen dollars, but when he got up to leave, Rico would not let him leave. ***Id.*** Rico showed Green his pistol, and Green stayed and continued shooting dice for a few more hours. ***Id.*** When the dice game was over a disagreement arose between Green and Rico with Green owing Rico somewhere around $2400. ***Id.***

After the dice game, Rico wanted his money. [T. 289]. Green was given an ultimatum that if he did not get the money to Rico then Rico was going to go see Green's sister. [T. 290]. Green knew that Rico was known to be ruthless in the streets. ***Id.*** Green got the idea to rob the Cleveland State Bank in Merigold from Rico. [T. 267]. Later the same night, Green rode with Rico from Washington County to Bolivar County. [T. 291]. They went to

the Merigold to the Bank of Merigold, where Rico was giving Green the information on want he wanted done. ***Id.*** Rico informed Green about eh various entrances and detail about inside the bank. [T. 291-92]. Rico gave Green until the weekend to get his money. [T. 291]. They rode around the bank a couple more times that night, and Green came back to Merigold the next morning to see what the Merigold and the bank looked like in the daylight. [T. 292].

Later that morning Green and Greg Smith, hereinafter Smith, picked up Joseph Glenn, hereinafter Glenn, and went to the home of Crystal Daniels, hereinafter Daniels. [T. 295-97]. Green did not tell Smith, Glenn, or Daniels his intentions to rob the Cleveland State Bank in Merigold. [T. 297]. After Green got to Daniels house he called Rico, and let Rico know that he was ready for the job that he had planned. ***Id.*** Green told Rico the location of Daniels house and Rico drove over towards Daniels house and parked on a corner where he could not be seen from the house. [T. 298]. Green went outside to Rico's vehicle alone. ***Id.*** Rico supplied a blue/black backpack to Green for the robbery. ***Id.*** Inside the backpack was a purse which held the guns, clothes, and wigs. [T. 267, 298-99].

Prior to walking back into the house, Green placed the guns in the back of the vehicle and took the backpack inside. [T. 299]. Green asked Glenn, Smith, and Daniels if they wanted to play a prank with him. [T.269, 300-301]. He said he wanted to play a prank on someone, but told them hardly any details of the prank. [T. 270, 300]. The only one that questioned the prank was Smith. [T. 269]. Green wanted everyone to pretend to be the opposite sex. [T. 270, 302]. Green wanted to go cash a check, then they were going to play

a prank, after which he was going to treat everyone out. [T. 273, 300]. Green never disclosed his intentions prior to going into the bank. [T. 302].

Everyone got into the vehicle dressed as the opposite sex, and headed toward Merigold. [T. 302]. Rico followed them with three individuals with him. ***Id.*** Green pulled the vehicle behind a church and told Glenn to get behind the wheel. [T. 272]. Green, Smith, and Daniels got out of the car and walked down the street and walked into the bank.

Green, Smith, and Daniels walked into the bank and walked to Mary Ann Trimble's window. [T. 223]. Green questioned the bank teller about opening an account. [T. 223]. The bank teller told him the information needed to open an account, but Green said he did not have a drivers license. [T. 223, 303]. Green then asked Daniels is she had any identification, and she told him no. [T. 223, 274, 303]. He then asked Daniels if he had left it in the vehicle and she said I do not know and walked off. ***Id.*** Daniels getting frustrated with Green walked off then came back, telling Green to come on, let's go and she would bring him back to cash his check. [T. 274, 303].

Green then pulled his gun out of the purse, and told everyone not to move. [T. 275]. Hogan reached for his pistol, and Green fired the first shot. [T. 275]. Green and Hogan exchanged gunfire and then Smith, Daniels, and Green ran out of the bank returning to the vehicle. [T. 275, 278]. Glenn was told to drive and a go somewhere safe. [T. 278-79]. There was a lot of yelling and screaming in the vehicle wanting to know what happened. [T. 279].

Glenn drove down a road that lead back to Mount Bayou, but stopped at a house owed by Glenn's family. ***Id.*** Green did not intend to stop at that house, but Green was shot in the

leg and the forearm, and started to feel nauseated. ***Id.*** Green told them that he was going to stay at the house and for them to go get help. [T. 280]. Everyone was demanding to know what had happened, Daniels was furious with Green and at one point slapped the pistol in the floor. [T. 280-81]. Glenn and Daniels left the house and Smith stayed with Green at he house. ***Id.*** Thirty-five to forty-five minutes later, police cars came to the house and Green and Smith were eventually apprehended. [T. 141-42].

SUMMARY OF THE ARGUMENT

The Appellant, Gregory Smith, was entitled to an acquittal as a matter of law in that no evidence was presented to show that there was a meeting of the minds between Green and Smith. Smith had no intent to rob the Cleveland State Bank in Merigold, nor did he commit an overt act towards the commission of the crime of robbery. Green testified that he and Rico were the ones who planned the robbery and that Smith knew nothing about the robbery. Green's version of the events were not contradicted by the evidence, and therefore Smith was entitled to an acquittal as a matter of law.

The verdict was also against the overwhelming weight of the evidence. Green told Smith that they were going to dress up as the opposite sex and go play a prank. Green was going to go to the bank cash a check, then they were going to play the prank, and then he was going to treat them out. No evidence was presented that Smith knew that Green was going to rob the bank, he thought he was going to participate in a prank. Smith never asked for any money, nor presented a gun at the bank. At no point did he know that he was walking into the bank with Green and that Green was going to try to rob the bank.

The verdict was clearly against the overwhelming weight of the evidence. This was clearly reversible error.

ARGUMENT

ISSUE NO. 1

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT; THEREFORE THE APPELLANT WAS ENTITLED TO AN ACQUITTAL

A. Standard of Review

Smith moved for a directed verdict at the close of the State's case, which was denied by the trial court. [T. 247-48]. Smith also made a post-trial motion for judgment notwithstanding the verdict, which was also denied by the trial court. C.P. 185, 187, R.E. 28, 30. Denial of a directed verdict and J.N.O.V. challenges the legal sufficiency of the evidence supporting the guilty verdict. ***Randolph v. State***, 852 So.2d 547, 554 (Miss. 2002); ***Fair v. State***, 789 So.2d 818, 820 (Miss. 2001); ***McClain v. State***, 625 So.2d 774, 778 (Miss. 1993).

The Mississippi Supreme Court has held that "if the facts and evidence considered in a challenge to sufficiency of the evidence 'point in favor of the defendant on any element of the offense with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty,' the appellate court should reverse and render the jury verdict." ***Kerns v. State***, 923 So.2d 196, 199 (Miss. 2005)(quoting ***Edwards v. State***, 469 So.2d 68,70 (Miss. 1985)). *See also* ***Stewart v. State***, 909 So.2d 52, 56 (Miss. 2005); ***Randolph***, 852 So.2d at 555; ***Fair***, 789 So.2d at 820.

B. The Evidence Did Not Support a Conviction of Conspiracy to Commit Armed Robbery to stand.

The Mississippi Supreme Court has held that "[f]or there to be a conspiracy, there must be a recognition on the part of the conspirators that they are entering into a common plan and knowingly intend to further its common purposes." ***Neal v. State***, 806 So.2d 1151, 1157 (Miss. 2002), ***Harris v. State***, 731 So.2d 1125 (Miss. 1999), and ***Franklin v. State***, 676 So.2d 287, 288 (Miss. 1996). "The conspiracy agreement need not be formal or express, but it may be inferred from the circumstances, particularly by declarations, acts and conduct of the alleged conspirators." ***Id.*** "Furthermore, the existence of a conspiracy, and a defendant's membership in it, may be proved entirely by circumstantial evidence." ***Id.***

"By its very nature, conspiracy is a joint or group offense requiring a concert of free will." ***Franklin***, 676 So.2d at 288 (quoting ***Flanagan v. State***, 605 So.2d 753, 757 (Miss. 1992), ***Moore v. State***, 290 So.2d 603, 604 (Miss. 1974)). "Furthermore, conspiracy requires the 'union of the minds' of the conspirators." ***Id.***

In Franklin, five teenagers decided to "mess with" a homeless man. ***Franklin***, 676 So.2d at 288. The five youngsters threw rocks and kicked the victim. ***Id.*** During this time, one of the guys left and returned with a gun and shot the victim. ***Id.*** The boy that shot the victim then turned and pointed the gun at some of the other boys because the knew they were going to tell it. ***Id.***

The Mississippi Supreme Court held that the only evidence of a conspiracy was the fact that Franklin and Jackson went with the other boys to "mess with" the victim. ***Id.*** That was insufficient evidence of conspiracy to commit murder. ***Id.*** *See* ***Thomas v. State***, 591 So.2d 837, 839 (Miss. 1991). There was no evidence indicating that either Franklin or

Jackson recognized that, by "messing with" the victim, they had entered into a common plan to commit murder or that they knowingly intended to further the common purpose of that plan. ***Franklin***, 676 So.2d at 289. The Court continued to state that no evidence was present that there was a "union of the minds" between the boy that pulled the trigger and the appellants. ***Id.*** The Mississippi Supreme Court ultimately reversed and rendered the judgment of conviction of conspiracy to commit murder. ***Id.***

In the present case the facts are the same as they were in ***Franklin***. Smith agreed to dress up as a girl to go with Green to play a prank and then to cash a check in the bank. He at no point and no evidence was presented that Smith entered into a common plan to rob the bank.

Green testified that he did not tell Smith his intentions of robbing the bank. [T. 302]. Green was the only one that had a gun in the bank. He had two guns in the bag that he was carrying and neither of the other two people including Smith had a gun. [T. 272]. Green stated that he owed money to a gun named Rico and was forced to commit the crime because of his sister's safety.

Neither Smith nor Daniels knew what was happening in the bank. Daniels was standing with Green at the teller counter. [T. 274]. Green asked the teller if he could open an account. ***Id.*** When the teller let Green know that he needed some identification, he asked Daniels whether she had any identification and whether she knew if he had left his in the car. ***Id.*** Daniels informed Green that she did not have any identification and did not know

whether he had left his identification in the car. ***Id.*** A frustrated Daniels then tried to tell Green to leave the bank and she would bring him back when he got his identification. ***Id.***

Mary Ann Trimble, a teller at the bank, also testified that Green came to her counter to open an account. [T. 223]. When she informed Green that he needed some identification, Green asked Daniels something and she said no he did not have anything in the car. ***Id.*** Daniels was there with Green to cash a check or open an account and knew nothing about Green wanting to rob the bank.

The same went for Smith. According to Janet Free, bank teller at the bank, Smith was just walking around the bank. [T. 219]. Also, Mary Ann Trimble stated that Smith continued to move around the bank, and was constantly looking out the window. [T. 226]. Smith could have very well just been walking around the bank, waiting on Green to finish his business at the bank. As in ***Franklin***, just because one person of the group suddenly carries out an illegal act, that does not necessarily mean that the entire group was involved in a conspiracy to commit the crime. Green even testified that Smith had no idea that he was going to rob the bank. Green told them that he was going to treat them out after he cashed a check and played a prank. [T. 300]. Without knowing any details about the prank, a prank in itself is not a crime. Furthermore, Green had both the guns prior to them going into the bank and in the bank. [T. 272]. Neither one of the tellers that testified said that Smith had a gun in the bank. Likewise, when Smith was arrested Smith did not have a gun. No evidence was presented that Smith entered into a common plan with Green to rob the Cleveland State Bank and knowingly intended to further its common purpose. A conspiracy did not exist.

C. The Evidence Did Not Support a Conviction of Attempted Armed Robbery to Stand.

Mississippi Code Annotated Section 97-3-79 (Rev. 1994) provides that "[e]very person who shall feloniously take or attempt to take from the person or from the presence the personal property of another against his will by violence to his person or by putting such person in feat of immediate injury to his person by the exhibition of a deadly weapon shall be guilty of robbery. . . ." "The elements of robbery are felonious intent, force or putting in fear, and carrying away the property of another as a result of the force or fear." ***Thomas v. State***, 754 So.2d 579, 581 (Miss. Ct. App. 2000). *See* ***Glenn v. State***, 439 So.2d 678, 680 (Miss. 1983). "Any person who is present at the commission of a criminal offense and aids, counsels, or encourages another in the commission of that offense is an 'aider and abettor' and is equally guilty with the principle offender." ***Nichols v. State***, 822 So.2d 984, 989 (Miss. Ct. App. 2002) (quoting ***Gleeton v. State***, 716 So.2d 1083, 1088 (Miss. 1998)).

An 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." ***Ishee v. State***, 799 So.2d 70, 73 (Miss. 2001)(quoting ***Bucklew v. State***, 206 So.2d 200, 202 (Miss. 1968). No doubt exists that the third element of attempt has been satisfied. The robbery was not completed. However, the first and second elements are at issue here.

The first element of attempt is the intent to commit a particular crime. Green said numerous times that he never told Smith about his plan to rob the bank. [T. 297, 300, 307, 308]. Smith was not with Green when Rico gave Green an ultimatum to get his money;

hence to rob the bank. [T. 268, 290]. Green told Smith and the others that he wanted to play a prank, without telling the details of the prank. [T. 269, 273]. He then was going to cash a check and treat them out afterwards. ***Id.*** Even looking at the actions of Smith and Daniels in the bank, one could gather that they had no idea that Green was going to rob the bank, much less that they had the intentions to rob the bank.

Both tellers in the bank testified that Smith was just walking around the bank. [T. 219, 226]. One of the tellers stated that he continued to move around the bank, and was constantly looking out the window. [T.226]. No evidence was presented to suggest that Smith was ever at the teller counter. Smith never asked for any money. He was not carrying a gun. He never had any intentions of robbing the bank, nor did he even know that Green was going to rob the bank. The intent to commit the crime of robbery was not present, and the state failed to prove that Smith had the intent.

The second element of attempt "[a]s explained by this Court in ***Bucklew***, what is required is an act which goes beyond mere preparation and which is best suited for the intended purpose." ***Ishee***, 799 So.2d at 73, ***Bucklew***, 206 So.2d at 202-03. "[T]he act may be any act in the series of acts which would ordinarily result in the commission of the crime, and need not be the last or final step in the sequence." ***Id.*** The Mississippi Supreme Court further defined what establishes an overt act:

> [A]n attempt is a direct movement toward the commission of the crime after the preparation have been made; the defendant's act must be a direct, unequivocal act toward the commission of the intended crime; that his acts must have progressed to the extent of giving him power to commit the offense and nothing but an interruption prevented the commission of the offense; that the defendant's act

> must reach fair enough toward the accomplishment of his intention to commit the offense to amount to a commencement of the consummation or to be a step in the direct movement toward its commission; and that some appreciable fragment of the crime must be committed so that the crime would be completed if the defendant were not interrupted.

Id.

"Whenever the design of a person to commit crime is clearly shown, slight acts done in furtherance of this design constitute an 'attempt'." ***Id*** at 203 (quoting ***Williams v. State***, 209 Miss. 902, 48 So.2d 598 (1950)). After Green pled guilty of attempting to rob the Cleveland State Bank, he testified on his own before the court. Green stated that never told Smith about his intentions of robbing the bank. Smith could not have possibly committed act toward the commission of the crime if he knew nothing about the crime.

Smith dressed up as a woman under the idea from Green that they were going to play a prank. Smith goes into the bank with Green assuming he is going to cash a check. All that Smith does in the bank is walk around the bank looking around and looking out the window. No evidence was presented that Smith ever asserts himself toward the commission of the crime. Smith never asked for any money. Nor did Smith ever have a gun. Green continued to testify that Smith had no knowledge of the crime. He and Rico had planned that entire scheme. Without having any knowledge of the crime Smith cannot commit an overt act toward the commission of the robbery, and no evidence was presented that Smith had any knowledge of the crime that was going to be committed by Green.

Accordingly, the trial court erred in not granting Smith's motion for a directed verdict. The Appellant asserts that the Court should reverse and render on this issue.

ISSUE NO. 2

THE TRIAL COURT ERRED IN DENYING SMITH'S MOTION FOR A NEW TRIAL BECAUSE THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

In trial counsel's Motion for Judgment of Acquittal Notwithstanding the Verdict (JNOV) or in the Alternative Motion for a New Trial, counsel specifically argued that the jury's verdict was against the overwhelming weight of the evidence. C.P. 185, R.E. 28. The trial judge denied this motion. C.P. 187, R.E. 30.

In ***Bush v. State***, the Mississippi Supreme Court set forth the standard of review as follows:

> When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, we will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. ***Herring v. State***, 691 So.2d 948, 957 (Miss.1997). We have stated that on a motion for new trial, the court sits as a thirteenth juror. The motion, however, is addressed to the discretion of the court, which should be exercised with caution, and the power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict. ***Amiker v. Drugs For Less, Inc.***, 796 So.2d 942, 947 (Miss.2000). However, the evidence should be weighed in the light most favorable to the verdict. ***Herring***, 691 So.2d at 957. A reversal on the grounds that the verdict was against the overwhelming weight of the evidence, "unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict." ***McQueen v. State***, 423 So.2d 800, 803 (Miss.1982). Rather, as the "thirteenth juror," the court simply disagrees with the jury's resolution of the conflicting testimony. ***Id.*** This difference of opinion does not signify acquittal any more than a disagreement among the jurors themselves. ***Id.*** Instead, the proper remedy is to grant a new trial.

Bush v. State, 895 So.2d 836, 844 (Miss. 2005) (footnotes omitted).

In the present case, even if the court finds that the evidence was sufficient to support the verdict, and Smith is not entitled to an acquittal as a matter of law, he is a minimum entitled to a new trial as the verdict was clearly against the overwhelming weight of the evidence.

Smith was just a friend of Green's and rode over with Green to Greenville. Smith was not present when Green and Rico were playing dice. Smith did not ride with Green and Rico over to Merigold to look at the bank that Rico wanted Green to rob. Green never told Smith about that plan between him and Rico to rob the bank. Green never brought the guns into Daniels house when he received them from Rico, and he maintained possession of them the entire time. Green had both guns with him in the bank in the purse.

Green talked Smith, Daniels, and Glenn into going to play a prank. However, Smith was the only one that was questioning the prank. [T. 269]. Green was telling them that it would be funny to dress up as the opposite sex, go cash a check, and then play a prank, after which he would treat them out. At no point in time did Smith have any knowledge of the bank robbery scheme.

Green also testified about how upset and mad everyone was at him after they ran out of the bank. Everyone in the vehicle, including Smith, was wanting to know what happened. Green stated that there was a lot of yelling and screaming. When they finally stopped at the house, Daniels was furious and slapped the gun off of the seat, obviously mad at Green.

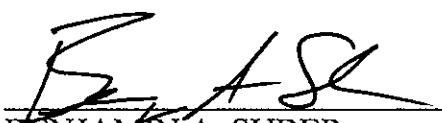
It would be a great injustice for this conviction to stand in that no reasonable juy could convict Smith based on the testimony of Lewis Green and the lack of any other type of evidence implicating Smith.

The verdict was clearly against the overwhelming weight of the evidence. Smith therefore respectfully asserts that the foregoing facts demonstrate that the verdict was against the overwhelming weight of the evidence, and the Court should reverse and remand for a new trial. To allow this verdict to stand would sanction an unconscionable injustice. *See* ***Hawthorne v. State***, 883 So.2d 86 (Miss. 2004).

CONCLUSION

The Appellant contends that the evidence was insufficient to support the verdict and that the Court should reverse and render his conviction. However, should that Court not reverse and render, the Appellant contends that the verdict was against the overwhelming weight of the evidence, and therefore the Court should reverse and remand for a new trial.

Respectfully submitted,
MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Gregory Smith, Appellant

BY: 

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CERTIFICATE OF SERVICE

I, Benjamin A. Suber, Counsel for Gregory Smith, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

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