IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JERRY LAMAR WHITLOCK — APPELLANT

VS. — NO. 2009-KA-1323

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: STEPHANIE B. WOOD
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JERRY LAMAR WHITLOCK **APPELLANT**

VS. **NO. 2009-KA-1323**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

STATEMENT OF THE ISSUES

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING INTO EVIDENCE TESTIMONY REGARDING THE PRE-TRIAL IDENTIFICATION.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN SENTENCING THE APPELLANT.

III. THE TRIAL COURT PROPERLY DENIED THE APPELLANT'S MOTION FOR NEW TRIAL AS THE VERDICT WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

STATEMENT OF THE FACTS

On August 5, 2005, Dottie Smith drove to the BankPlus in Flowood to get the coin change necessary to run her business for the weekend. (Transcript p. 409). She exited the bank with two change bags and noticed a vehicle parked very close to her vehicle in an otherwise empty parking lot. (Transcript p. 410). She unlocked the back door of her vehicle, placed the change bags inside, and immediately locked the door. (Transcript p. 410). As she did this, a man exited the driver's side

of the car parked next to her vehicle. (Transcript p. 410). Both Ms. Smith and the man, later identified as the Appellant, Jerry Lamar Whitlock, were standing inches apart between the vehicles. (Transcript p. 410). The Appellant acted as though he were going to walk past her but instead grabbed the handle of the back door of her vehicle where she had just placed the money. (Transcript p. 410). Ms. Smith ran to the back of the vehicle and the Appellant yelled for her to unlock the door. (Transcript p. 410 - 411). She pushed the panic button on her remote locking device and he yelled again for her to unlock the door. (Transcript p. 411). When she refused, he jumped in his vehicle and drove away. (Transcript p. 411). Ms. Smith was able to write down the tag number of the vehicle he was driving and give a description of the Appellant and the vehicle. (Transcript p. 411).

The Appellant was arrested shortly thereafter. He was tried and convicted of attempted armed robbery. He was sentenced as a habitual offender to life in the custody of the Mississippi Department of Corrections with no chance of probation or parole.[1]

SUMMARY OF THE ARGUMENT

The Appellant did not show sufficient evidence that the show-up identification shortly after the crime was committed gave rise to a substantial likelihood of misidentification. Each of the *Biggers* Factors weighed in favor of the reliability of the identification. As such, the trial court did not abuse its discretion in allowing testimony regarding the pre-trial identification.

The trial court did not abuse its discretion in sentencing the Appellant to life imprisonment without parole or probation. The Appellant was indicted as a habitual offender under Miss. Code Ann. §99-19-83 and met the requirements thereof. According to the statute, the trial court was required to sentence him as it did. Moreover, the Mississippi Court of Appeals recently upheld the

---

[1] Gregg Trigg was seated in the passenger seat of the vehicle driven by the Appellant during the attempted robbery. He was also later arrested and pleaded guilty to attempted armed robbery.

same sentence for the same crime under this statute.

The trial court properly denied the Appellant's Motion for New Trial as the verdict was not against the overwhelming weight of the evidence.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING INTO EVIDENCE TESTIMONY REGARDING THE PRE-TRIAL IDENTIFICATION.

The Appellant first argues that "the identification process was so impermissibly suggestive that [the Appellant] suffered irreparable misidentification." (Appellant's Brief p. 7). The standard of review for such issues has previously been stated by this Court as follows:

> This Court's standard of review regarding the admissibility of evidence is abuse of discretion. *Johnston v. State*, 567 So.2d 237, 238 (Miss.1990). Unless a trial court abuses its discretion in admitting the specific evidence this Court will not find error. *Shearer v. State*, 423 So.2d 824, 826 (Miss.1983). The standard of review for trial court decisions regarding pretrial identification is "whether or not substantial credible evidence supports the trial court's findings that, considering the totality of the circumstances, in-court identification testimony was not impermissibly tainted." *Roche v. State*, 913 So.2d 306, 310 (Miss.2005). We will only disturb the order of the trial court where there is an absence of substantial credible evidence supporting it. *Id.*

Outerbridge v. State, 947 So.2d 279, 282 (Miss. 2006).

The Appellant specifically argues that the "show-up" identification was impermissibly suggestive because there was no necessity for doing so. (Appellant's Brief p. 8). However, as noted by the Mississippi Court of Appeals, the United States Supreme Court has made "clear that the fact of an identification based on a single person show-up is not, of itself, a basis to exclude evidence of the identification" but that "the issue is whether, based on a totality of circumstances, the show-up 'was so unnecessarily suggestive and conducive to irreparable mistaken identification" that it amounted to a deprivation of due process." *Guerrero v. State,* 943 So.2d 774, 778 (Miss. Ct. App. 2006) (quoting *Stovall v. Denno*, 388 U.S. 293, 302, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967), *rev'd*

on other grounds, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987)). "The likelihood of misidentification is what violates a defendant's right to due process." *Johnson v. State*, 884 So.2d 787, 789 (Miss. Ct. App. 2004). Courts are to look to the factors outlined in *Neil v. Biggers*, 409 U.S. 188, 198, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), in order to determine "whether the likelihood of misidentification is so great as to violate the suspect's due process rights." *Id.* Those factors include: "(1) the witness's opportunity to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description; (4) the level of certainty; and (5) the length of time between the crime and the confrontation." *Id.*

a. The witness's opportunity to view the criminal at the time of the crime. Ms. Smith testified that she was very close to the Appellant at the time of the crime, indicating that they were both standing between two vehicles parked side by side in the parking lot. (Transcript p. 415). She further testified that the distance could be measured in inches. (Transcript p. 415 - 416). The crime occurred during daylight and there was nothing obstructing her view of the Appellant. (Transcript p. 416). She also testified that she did not have on sunglasses and that she did get a good look at him. (Transcript p. 416).

b. The witness's degree of attention. Ms. Smith's testimony illustrates that she was paying close attention to the Appellant at the time of the crime. At one point during her testimony she stated that she did not take her eyes off the Appellant. (Transcript p. 411).

c. The accuracy of the witness's prior description. Ms. Smith described the man who attempted to rob her as a black male wearing a white tank top and dark shorts. (Transcript p. 425). When he was arrested, the Appellant was wearing a white tank top and blue shorts. (Transcript p. 433, 485, 487 and 518).

d. The level of certainty. Ms. Smith testified that she was one hundred percent sure that

the Appellant was the man who attempted to rob her. (Transcript p. 450). She also testified that there was no way she got the man in the passenger seat at the time of the attempted robbery confused with the Appellant. (Transcript p. 423).

e. The length of time between the crime and the confrontation. Ms. Smith testified that she arrived at the bank at around 5:00 p.m. (Transcript p. 418). The crime occurred after she finished her banking. The show-up occurred at some time around 6:00 p.m. (Transcript p. 431 and 552). Thus, the time elapsed was around an hour, but not more than two hours.

These factors establish there was a very small, if any, likelihood of misidentification. Ultimately, as this Court noted in *Roche v. State*, "reliability is the linchpin of the inquiry." 913 So.2d 306, 311 (Miss. 2005). As set forth above, there was ample evidence that the identification was reliable. Furthermore, this Court has previously noted that:

> It can thus be observed that an accused who seeks to exclude identification testimony based upon an alleged due process violation faces a very heavy burden. Even though the pretrial identification is impermissibly suggestive, he must still show the conduct gave rise to a very substantial likelihood of misidentification.

Roche, 913 So.2d at 312 (quoting *York v. State*, 413 So.2d 1372, 1384 (Miss.1982)). As this Court held in *Roche*, the Appellant here "has not met his very heavy burden of showing the conduct gave rise to a very substantial likelihood of misidentification, and the issue is without merit." *Id.*

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN SENTENCING THE APPELLANT.

The Appellant next argues that his "sentence of life imprisonment without parole as an habitual offender for attempted automobile burglary is disproportionate to the crime and constitutes cruel and unusual punishment." (Appellant's Brief p. 10). The Appellant was sentenced as a habitual offender under Mississippi Code Annotated §99-19-83 which reads as follows:

> Every person convicted in this state of a felony who shall have been convicted twice

> previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to and served separate terms of one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere, and where any one (1) of such felonies shall have been a crime of violence **shall** be sentenced to life imprisonment, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation.

(*emphasis added*). During the sentencing hearing, testimony was given regarding the Appellant's prior convictions which include: 1) a conviction for rape in the Second Judicial District of Harrison County in 1978, Cause No. 1672, for which the Appellant was sentenced to fifteen years and served more than one year, 2) a conviction for house burglary in the Second Judicial District of Harrison County in 1978, Cause No. 1673, for which the Appellant was sentenced to ten years and served more than one year, 3) a conviction for house burglary in the Second Judicial District of Harrison County in 1978, Cause No. 1674, for which the Appellant was sentenced to ten years and served more than one year, 4) a conviction for burglary in the First Judicial District of Harrison County in 1978, Cause No. 16308, for which the Appellant was sentenced to seven years and served more than one year, 5) a conviction for aggravated assault in the Second Judicial District of Harrison County in 1978, Cause No. 1268, for which the Appellant was sentenced to seven years and served more than one year, and 6) a conviction for robbery in the First Judicial District of Harrison County in 1997, Cause No. 132401-97-00394, for which the Appellant was sentenced to eight years and served more than one year. (Transcript p. 632 - 634).[2] The testimony conclusively proves that the requirements of the statute were met. The Appellant was previously convicted of at least two felonies that were brought out of separate incidents and was sentenced to and served more than one

---

[2] The sentences for cause numbers 1672, 1673, 1674, 16308, and 1268 were all served concurrently. (Transcript p. 637). Concurrent sentences for separate convictions meet the requirements of the habitual offender statute as "separate terms served." *Magee v. State*, 542 So.2d 228 (Miss. 1989). *See also Hughes v. State*, 989 So.2d 434 (Miss. Ct. App. 2008).

year for each. Additionally, he was convicted of more than one violent crimes. Thus, as the statute requires that the Appellant receive the life imprisonment without parole or probation, the trial court properly sentenced the Appellant.

Nonetheless, the Appellant contends that the sentence was disproportionate and harsh. However, it is well established Mississippi law that "[s]entencing is within the complete discretion of the trial court and not subject to appellate review if it is within the limits prescribed by statute." *Gibson v. State,* 731 So.2d 1087, 1097 (Miss. 1998) (citing *Hoops v. State*, 681 So.2d 521, 537 (Miss.1996)). Further, it has been held that "as general rule, a sentence will not disturbed on appeal so long as it does not exceed the maximum term allowed by statute." *Stromas v. State*, 618 So.2d 116, 122 -124 (Miss.1993) (*citations omitted*). Additionally this Court has previously held that , "[d]eclaring a sentence violative of the Eighth Amendment to the U.S. Constitution carries a heavy burden and only in rare cases should this Court make such a finding." *Id.* at 123. (*emphasis added*). Moreover, and most importantly, the Mississippi Court of Appeals upheld a life sentence as a habitual under §99-19-83 for the same crime as the Appellant was convicted, attempted automobile burglary, in *Hawkins v. State,* 11 So.3d 123, 128-129 (Miss. Ct. App. 2008). Thus, the Appellant's sentence was not disproportionate and harsh.[3]

III. THE TRIAL COURT PROPERLY DENIED THE APPELLANT'S MOTION FOR NEW TRIAL AS THE VERDICT WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Finally, the Appellant argues that "the trial court erred in denying [his] Motion for a New Trial because the verdict was against the overwhelming weight of the evidence." (Appellant's Brief

---

[3] The Appellant asserts in support of this issues that "a life imprisonment sentence without parole for essentially grabbing the handle of a vehicle is unconstitutionally too severe and clearly disproportionate to the offense." (Appellant's Brief p. 11). However, "grabbing the handle of a vehicle" does not sufficiently describe the crime. Had Ms. Smith not locked the door of her vehicle and refused to unlock it after the Appellant's demand, the Appellant would have successfully burglarized her automobile.

p. 14). The appellate standard of review for claims that a conviction is against the overwhelming weight of the evidence is as follows:

> [This court] must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial. A new trial will not be ordered unless the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an "unconscionable injustice."

Pierce v. State, 860 So.2d 855 (Miss. Ct. App. 2003) (quoting *Smith v. State*, 802 So.2d 82, 85-86 (Miss. 2001)).

In support of his argument, the Appellant first argues that "Smith was very clear that the driver of the car attempted to rob her" and that "when Dearman pulled over the car, he clearly identified Whitlock as the passenger in the car, not the driver." (Appellant's Brief p. 15). However, this alleged conflict in the testimony was explained during Investigator Jerry McCue's testimony wherein he explained that Gregg Trigg told investigators that the he and the Appellant made a stop between the bank and being pulled over. (Transcript p. 573). The two changed positions in the vehicle when they stopped. Furthermore, "the jury is the sole judge of the credibility of witnesses, and the jury's decision based on conflicting evidence will not be set aside where there is substantial and believable evidence supporting the verdict." *Id.* (quoting *Billiot v. State*, 454 So.2d 445, 463 (Miss.1984) (*emphasis added*). As held by the Court of Appeals:

> 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 their 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.

Nason v. State, 840 So.2d 788, 792 (Miss. Ct. App. 2003) (quoting *Groseclose v. State*, 440 So.2d

297, 300 (Miss.1983)) (*emphasis added*).

Also in support of this issue, the Appellant argues that "no scientific evidence was admitted that showed that Whitlock was the person who attempted to rob Smith" noting that "fingerprints were not taken, no video tapes were introduced showing Whitlock as the person involved in the attempted robbery at the bank." (Appellant's Brief p. 15). However, Mississippi law does not require scientific evidence to support a conviction. In fact, "the testimony of one credible witness is sufficient to sustain a conviction." *Taylor v. State,* 930 So.2d 1268, 1269 (Miss. Ct. App. 2005) (citing *Williams v. State*, 512 So.2d 666, 670 (Miss.1987)).

Additionally, the Appellant argues that because of the weather, "Smith's perception of the individual she saw at the bank could have been inaccurate." (Appellant's Brief p. 16). However, Mississippi law indicates that the appellate court "does not have the task of re-weighing the facts in each case to, in effect, go behind the jury to detect whether the testimony and evidence they chose to believe was or was not the most credible." *Nason v. State,* 840 So.2d 788, 792 (Miss. Ct. App. 2003) The record in this case clearly indicates that there was substantial and believable evidence to support the verdicts. As such, the trial court properly denied the Appellant's motion for new trial.

CONCLUSION

For the foregoing reasons the State of Mississippi respectfully requests that this Honorable Court affirm the conviction and sentence of Jerry L. Whitlock.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

STEPHANIE B. WOOD
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO[redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

CERTIFICATE OF SERVICE

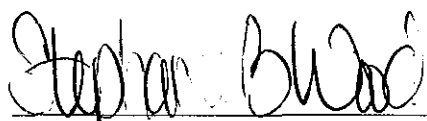
I, Stephanie B. Wood, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Samac S. Richardson
Circuit Court Judge
P. O. Box 1885
Brandon, MS 39043

Honorable Michael Guest
District Attorney
P. O. Box 68
Brandon, MS 39043

Benjamin A. Suber, Esquire
Attorney At Law
Mississippi Office of Indigent Appeals
301 North Lamar Street, Suite 210
Jackson, Mississippi 39201

This the 25th day of February, 2010.



STEPHANIE B. WOOD
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680