IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JERRY LAMAR WHITLOCK **APPELLANT**

V. **NO. 2009-KA-1323-SCT**

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. Jerry Lamar Whitlock, Appellant
3. Honorable Michael Guest, District Attorney
4. Honorable Samac S. Richardson, Circuit Court Judge

This the 10 day of December, 2009.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

Benjamin A. Suber
COUNSEL FOR APPELLANT

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS i

TABLE OF AUTHORITIES iii

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 2

FACTS 2

SUMMARY OF THE ARGUMENT 6

ARGUMENT 7

ISSUE NO. 1
THE IDENTIFICATION PROCESS WAS SO IMPERMISSIBLY SUGGESTIVE THAT WHITLOCK SUFFERED IRREPARABLE MISIDENTIFICATION. 7

ISSUE NO. 2
WHITLOCK'S 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. 10

ISSUE NO. 3
THE TRIAL COURT ERRED IN DENYING WHITLOCK'S MOTION FOR A NEW TRIAL BECAUSE THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE. 14

CONCLUSION 16

CERTIFICATE OF SERVICE 17

TABLE OF AUTHORITIES

FEDERAL CASES

Foster v. California, 394 U.S. 440, 89 S.Ct. 1127, 22 L.Ed.2d 402 (1969) 8

Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977) 8

McGruder v. Puckett, 954 F.2d 313, 317 (5th Cir.1992) 12

Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972) 8, 9

Rummel v. Estelle, 445 U.S. 263, 267 (1980) 13

Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968) 8

Solem v. Helm, 463 U.S. 277, 292 (1983) 11

Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967) 8, 9

STATE CASES

Bell v. State, 769 So.2d 247 (Miss. Ct. App. 2000) 13

Bush v. State, 895 So. 2d 836, 844 (Miss. 2005) 15

Clowers v. State, 522 So.2d 762, 764 (Miss.1988) 11, 12

Davis v. State, 724 So. 2d 342 (Miss. 1998) 13

Herring v. State, 691 So. 2d 948, 957 (Miss.1997) 15

Hoops v. State, 681 So.2d 521, 538 (Miss. 1996) 12

Johnston v. State, 567 So. 2d 237, 238 (Miss. 1990) 7

Lamar v. State, 983 So. 2d 364, 367 (Miss. Ct. App. 2008) 15

Oby v. State, 827 So.2d 731 (Miss.Ct. App. 2002) 12

Roche v. State, 913 So.2d 306, 310 (Miss. 2005) 7, 8

Shearer v. State, 423 So.2d 824, 826 (Miss. 1983) 7

Weaver v. State, 996 So.2d 142, 144 (Miss. Ct. App. 2008) 9, 11

York v. State, 413 So. 2d 1372,1383 (Miss. 1982) 8, 9

STATE STATUTES

Miss. Code Ann. Section 99-19-83 2-5

Miss. Code Ann. Section 99-19-83 14

Miss. Const. Art. 3 Section 28 11

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JERRY LAMAR WHITLOCK — APPELLANT

V. — NO. 2009-KA-01323-SCT

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

STATEMENT OF THE ISSUES

ISSUE NO. 1

THE IDENTIFICATION PROCESS WAS SO IMPERMISSIBLY SUGGESTIVE THAT WHITLOCK SUFFERED IRREPARABLE MISIDENTIFICATION.

ISSUE NO. 2

WHITLOCK'S 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.

ISSUE NO. 3

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

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Rankin County, Mississippi, and a judgment of conviction for the crime of Attempted Automobile Burglary. Whitlock was sentenced to life with the Mississippi Department of Corrections without parole. Whitlock was sentenced as a violent habitual offender pursuant to Miss. Code Ann. Section 99-19-83 (1972, as amended). Whitlock is currently in the custody of the Department of Corrections following a jury trial on May 20-21, 2009, Honorable Samac S. Richardson, presiding.

Whitlock had been previously been tried on two other separate occasions. The trial judge granted a mistrial in the first trial on July 18, 2007. The trial judge issued another mistrial for the second trial after the jury could not reach a verdict on February 25, 2009.

FACTS

On Friday, August 5, 2005, Dottie Smith (Smith) went to the BankPlus in Flowood to get coin change for the weekend. Tr. 409. As Smith exited the BankPlus, she noticed that another vehicle was backed into a parking spot next to her vehicle. *Id.* Smith's vehicle was facing away from the bank and the other vehicle was backed in beside her vehicle facing the bank. *Id.* Smith testified that she thought it was strange that the vehicle was parked next to her with the other parking spaces empty. Tr. 409-10.

Smith continued to testify that as she approached her vehicle, she unlocked the

doors to her vehicle. Tr. 410. She opened the back passenger door to her vehicle and placed the bags of change on the seat and started to shut the door. *Id.* As Smith was shutting the back door, she heard the driver's door on the vehicle beside her began to open. *Id.* Once the back door on her vehicle was shut, Smith clicked the lock button on her remote and locked all the doors on her vehicle. *Id.*

Smith then noticed that a black male was standing there looking at her as if he was about to go toward the bank. *Id.* Smith and the black male were in between the only two vehicles. *Id.* The black male said "excuse me", and walked pass Smith. *Id.* Smith then walked up a few steps to get into her vehicle, which was still locked. *Id.* Before Smith had an opportunity to unlock the door, the man placed his hand on the door handle of Smith's vehicle where Smith had just placed the money. *Id.*

The man pulled on the door handle and realized that the door was in fact locked. *Id.* Smith continued to testify that as the man was trying to get into her vehicle, she ran to the back of the man's car. *Id.* The man began to yell at Smith to unlock the vehicle. Tr. 410-11. Smith, standing there looking at him, told him "No." Tr. 411.

As the man was telling Smith to unlock the door, Smith was attempting to find her panic button on her key chain. Tr. 411. Smith finally found the panic button and the horn started blowing on her vehicle, as the man continued to yell for Smith to unlock the door. Id. The man finally got into the driver's side of his vehicle and drove away. *Id.* Smith was standing behind the man's vehicle and read the tag on the vehicle. *Id.* Smith

immediately ran straight into the bank and grabbed a bank slip to write down the tag number of the vehicle. *Id.*

Smith claimed that she ran into the bank voicing that someone had tried to rob her in the parking lot. Tr. 424. Smith also told one of the bank employees that the man in the parking lot was wearing a white tank top and some dark colored shorts. *Id.* She also described the color of the car and the tag number. *Id.* Someone from the bank then called 911 and reported the incident and gave the information to the police. *Id.*

State Trooper Wayne Dearman (Dearman) heard on his radio about an attempted robbery. Tr. 479. Dearman heard that two black males attempted a robbery at the BankPlus and he got a vehicle description and a tag number. Tr. 480. As Dearman was trying to write this information down on a note pad in his car, he noticed a vehicle that passed him that appeared to be the vehicle described on the police radio. Tr. 481.

Dearman immediately turned around to initiate a stop and the alleged suspects pulled into a driveway. Tr. 482. Dearman turned on his blue lights and pulled up behind the car. Tr. 483. The driver of the car got out of the vehicle and Dearman ordered him to the ground. Tr. 484. The passenger got out of the vehicle, acting like he wanted to get on the ground, but just eased away and kicked off his flip-flops and ran from the area. *Id.* Officer Dearman noticed that the passenger of the car had on a white tank top and blue shorts. Tr. 484-85.

As Dearman went back to the patrol car to get on the radio to tell about the passenger of the car running away from the area, the driver of the vehicle jumped up and

goes through a little garden and through the woods. Tr. 485. Dearman described the driver of the vehicle as wearing a white tee shirt, a regular tee shirt, and Hawaiian shorts. *Id.* Dearman then notified the Rankin County Sheriff's Office that two suspects were on foot and that he needed help. *Id.*

Sidney Spann (Spann) testified that on August 5, 2005, someone came through his back gate and came to the door. Tr. 512. The man at the door told Spann that he needed to use the phone. *Id.* The man told Spann that someone had tried to rob him and that he wanted to call someone. Tr. 512-13. Spann stated that he did not let the man inside because he had cuts on his feet and his feet were bleeding. Tr. 513. Spann allowed the man at the door to use the phone and about the time the man was finished an officer arrived at Spann's property. Tr. 514.

Officer Sentel Easterling (Easterling) claimed he observed a black male wearing a white tank top and dark colored shorts trying to get into a residence. Tr. 518. Easterling ordered the man to the ground, handcuffed him, and escorted him back towards his patrol car. *Id.* The man in that was at Spann's house and in the passenger seat of car, wearing a white tank top and dark colored shorts was identified as Jerry Whitlock (Whitlock). Tr. 529.

Whitlock was taken to a mini storage unit and taken out of the car and Smith positively identified him as the person that attempted to rob her at the BankPlus parking lot. Tr. 531. At approximately, eleven o'clock on August 5, 2005, is when the second

suspect was apprehended. Tr. 533. The second suspect was identified as Gregory Trigg (Trigg).

Charlene Sims (Sims) testified for Whitlock in his defense. Tr. 578-83. Sims stated that Trigg was her son and that Whitlock was her fiancé. Tr. 579. In Sims testimony, she told the court that she was with Whitlock and Trigg on August 5, 2005. Tr. 579-80. Sims said they all went to Wal-mart and that Trigg was driving when caught out of the car. Tr. 580.

SUMMARY OF THE ARGUMENT

The identification procedures performed by the police department were unfairly suggestive, all identification stemming from the show up procedure should have been inadmissible at trial. For those reason, this Honorable Court should reverse Jerry Lamar Whitlock's conviction and remand for a new trial without inadmissible evidence used to convict him.

Appellant also asserts that a life imprisonment sentence without parole for possessing grabbing a vehicle door is unconstitutionally too severe and clearly disproportionate to the offense. A ***Solem*** analysis leads to the legally sound conclusion that Jerry Lamar Whitlock's sentence is patently unconstitutionally disproportionate to his offense and should be vacated.

The verdict was also against the overwhelming weight of the evidence. No fingerprints or video evidence was submitted to the court associating Whitlock to the

attempted robbery. The verdict was against the overwhelming weight of the evidence and this was reversible error. Jerry Lamar Whitlock is entitled to a new trial.

ARGUMENT

ISSUE NO. 1

THE IDENTIFICATION PROCESS WAS SO IMPERMISSIBLY SUGGESTIVE THAT WHITLOCK SUFFERED IRREPARABLE MISIDENTIFICATION.

The standard of review on appeal 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, the appellate court will not find error. ***Shearer v. State***, 423 So.2d 824, 826 (Miss. 1983).

The standard of review for trial court decision concerning 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). The appellate court will only disturb the trial court's order where there is an absence of substantial credible evidence supporting it. *Id.*

After the incident, Smith went into the bank and a bank employee called the police. Tr. 424. The police responded to the call and Smith and a bank employee gave the police a description of the car that the alleged robbers were driving, including a license plate number. *Id.* The police were also notified that the man that allegedly was attempting to rob Smith was wearing a white tank top and some dark colored shorts. *Id.*

Easterling claimed he observed a black male wearing a white tank top and dark colored shorts trying to get into a residence. Tr. 518. Easterling ordered the man to the ground, handcuffed him, and escorted him back towards his patrol car. *Id.* The man in that was at Spann's house and in the passenger seat of car, wearing a white tank top and dark colored shorts was identified as Jerry Whitlock (Whitlock). Tr. 529.

Whitlock was taken to a mini storage unit and taken out of the car and Smith positively identified him as the person that attempted to rob her at the BankPlus parking lot. Tr. 531.

"Only pretrial identifications which are suggestive, without necessity for conducting them in such manner, are proscribed. A lineup or series of photographs in which the accused, when compared with the others, is conspicuously singled out in some manner from the others, either from appearance or statements by an officer, is impermissibly suggestive." ***York v. State***, 413 So. 2d 1372,1383 (Miss. 1982); *See* ***Foster v. California***, 394 U.S. 440, 89 S.Ct. 1127, 22 L.Ed.2d 402 (1969); ***Simmons v. United States***, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968).

"A showup in which the accused is brought by an officer to the eyewitness is likewise impermissibly suggestive where there is no necessity for doing so." ***York*** at 413 So.2d 1383. *See* ***Manson v. Brathwaite***, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977) (impermissively suggestive); ***Neil v. Biggers***, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972) (same); ***Stovall v. Denno***, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967) (not impermissively suggestive).

"The practice of showing suspects singly to persons for the purpose of identification and not part on a lineup has been widely condemned." ***Stovall v. Denno***, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967); See also, ***York v. State***, 413 So. 2d 1372,1381 (Miss. 1982).

As pointed out in ***York***, an unnecessarily suggestive pretrial identification does not alone require exclusion of the identification evidence which may be admitted if the identification is reliable under the totality of the circumstances. ***York***, 413 So. 2d at 1381.

An impermissibly suggestive pretrial identification does not preclude an in-court identification by an eyewitness who viewed the suspect at the procedure, unless: (1) from the totality of the circumstances surrounding it (2) the identification was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Id* at 1383..

In determining the validity of identification testimony, this Court must look to the five factors from ***Neil v. Biggers***, 409 U.S. 188, 199-200, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). These factors were adopted by our Supreme Court in ***York***, 413 So.2d at 1383, and are as follows: (1) "the opportunity of the witness 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 of the criminal"; (4) "the level of certainty demonstrated by the witness at the confrontation"; and (5) "the length of time between the crime and the confrontation." ***Weaver v. State***, 996 So.2d 142, 144 (Miss. App. 2008).

Whitlock was apprehended over a mile away from the place where the crime happened. The crime occurred around late in the afternoon on a rainy day, which means it could have been difficult to identify an individual clearly. Smith identified the driver of the car with certainty as the man that attempted to rob her, however, Dearman clearly identifies Whitlock as the man that got out of the passenger side of the car. Tr. 484

Smith identified Whitlock immediately as the one who allegedly attempted to rob her at the BankPlus at the mini storage building. It was late in the afternoon outside on a day that it had been raining all day and it would have been tough for her to view the alleged robber with a degree of attention. Because the identification procedures performed by the police department were unfairly suggestive, all identification stemming from the show up procedure should have been inadmissible at trial. For those reason, this Honorable Court should reverse Jerry Whitlock's conviction and remand for a new trial without inadmissible evidence used to convict him.

ISSUE NO. 2

WHITLOCK'S 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.

Whitlock asserts that a sentence of life imprisonment without parole is unduly harsh and constitutes cruel and unusual punishment. The State moved to amend the indictment to sentence Whitlock as a habitual offender. Tr. 634. The State submitted evidence that Whitlock had at least two prior felonies, one conviction in 1978 for Rape

and sentenced to a term of fifteen (15) years in the custody of the Mississippi Department of Corrections. Tr. 632.. Furthermore the prosecution alleged that Whitlock was convicted in Harrison County for Burglary and sentence to a term of ten (10) years in the custody of the Mississippi Department of Corrections. *Id.*

Appellant asserts 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. U.S. Const. Eighth and Fourteenth Amendments, Miss. Const. Art. 3 § 28.

The United States Supreme Court in ***Solem v. Helm***, 463 U.S. 277, 292 (1983), set out three factors for courts to consider when conducting a proportionality analysis. The criteria are:

(1) the gravity of the offense and the harshness of the penalty;

(2) the sentences imposed on other criminals in the same jurisdiction; and

(3) the sentences imposed for commission of the same crime in other jurisdictions. In ***Solem***, the Court held a life sentence without parole to be unconstitutional for the crime of writing a $100 bad check on a nonexistent bank account, even though the defendant had been convicted of six prior felonies including three for burglary. *Id.*

The Mississippi Supreme Court has consistently applied ***Solem*** in reviewing the imposition of habitual sentences. The case of ***Clowers v. State***, 522 So.2d 762, 764 (Miss.1988), is a good example. In ***Clowers***, the defendant was an habitual offender with a new conviction of forging a $250 check. As an habitual offender, Clowers was subject

to the mandatory maximum sentence of fifteen years without parole. *Id.* The trial court imposed a sentence of less than fifteen years on the grounds that the mandatory maximum sentence would be disproportionate to the crime. *Id.*

The ***Clowers*** court affirmed the trial court, acknowledging that "a criminal sentence [even though habitual] must not be disproportionate to the crime for which the defendant is being sentenced." *Id.* at 765. Also, even though a trial judge may lack the usual discretion in sentencing an habitual offender, it "does not necessarily mean the prescribed sentence meets federal constitutional proportionality requirements." *Id.* See also ***Hoops v. State***, 681 So.2d 521, 538 (Miss. 1996).

In ***Oby v. State***, 827 So.2d 731 (Miss.App. 2002), where a violent habitual drug dealer's life sentence was affirmed as being proportionate, the Court reiterated the important point that in a ***Solem*** review, a "correct proportionality analysis for a habitual offender sentence does not consider the present offense alone, but within the habitual offender statute." In other words, a reviewing court, and the trial court, should review an offender's past offenses together with the present offense.

In ***McGruder v. Puckett***, 954 F.2d 313, 317 (5th Cir.1992), the court recognized the ***Solem*** three-part test be applied "when a threshold comparison of the crime committed to the sentence imposed leads to an inference of gross disproportionality." The violent habitual defendant in ***McGruder*** was sentenced to life imprisonment after his last offense of auto burglary. McGruder's prior convictions were armed robbery, burglary, escape, and auto burglary, and the Fifth Circuit held that McGruder's life

sentence was not grossly disproportionate to his current offense. The ***McGruder*** court made it clear that an habitual sentence analysis is based on the sentence rendered in response to the severity of the current offense taking the prior offenses into consideration secondarily.

In ***Rummel v. Estelle***, 445 U.S. 263, 267 (1980), the defendant had two prior felonies of credit card fraud and uttering a forgery, and was convicted of a third felony of false pretenses. Rummel was sentenced to life in prison, a mandatory recidivist sentence for non-violent offenders. The Court held that Rummel's sentence was not unconstitutionally disproportionate to the offense "even though the total loss from the three felonies was less than $250," in part because he was eligible for parole after twelve (12) years. Whitlock has no hope for parole.

In ***Bell v. State***, 769 So.2d 247, (¶8-16) (Miss. App. 2000), a drug dealer was tried and sentenced as a non-violent habitual offender. The trial judge reviewed Bell's prior convictions and afforded Bell the opportunity to present mitigating evidence. According to the court in ***Bell***, the trial judge is required to justify, on the record, any sentence that appears harsh or severe for the charge. Citing ***Davis v. State***, 724 So. 2d 342 (¶10) (Miss. 1998), the ***Bell*** Court recognized that, "[i]n essence, the Mississippi Supreme Court set forth a requirement that the trial judge justify any sentence that appears harsh or severe for the charge." *Bell*, 769 So. 2d at ¶15.

The previous convictions of Bell were acknowledged by the trial judge at the sentencing hearing prior to Bell receiving his habitual sentence. The *Bell* court

"considered the gravity of the offense with the harshness of the sentence before imposing the thirty year sentence" which was a proper use of "the broad discretionary authority granted to it." Bell's sentence was not seen as disproportionate, so no further review under ***Solem*** was conducted. *Id.* at ¶16.

In the present case, Whitlock was convicted of attempting to break into the vehicle of Smith. Essentially, allegedly grabbing the door of Smith's vehicle. Yet, without commenting on the apparent harshness of the sentence, the court sentenced Whitlock in accordance with Miss. Code Ann. §99-19-83, to life imprison without the possibility of parole.

Applying the ***Solem*** test here, it is clear that the grabbing the door of Smith's vehicle is petty. A ***Solem*** analysis leads to the legally sound conclusion that Whitlock's sentence is patently unconstitutionally disproportionate to his offense and should be vacated. If the Court does not reverse the conviction altogether, at a minimum, Whitlock's case should be remanded for resentencing, with him present, to include a proportionality hearing is required by ***Bell***, *supra*.

ISSUE NO. 3

THE TRIAL COURT ERRED IN DENYING WHITLOCK'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.284, R.E. 38 The trial judge denied this motion. C.P. 287, R.E. 41.

In reviewing a challenge to the weight of the evidence, the verdict will be only be disturbed "when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." ***Bush v. State***, 895 So. 2d 836, 844 (Miss. 2005). The evidence is viewed in the light most favorable to the verdict. *Id.* (citing ***Herring v. State***, 691 So. 2d 948, 957 (Miss.1997)). This Court "sits as a hypothetical thirteenth juror." ***Lamar v. State***, 983 So. 2d 364, 367 (¶5) (Miss. Ct. App. 2008) (citing ***Bush***, 895 So. 2d at 844 (¶18)). "If, in this position, the Court disagrees with the verdict of the jury, 'the proper remedy is to grant a new trial.'" *Id.* In the instant case, the overwhelming weight of the evidence established that Whitlcok did not attempt to rob Smith at the BankPlus.

Smith was very clear that the driver of the car attempted to rob her. Tr. 447. However, when Dearman pulled over the car, he clearly identified Whitlock as the passenger in the car, not the driver. Tr. 484.

Furthermore, no scientific evidence was admitted that showed that Whitlock was the person who attempted to rob Smith. Fingerprints were not taken, no video tapes were introduced showing Whitlock as the person involved in the attempted robbery at the bank.

Also, on August 5, 2005, the weather did not appear from the record to be good. Smith stated that she went into the bank and when she came out she was carrying two bags and an umbrella. Tr. 409. Also, Spann testified that the weather was bad and that it

had been raining all day long. Tr. 514. Due to the weather and the rain Smith's perception of the individual see saw at the bank could have been inaccurate.

The verdict was against the overwhelming weight of the evidence. Whitlock 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.

CONCLUSION

Jerry Lamar Whitlock respectfully requests that his conviction of attempted automobile burglary be reversed and remanded, or in the alternative, that the conviction be remanded for resentencing.

Respectfully submitted,

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For Jerry Lamar Whitlock, Appellant

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CERTIFICATE OF SERVICE

I, Benjamin A. Suber, Counsel for Jerry Lamar Whitlock, 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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