IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

GLORIA B. CATLING **APPELLANT**

V. **NO. 2009-KA-2029-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. Gloria B. Catling, Appellant
3. Honorable Ronnie Harper, District Attorney
4. Honorable Forrest A. Johnson, Circuit Court Judge

This the 12th day of March, 2010.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

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GLORIA B. CATLING — APPELLANT

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STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

STATEMENT OF THE ISSUES

I. **THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT AS TO COUNT I, AND, ALTERNATIVELY, THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.**

II. **THE VERDICTS AS TO COUNTS II, III, AND IV WERE AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.**

STATEMENT OF THE CASE

This case proceeds from the Circuit Court of Amite County, Mississippi, and a judgment of conviction for one count of Grand Larceny (Count I) and three counts of Fraudulent Use of a Debit Card and Identity to Obtain Thing of Value (Counts II, III, and IV) entered against Gloria B. Catling following a jury trial on October 27, 2009, the Honorable Forrest A. Johnson, Jr., Circuit Judge,

presiding. (C.P. 31-37, R.E. 2-7). The trial court sentenced Catling to serve a tem of eight (8) years on Count I; on Counts II, II, and IV, Catling was sentenced to serve four (4) years on each count, to run concurrent with each other, but consecutive to eight-year sentence in Count I, for a total sentence of twelve (12) years in the custody of the Mississippi Department of Corrections. (C.P. 36-37, Tr. 121-22, R.E. 6-7). The trial court denied Catling's motion for judgment notwithstanding the verdict or, in the alternative, motion for a new trial. (C.P. 41-43, R.E. 8-10). Catling is presently incarcerated and now appeals to this Honorable Court for relief.

STATEMENT OF THE FACTS

The charges against Gloria Catling ("Catling") stem from her employment with Juanita and Allen Johanningmeier. In late September or early October, 2008, Juanita Johanningmeier ("Juanita") hired Catling through an agency to work as a caretaker for her elderly husband, Allen. (Tr. 37-38, 85). Juanita described Catling as "pleasant" and an overall good worker. (Tr. 38). Soon after Catling began working, Juanita gave her an advance of $140 to help pay rent. (Tr. 45). Catling testified that Juanita paid her by check, and also supplemented her pay with cash sometimes. (Tr. 86).

Catling testified that Juanita was going through her jewelry one morning and asked her if she wanted some rings; according to Catling, Juanita gave her several rings and a bracelet. (Tr. 91). At trial, Catling's mother, Retta Catling ("Retta"), recalled that Catling told her that Juanita gave her the rings. (Tr. 77).

One day in November, Catling asked Juanita for more hours because she had some bills due. (Tr. 87). According to Catling, Juanita told her the insurance company would not allow her to pay for more hours, but she offered to help pay some of her bills and told Catling to bring her account numbers the next day. (Tr. 87). The next day, Catling forgot to bring her account numbers, so she

called her mother, Retta, to get them. (Tr. 87). Catling testified that Retta read the account numbers over the phone and Juanita was standing right there by her. (Tr. 87). Similarly, Retta recalled that, as she read the account numbers over the phone, she (Retta) could hear Juanita in the background repeating the numbers. (Tr. 79, 83). Catling testified that she called Dish Network and Direct General, but she handed the phone to Juanita to give her account information to pay the bills. (Tr. 88). Catling stated that she never held Juanita's debit card in her hand, and she never knew Juanita's debit card number. (Tr. 88-89).

At trial, Juanita testified that she noticed three charges that she did not recognize as being hers when she was reconciling her November, 2008, bank statement. (Tr. 39-42, Ex. 1). The first charge was dated November 3, 2008, and indicated a payment made to Dish Network in the amount of $208.00; the second was dated November 7, 2008, and indicated a second payment to Dish Network in the amount of $283.14; the third was dated November 10, 2008, and indicated a payment to Direct Insurance in the amount of $168.33. (Tr. 39-42, Ex. 1). Juanita testified that Catling was present at the time she noticed the charges, and Catling told her that employees at the bank could have done that. (Tr. 39, 46).

Sylvia Koon, an employee at First Bank, McComb (Juanita's bank), testified that Juanita reported the three unauthorized transactions on her debit card, and First Bank returned the monies to Juanita's bank account. (Tr. 48-49). At trial, Juanita claimed that she never gave Catling permission to use her debit card. (Tr. 43).

Juanita also testified that she later discovered that she was missing three rings. (Tr. 70). She described one missing ring as a "wide gold band with a center solitaire diamond on it with diamonds on each side." (Tr. 70). She described a second missing ring as "a cluster ring, gold ring with diamond surrounding, a pinkie ring, but it was a mound of diamonds on it." (Tr. 70). At trial,

Juanita initially could not recall what the third ring looked like; she later claimed to remember that the ring was "a little gold ring." (Tr. 70, 71).

Juanita testified that, a day or two after she notified the police, Retta came to her house, and Jaunita mentioned that she was missing some rings. (Tr. 71). Retta left and returned to Juanita's house about thirty minutes later with four rings. (Tr. 71). Juanita then testified that she had forgotten the fourth missing ring, which she described as "a cocktail ring, elongated, and a diamond in the center of it." (Tr. 71).

Officer Nathan Toney, Chief of Police for the Liberty Police Department, testified that Juanita contacted him regarding the debit card payments and also reported some missing jewelry. (Tr. 53-54, 62). Officer Toney's investigation led to Catling, who provided the following written statement:

> I Gloria Catling . . . I didn't mean to do it but I did. Don't remember how I did it but I did. Please tell Ms. Nita Johanningmeier that I am sorry. I used her debit card so she say to pay my insurance, dish network. Dish Network twice I was at her home, Direct Insurance once I was at her home.

(Tr. 61, Ex. 3).

After deliberations, the jury found Catling guilty of one count of grand larceny and three counts of fraudulent use of a debit card.

SUMMARY OF THE ARGUMENT

The evidence was insufficient to support the verdict as to Count I. Under the reasoning of this Court's holding in *Williams v. State*, 763 So. 2d 186, 187-88 (¶¶4-10) (Miss. Ct. App. 2000), the State failed to present sufficient evidence to establish beyond a reasonable doubt that the value of the property was $500 or more. The only evidence of value was Juanita's answer, "yes," to the prosecutor's question whether the rings would have been valued at more than $500 . For reasons

explained in more detail in the argument section, this testimony was insufficient under this Court's reasoning in *Williams*. Accordingly, Catling is entitled to have her conviction and sentence for grand larceny reversed and, pursuant to the direct remand rule, remanded for re-sentencing for petit larceny under Mississippi Code Annotated Section 97-17-43(1).

Alternatively, the verdict as to Count I was against the overwhelming weight of the evidence, which showed that Catling took the rings with Juanita's consent. Although Juanita did not remember having a conversation with Catling about the rings, Catling testified that Juanita gave her the rings, and Catling's mother, Retta, testified that Catling told her the same. Also, Juanita liked Catling and had previously given Catling additional money. Thus, the rings were not the first gratuity Juanita had given Catling. Because the weight of the evidence tended to showed that Juanita gave Catling the rings, Catling is entitled to have her conviction and sentence for grand larceny reversed and remanded for a new trial.

Additionally, the verdicts as to Counts II, III, and IV were against the overwhelming weight of the evidence. The weight of the evidence showed that Juanita agreed to and, in fact, helped Catling pay the bills. The weight of the evidence also showed that Catling never made a false statement or representation regarding her identity or Juanita's identity, as required by Mississippi Code Annotated Section 97-19-85 (Rev. 2006). Accordingly, Catling submits that she is entitled to have her convictions and sentences on Counts II, III, and IV reversed and remanded for a new trial.

ARGUMENT

I. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT AS TO COUNT I, AND, ALTERNATIVELY, THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

On Count I, Gloria was charged with grand larceny under Mississippi Code Annotated

Section 97-17-41, which provides that one is guilty of grand larceny for "taking and carrying away, feloniously, the personal property of another, of the value of Five Hundred Dollars ($500.00) or more. . . ." Miss. Code Ann. § 97-17-41(1) (Rev. 2009). For the reasons explained below, the evidence was insufficient to support the verdict as to Count I, and Catling is entitled to have her conviction and sentence for grand larceny reversed and, pursuant to the direct remand rule, remanded for re-sentencing for petit larceny under Mississippi Code Annotated Section 97-17-43(1). Alternatively, the verdict was against the overwhelming weight of the evidence, and Catling is entitled to new trial.

A. The Evidence was Insufficient to Support the Verdict as to Count I because the State Failed to Establish Beyond a Reasonable Doubt that the Value of the Property was $500 or more.

The only evidence of the value of the property in the instant case came from the victim, Juanita, who simply answered "yes" when asked if the jewelry would have been valued at more than $500. (Tr. 70). Under the reasoning of this Court's holding in *Williams v. State*, 763 So. 2d 186, 187-88 (¶¶4-10) (Miss. Ct. App. 2000), the State failed to present sufficient evidence to establish beyond a reasonable doubt that the value of the property was $500 or more. Thus, Catling is entitled to have her conviction and sentence for grand larceny reversed and, pursuant to the direct remand rule, remanded for re-sentencing for petit larceny under Mississippi Code Annotated Section 97-17-43(1).

In reviewing the sufficiency of the evidence, the relevant inquiry is whether, "viewing the evidence in the 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*, 443 U.S. 307, 315, 99 S.Ct. 2781, (1979)). The verdict will not be disturbed where the evidence so reviewed is such that "reasonable fair-minded men in

the exercise of impartial judgment might reach different conclusions on every element of the offense." *Id.* (citing *Edwards v. State*, 469 So. 2d 68, 70 (Miss.1985)). However, the proper remedy is to reverse and render where the evidence "point[s] 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[.]" *Id.*

In *Willaims v. State*, the defendant was convicted of possession of stolen property of a value greater than $250. *Williams v. State*, 763 So. 2d 186, 187 (¶¶1-3) (Miss. Ct. App. 2000). There, the owner of the stolen property–a stereo and a flashlight–testified that he paid $600 dollars for the stereo two-and-a-half years before the theft, and he paid $110 for the flashlight one year before the theft; he also stated that both items were in good condition. *Williams*, 763 So. 2d at 188 (¶6). This Court identified the proper measure of value in a larceny case as "the property's market value on the date of the crime." *Id.* at (¶7) (citing *Barry v. State*, 406 So. 2d 45, 47 (Miss. 1981)).

In holding that the victim's testimony was insufficient to establish that the market value of the items at the time of the theft was $250 or more, this Court found that the owner's testimony alone was not competent evidence. *Id.* at (¶8). To this end, this Court concluded that "[w]ithout evidence from *someone familiar with the market value of the used stereo or flashlight*, there was nothing for the jury to consider in deciding whether this property was worth more than $250. *Id.* at 189 (¶10). This Court added that "[the jury] could speculate, but that is insufficient." *Id.*

As in *Williams*, the only evidence of the value of the property in the instant case came from the victim, Juanita, who simply answered "yes" when asked if the jewelry would have been valued at more than $500. (Tr. 70). As in *Williams*, Juanita's testimony as to value was not sufficient evidence for the jury to find that the property was worth at least $500. As in *Williams*, "without someone familiar with the market value of the used [jewelry], there was nothing for the jury to

consider in deciding whether this property was worth more than [$500]. They could speculate, but that is insufficient." *Id.* Thus, under *Williams*, the State failed to provide sufficient evidence to establish beyond a reasonable doubt that the value of the property was $500 or more.[1]

Accordingly, the State's failure to present sufficient evidence on Count I warrants reversal of Catling's conviction and sentence for grand larceny and remand for re-sentencing on petit larceny under Mississippi Code Annotated Section 97-17-43(1). *See Williams*, 763 So. 2d at 189 (¶10); *Henley v. State*, 729 So. 2d 232, 238 (¶28) (Miss. 1998) (following the direct remand rule, which provides for a remand for re-sentencing on a lesser included offense).

B. The Verdict as to Count I was Against the Overwhelming Weight of the Evidence, which Showed that Catling Took the Rings with Juanita's Consent.

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*, 895 So. 2d at 844. 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.*

"Grand larceny requires evidence of specific intent to deprive the owner of his property wholly and permanently." *State v. Smith*, 652 So. 2d 1126, 1127 (Miss. 1995) (quoting *Slay v. State*,

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[1]Applying this Court's holding in *Williams* to the instant case, is especially warranted in the instant case, where the property to be valued is jewelry. This is so because of the significant possibility that the jewelry could be costume jewelry. Although, Juanita claimed that the jewelry was real, there is a very reasonable possibility that she was mistaken; someone familiar with the market for jewelry was necessary to make an informed determination on this point, and provide a reliable valuation of the jewelry for the jury to consider.

241 So. 2d 362, 364 (Miss. 1970)). To prove one guilty of grand larceny, the State must establish that the defendant "took and carried away, at any time, personal property belonging to another *without the owner's consent*, under circumstances where the accused was not entitled to possession of the property." *Smith*, 652 So. 2d at 1127 (quoting *Strong v. Nicholson*, 580 So. 2d 1288, 1294 (Miss. 1991) (emphasis added).

In addition to the State's failure to establish the value of the property, the weight of the evidence showed that Catling took the rings with Juanita's consent. "The intent to commit a crime or to do an act by a free agent can be determined only by the act itself, surrounding circumstances, and expressions made by the actor with reference to his intent." *Shive v. State*, 507 So. 2d 898, 900 (Miss. 1987) (citing *Newburn v. State*, 205 So. 2d 260 (Miss. 1967)). Although Juanita did state at trial that she never had a conversation with Catling about the rings, Catling testified that Juanita gave her the rings and a bracelet one morning when Juanita was going through her jewelry. (Tr. 91). Furthermore, the evidence contained an expression of Catling with reference to her intent: Catling's mother, Retta, also testified that she remembered Catling telling her that Juanita gave her the rings. (Tr. 77). Also, the surrounding circumstances showed that Juanita liked Catling and previously gave her additional money to pay her bills. (Tr. 45). Thus, it is reasonable to conclude that Juanita engaged in another act of kindness on the morning she was going through her jewelry.

Accordingly, Catling submits that she is entitled to have her conviction and sentence for grand larceny reversed and remanded for a new trial.

II. THE VERDICTS AS TO COUNTS II, III, AND IV, WERE AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

On Counts II, III, and IV, Gloria was indicted under Mississippi Code Annotated Section 97-19-85, which provides in relevant part:

> (1) Any person who shall make or cause to be made any false statement or representation as to his or another person's or entity's identity, social security account number, credit card number, debit card number or other identifying information for the purpose of fraudulently obtaining or with the intent to obtain goods, services or any thing of value, shall be guilty of a felony. . . .
>
> (2) A person is guilty of fraud under subsection (1) who:
>
> (a) Shall furnish false information willfully, knowingly and with intent to deceive anyone as to his true identity or the true identity of another person. . . .

Miss. Code Ann. § 97-19-85 (Rev 2006).[2]

Section 97-19-85 requires State to prove that the defendant "[made or caused] to be made any *false statement or representation as to his or another person's or entity's identity*, social security account number, credit card number, debit card number or other identifying information. Miss Code Ann. § 97-17-85(1). Subsection two further provides that one commits fraud if he or she "*furnish[es] false information* willfully, knowingly and *with intent to deceive anyone as to his true identity* or the true identity of another person. . . ." Miss Code Ann. § 97-17-85(2)(a). Thus, a plain reading of this statute requires the State to prove that Catling made a false statement or representation as to her or Juanita's identity to deceive another.

While Juanita claimed at trial that she never gave Catling permission to use her debit card, Catling testified that she asked Juanita for more hours because she had some bills due, and Juanita offered to help pay some of her bills and told her to bring her account numbers the next day. (Tr. 87). Catling forgot to bring her account numbers the next day, but she called her mother, Retta, to get them. (Tr. 87). Catling testified that Juanita was sitting right by her when Retta read the account numbers over the phone. (Tr. 87). Further, Catling testified that she called Dish Network and Direct

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[2] The remainder of subsection two (i.e., (2)(b) *et al*) deals only with social security fraud.

General, but she handed the phone to Juanita to give her account information to pay the bills. (Tr. 88). Catling testified that she never held Juanita's debit card in her hand, and she never knew Juanita's debit card number. (Tr. 88-89). Significantly, Retta testified that she heard Juanita in the background repeating the numbers when she (Retta) read them over the phone. (Tr. 79, 83). Retta's testimony is consistent with Catling's, and it tends to show that Juanita and Catling, collectively, were in the process of paying Catling's bills.

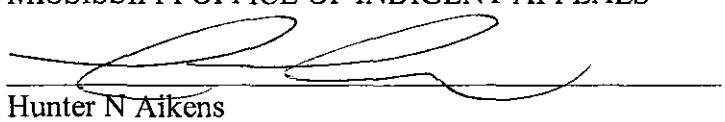
In sum, the weight of the evidence shows that Juanita agreed to and, in fact, helped Catling pay the bills. Additionally, the evidence showed that Catling never made a false statement or representation regarding her identity or Juanita's identity. Instead, Catling handed the phone to Juanita so that she could provide her information to pay the bills. Accordingly, Catling submits that she is entitled to have her convictions and sentences on Counts II, III, and IV reversed and remanded for a new trial.

CONCLUSION

In light of the foregoing arguments and the authority cited therein, together with any plain error this Court may notice, Catling respectfully submits that she is entitled to have her conviction and sentence on Count I reversed and remanded for re-sentencing for petit larceny under Mississippi Code Annotated Section 97-17-43(1), or alternatively, reversed and remanded for a new trial. As to Counts II, III, and IV, Catling respectfully submits that she is entitled to a new trial.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

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CERTIFICATE OF SERVICE

I, Hunter N Aikens, Counsel for Gloria B. Catling, 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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