IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

STACY MARSHALL — APPELLANT

VS. — NO. 2006-KA-0113-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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PROCEDURAL HISTORY:

On October 5, 2005, Stacy Marshall, "Marshall" was tried for possession of cocaine before a Jones County Circuit Court jury, the Honorable Billy Joe Landrum presiding. R. 1. Marshall was found guilty and given a thirty years with five years suspended sentence. R. 189-190. From that conviction, he appealed to this Court. C.P. 55.

ISSUES ON APPEAL

I.

WERE COMMENTS ABOUT MARSHALL'S ALLEGED POST ARREST SILENCE PLAIN ERROR?

II.

WAS IT PLAIN ERROR FOR THE PROSECUTION TO COMMENT ON THE ALLEGED UNTRUTHFULNESS OF DEFENSE COUNSEL?

III.

DID CUMULATIVE ERRORS IN CLOSING ARGUMENT DENY MARSHALL A FAIR TRIAL?

STATEMENT OF THE FACTS

On November 24, 2004, Marshall was indicted by a Jones County Grand Jury for possession of cocaine on September 8, 2004. C.P. 3

On October 5, 2005, Stacy Marshall was tried for possession of cocaine before a Jones County Circuit Court jury, the Honorable Billy Joe Landrum presiding. R. 1. Marshall was represented by Mr. Robert S. Smith. R. 1.

Officer Robert Strickland with the Laurel Police Department testified that a warrant was issued for 1504 N. 3rd Street in Laurel. The house had been under surveillance. A lot of people had been observed going in and out of the house, staying only for short periods of time. R. 55. Strickland testified that he was present during the execution of the search warrant. This home was occupied by Marshall's half sister, Dominique. Marshall was a guest in the home who had been known to have been staying there for some time.

On cross examination, Strickland was questioned about whether or not any other keys to the lock box were ever found. R. 73-74. He was questioned about whether someone else could have given Marshall the key to the box found on his key chain. R. 74; 83. He was questioned about whether or not Marshall was seen bringing the box into the house or placing anything in the box. He was also questioned about why no finger prints were found on any of the evidence against Marshall. R. 71-90.

On redirect, there was an objection to leading which was sustained. R. 93. This came after a question was asked about whether or not Marshall had ever denied that the key to the box on his key chain belonged to him. This was an attempt to clarify the circumstances surrounding the finding of the key to the box and Marshall's admission that he was in possession of those keys. R. 93-94.

Officer Layne Bounds testified that he was present when Marshall was captured in the yard beside the house. R. 117-118. Marshall ran out a side door when the officers announced their presence on the premises. A key ring was found in his pocket. Marshall admitted that the keys were his. R. 119. At that time the keys were returned to Marshall.

Marshall was taken inside the house. He was then present with two other adults, including his half sister, Dominque, her husband and a child. Inside a child's bedroom, a lock box with a set of digital scales sitting on top was found. R. 121. After finding the box locked, Officer Bounds retrieved the keys from Marshall's pocket. R.122. One of the keys fit the lock and opened the box. R.122. It was "a different type key." R. 122. The box contained what appeared to be both powder and crack cocaine. R. 123.

Bounds testified that all those present in the house were searched. No other key was found that would open the lock box. R. 127.

Officer Van Sychel testified that he found a suitcase which had "a picture ID card of the defendant." R. 102. Inside the suitcase was a Walmart receipt for "a security box." R. 102.

Mr. Derryle Smith, a technician with the Mississippi Crime Laboratory, testified that exhibit 4 and 5 , containing the alleged cocaine, tested positive for being cocaine, both powder and crack cocaine. The crack cocaine was worth some $700.00, and the powder cocaine was worth some $24,000.00. R. 141.

When informed of his right to testify in his own behalf, Marshall chose not to testify. R. 157-158. Marshall presented no witnesses on his behalf.

In its closing, the prosecution pointed out that the evidence against Marshall included the fact that the key in his pocket fit the lock. Marshall admitted that the key belonged to him. The record reflected that no other key was found on anyone else that would fit the lock. R. 127.

Marshall's counsel argued before the jury that there was insufficient evidence for convicting him of possession of the two pounds of cocaine. He argued that the police should have located the duplicate keys for the lock box. He argued that Marshall was never seen bringing the box into the house, or putting anything in the box. He argued that Marshall's fingerprints were not found on the box or the cocaine. He argued that no other person present in the home was prosecuted or came to court to testify about their relationship to any drugs found in the house. He argued that Marshall's relatives found with him in the house did not come to testify in his defense because they did not want to be held responsible for having the cocaine in their home. R. 174.

The prosecution argued in response to Marshall's argument that the relatives of Marshall may have not come forward to testify for reasons other than any admission of guilty knowledge on their part. R. 178. There was no objection on grounds being argued on appeal. R. 178

There were no objections during closing argument to comments about this case being one of the largest drug cases in Jones County history, or that the missing relatives could be missing for reasons other than admissions of guilt. R. 174-179.

Marshall was found guilty and given a thirty year with five years suspended sentence. R. 180; 189-190. From that conviction, he appealed to this Court. C.P. 55.

SUMMARY OF ARGUMENT

PROPOSITION I

THIS ISSUE WAS WAIVED AND TESTIMONY ABOUT THE CIRCUMSTANCES OF MARSHALL'S ARREST WAS RELEVANT FOR CLARIFYING ISSUES RAISED ON CROSS EXAMINATION.

Marshall believes his right to remain silent after being arrested was improperly used as evidence against him during his trial. Marshall believes that this was plain error. His Constitutional right to silence was used to prejudice him before the jury. He believes that the fact that he said nothing when his key opened the drug box did not indicate any guilt as far as the possession charge. Appellant's brief page 6-10.

The record reflects no objection was raised on the grounds being raised on appeal. There was never any objection to testimony that would indicate that Marshall's right to silence was being used against him in the instant cause. R. 93-94; R. 106-107; C.P. 37-39. **Haddox v. State**, 636 So. 2d 1229, 1240 (Miss. 1994). This issue was therefore waived on appeal.

The record also reflects that there were no trial errors that would indicate "a miscarriage of justice" occurred under the facts of this case. **Morgan v. State** 793 So.2d 615, 617 (Miss. 2001).

The record reflects that questions about the circumstances under which Marshall's key opened the box with cocaine were relevant for clarifying issues raised by Marshall on cross examination. R.71-90 **Alexander v. State** 875 So.2d 261, 272 (Miss. App. 2004).

PROPOSITION II

THIS ISSUE WAS WAIVED AND CLOSING ARGUMENT WAS ABOUT FACTS AND ARGUMENTS BEFORE THE JURY.

Marshall believes that it was also plain error to allow the prosecution during closing argument to mention the fact that he chose to remain silent after he was arrested for possession of cocaine at his half-sister's house in Laurel. Appellant's brief page 10-12.

To the contrary, the record reflects that there was no objection to the prosecution's closing argument on the grounds being raise for the first time of appeal. R. 174-175. This issue was therefore waived. **Haddox, supra**.

In addition, the record reflects that the prosecution was responding to Marshall's closing argument. Marshall's argument to the jury was about what was not found in evidence. There were no fingerprints. No duplicate keys to the lock box were ever found. There were no eye witnesses who saw Marshall bring the box to his sister's home. There were no eye witnesses who saw Marshall place anything inside the box. The box was not found in Marshall's possession, near him, or where he slept.

The prosecution had a right to respond to what "was not" with what "was." The record reflects that the prosecution was responding to the innuendo about "the relatives" being guilty as well as to their being no conclusive evidence of guilt in a strong circumstantial evidence case. R. 174. **Moss v. State** 727 So. 2d 720, 727 (Miss. App.1998).

PROPOSITION III

THESE ISSUES WERE WAIVED AND THE COMMENTS IN CLOSING WERE RESPONSES TO MARSHALL'S DEFENSE.

Marshall also argues that the prosecution erred during closing in using an argument similar to the condemned "send them a message." In addition, they erred in allegedly referring improperly to "the relatives" that did not testify on behalf of Marshall. Appellant's brief page 12-15.

The record reflects that there was no objection to either of the alleged errors during closing argument. These issues were therefore also waived. **Haddox, supra**

In addition, they are lacking in merit. The comments complained of on appeal were argument about facts in evidence and inferences from those facts, given the defense presented by Marshall's counsel before the jury. R. 51-53; 169-174. **Shook v. State**, 552 So. 2d 841, 851(Miss 1989).

ARGUMENT

PROPOSITION I

THIS ISSUE WAS WAIVED AND TESTIMONY ABOUT THE CIRCUMSTANCES OF MARSHALL'S ARREST WAS RELEVANT FOR CLARIFYING ISSUES RAISED ON CROSS EXAMINATION.

Marshall believes that "plain error" was committed against him. Marshall argues on appeal for the first time that his right to remain silent after being arrested was improperly used as evidence against him during his trial. Marshall believes his silence was used to prejudice him before the jury. The fact that nothing was said when the key to the box was found should not have been used to indicate any guilt as far as the possession of cocaine charge. Appellant's brief 6 to 10.

The record reflects no objection was raised on the grounds being raised on appeal. There was never any objection to testimony that would indicate that Marshall's right to silence was being used against him in the instant cause. R. 73-74; R, 93-94; C.P. 37-39.

In **Haddox v. State**, 636 So. 2d 1229, 1240 (Miss. 1994), the Court stated issues not raised on the same grounds at trial were waived on appeal.

> Because these arguments are not preserved for appeal, this Court cannot reverse based upon them. The assertion on appeal of grounds for an objection which was not the assertion at trial is not an issue properly preserved on appeal. **Baine v. State**, 606 So. 2d 1076 (Miss. 1992); **Willie v. State**, 585 So. 2d 660, 671 (Miss. 1991); **Crawford v. State**, 515 So. 2d 936,938 (Miss. 1987);...

In **Morgan v. State** 793 So.2d 615, 617 (¶ 9) (Miss. 2001), the Supreme Court stated that only errors that generate "a miscarriage of justice" rises to the level of plain error. The Court of Appeals has followed this precedent in its prior rulings.

> ¶ 9. The plain error rule is codified in Miss. R. Evid. 103(d). It provides that nothing precludes the Court from taking notice of plain errors affecting the substantial rights of a defendant, even though they were not brought to the attention of the trial court. If a party persuades the court of the substantial injustice that would occur if the rule were not invoked, the court may invoke the rule. See **Edwards v. Sears, Roebuck**

> **& Co.**, 512 F.2d 276 (5th Cir.1975). "Only an error so fundamental that it generates a miscarriage of justice rises to the level of plain error," however. **Gray v. State**, 549 So.2d 1316, 1321 (Miss.1989); **Kuehne & Nagel (AG & Co.) v. Geosource, Inc.**, 874 F.2d 283, 292 (5th Cir.1989).

In **Taylor v. State** 754 So.2d 598, 603 (¶11) (Miss. App. 2000), the Appeals Court stated that plain error was error that affected the substantial rights of a defendant. It was also error that cast doubt upon the fairness of the judicial proceedings against him.

> ¶11. The Mississippi Supreme Court defined "plain error" as error that affects the substantive rights of a defendant. **Grubb v. State**, 584 So.2d 786, 789 (Miss.1991). "The plain error doctrine has been construed to include anything that 'seriously affects the fairness, integrity or public reputation of judicial proceedings.' " **Porter v. State**, 749 So.2d 250, 260-61 (¶ 36) (Miss.Ct.App. 1999) (quoting **United States v. Olano**, 507 U.S. 725, 732-35, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993)). Our analysis, therefore, necessarily includes a determination of whether there is an error that is some deviation from a legal rule, whether that error is plain, clear or obvious, and whether the error is prejudicial in its effect upon the outcome of the trial court proceedings. **Porter**, 749 So.2d at 260-61 (¶ 36).

In **Taylor v State**, 754 So 2d 598, 603 (¶11) (Miss Ct. App. 2000), the Court of Appeals construed plain error to be error that affected the fundamental fairness of an appellant's trial.

> The plain error doctrine had been construed to include anything that seriously affected the fairness, integrity or public reputation of judicial proceedings.

The record reflects that at the time the keys were found on Marshall he was not placed under arrest. Neither was he under arrest when he was brought back into the house with his sister and others present. R. 113. At that time a search was being made of the house, and the persons inside the house which included Marshall who was a house guest.

During cross examination of Officer Robert Strickland, he was questioned thoroughly about the circumstances surrounding the detention of the fleeing Mr. Marhsall. R. 71-90. This included questions about the circumstances involved in finding the key in Marshall's pocket which unlocked the box containing two pounds of what appeared to be cocaine.

On cross examination Officer Strickland was questioned about whether or not other keys to the box might have been present but were not found. R.73-74

Q. You can't tell us that someone did not give him that key and say, hold this for me?

A. No, I can't testify to that. R. 74.

He was questioned about the fact that the cocaine was found not near Marshall or even where he was sleeping but in a child's bedroom. R. 73.

On redirect, the complaint about what Marshall did not say when the box was opened was raised in the context of clarifying the circumstantial evidence in this case. Officer Strickland testified that he was present when the key to the box was found on Marshall's person. R. 65. He was also questioned about whether or not Marshall admitted that the key found in his pocket was his key rather than his half-sister's, Dominique. The record reflects that Marshall was visiting in the home that belonged to his half sister and her husband.

There was no objection to this question other than as to leading. R. 93.

Q. And were you there when Mr. Marshall said it was his keys?

A. I heard a conversation of that. And Officer Flowers and Van Sychel spoke with them about--I think he advised him that it was his.

Q. You heard Mr. Marshall's conversation to him, correct?

A. It was told to me by the other officer.

Q. Did you ever hear Marshall or did Marshall ever state to you that that was not his key on his key ring.

A. No.

Q. In your presence, did you ever hear him explain or make any statement to anybody else how that key got on his key chain?

Smith: Objection, Your Honor. He's leading.

Court: Sustained.

Q. Did you hear Mr. Marshall make any comments about how the key got on his key chain?

A. No, I didn't. I didn't hear it. R. 93-94.

On the second occasion of alleged improper question about what Marshall did not say a general objection was sustained. R. 106.

Q. Did he make any comment about, oh, that's not my key–

Smith: Objection, Your Honor.

Court: Sustained.

Q. Did he make any comments at all?

A. Not that I recall. R. 106.

The record reflects that a general objection was raised and sustained. It was not raised on grounds of the fifth amendment right against self incrimination.

In addition, Officer Mitch Van Sychel testified that he was present when Marshall admitted the keys in his possession belonged to him.

Q. Go ahead.

A. What I did is a(sic) pushed the button. I didn't hear anything. So I asked the defendant, I said, where's the car that this key fits. He said, it's not here. I asked a second time, where's the car that these keys to go. He said it's not here. **I said, these are your keys, aren't they. And he said yes.** I said, well, then where is the car that these keys go to. He said, in California. And then I put them back in his pocket. R. 101. (Emphasis by Appellee).

Officer Van Sychel was also present when one of Marshall's keys opened the box with what appeared to be cocaine inside. When Marshall's key opened the box, Marshall said nothing. He said nothing about the key much less any comment about to whom the box belonged.. R. 106. Marshall's counsel questioned Van Sychel , as he had Officer Robert Strickland, about whether other

person's present were searched for other keys that might have also opened the cocaine box. R. 127.

Officer Van Sychel testified that a thorough search was conducted. No other key to the lock box was ever found.

Q. Just tell them about looking to see if anybody else had one?

A. **I searched every other person in that residence. I searched the purses. I searched the bags of luggage, I searched every item that could contain a key like that in it. And no where and on no one else did I find a key to that safe. That was the only key like that. And as you can see, it is clearly a very odd looking key. You would not have trouble noticing it.** R. 127. (Emphasis by Appellee).

In **Alexander v. State** 875 So.2d 261, 272 (¶41)(Miss. App. 2004), the Court pointed out that the prosecution had a right to respond to relevant issues raised on cross examination.

> **¶ 41**. Alexander's counsel asked numerous questions regarding Bound's statements to him. In doing so, Alexander opened the door for questions on re-direct regarding the statement. **Jackson v. State**, 766 So.2d 795, 807 (¶ 37) (Miss.Ct.App.2000) (citations omitted). The State's question was in direct response to an issue raised in Jackson's cross-examination; thus, it was proper re-direct. The Mississippi Supreme Court has held:
>
> The trial court has broad discretion in allowing or disallowing redirect examination of witnesses. When the defense attorney inquires into a subject on cross-examination of the State's witnesses, the prosecutor on rebuttal is unquestionably entitled to elaborate on the matter.... Because these matters were all brought out on cross-examination, we find the trial court did not abuse its discretion in allowing redirect examination on the matters. **Jackson v. State**, 766 So.2d at 807 (¶ 37) (internal citations omitted).

The alleged third instance of improper comments on Marshall's right against self incrimination came during closing argument.

During closing argument, Marshall's counsel argued that the circumstantial evidence surrounding the finding of the key which unlocked the cocaine box was inconclusive. He focused upon the fact that there was no evidence that any duplicate or spare key to the box was ever located. He argued that unless someone could testify to having seen Marshall put cocaine in the box, or

actually bring the lock box with the cocaine into the house there was insufficient evidence that it was, in fact, his cocaine. R. 169-174.

In response to Marshall's arguments about what was lacking in evidence in the instant cause, the prosecution made the statement about there being no evidence showing that Marshall was not guilty of possession of the cocaine found in the lock box. R. 169-174. The record reflects that there was no objection. And there was no objection on the grounds being raised on appeal. R. 177-178. Therefore, this issue was also waived. **Haddox, supra.**

On redirect, Mr. Robert Strickland testified the only person found in the house with a key to the lock box with cocaine in it was Marshall. R. 92. An objection to leading was sustained to a question about Marshall not providing any explanation about why his key , rather than anyone else's present ,opened the box containing cocaine. R. 93-94.

The prosecution has a right to respond to defense arguments based upon record evidence. **Shook v. State**, 552 So. 2d 841, 851(Miss 1989) and **Moss v. State** 727 So. 2d 720, 727 (Miss. App.1998).

The Appellee would submit that this issue was not only waived for failure to object on the same grounds being raised on appeal, but it is also lacking in merit. R. 73-74; R. 106-107; C.P. 37-39. There was no error committed by the prosecution or the trial court that interfered with Marshall's receiving a fair trial by a jury of his peers.

PROPOSITION II

THIS ISSUE WAS WAIVED AND CLOSING ARGUMENT WAS ABOUT FACTS AND ARGUMENTS BEFORE THE JURY.

Marshall believes that the prosecution erred during closing argument. He erred by making unwarranted personal comments about his trial counsel's veracity. He went so far as to imply that trial counsel was being less than truthful in his statements to the jury. Appellant's brief page 10-12.

To the contrary, the record reflects there was no objection to these statements during closing argument. R. 174-175. This issues was therefore also waived.. **Haddox, supra.**

In addition, this issue is also lacking in merit. When the prosecution's closing argument is viewed in context, it can be seen as an argument directed at facts in evidence, and relevant inferences from those facts, given the defendant's theory of the case, as stated to the jury in opening and closing. R. 51-53; 169-174.

Marshall counsel's argument to the jury was that possession of a key did not prove possession of the cocaine found in the lock box that the key opened. R. 169-174. His argument was that since there was no testimony that Marshall either brought the box into the house or put anything inside it, there was insufficient evidence that the drugs found in his half sister's home belonged to him. He also argued that the investigation was flawed because the police did not test for fingerprints or locate any other key that must have existed for the lock box.

Trial counsel also argued that the drugs must have belonged to the people who owned the house and yet did not show up to testify. According to his argument, they were the guilty party who were hiding rather than facing up to their alleged unlawful activities in their own house. R. 173-174.

In **Moss v. State** 727 So. 2d 720, 727 (¶ 30- ¶ 32) (Miss. App.1998), the Court found that comments about the failure of the defense to present witnesses to explain the State's evidence or

present evidence to support its theory of the case were not a comment on the defendant's failure to testify.

> ¶ 30. "In order to protect this right, prosecutors are prohibited from making direct comments on the defendant's failure to testify; they are also precluded from referring to the defendant's failure to testify 'by innuendo and insinuation.' " Jones, 669 So.2d at 1390 (quoting **Wilson v. State**, 433 So.2d 1142, 1146 (Miss.1983)). The question is whether the comment of the prosecutor can reasonably be construed as a comment on the defendant's failure to take the stand. **Taylor v. State**, 672 So.2d 1246, 1265 (Miss.1996).
>
> ¶ 31. The Mississippi Supreme Court has stated before that it is not error to comment on the defense's failure to offer an available witness to counter or explain the State's evidence. **Lee v. State**, 435 So.2d 674, 678 (Miss.1983); **Conway v. State**, 397 So.2d 1095, 1099 (Miss.1980). It is also not error to comment regarding the paucity of evidence before the jury to support the defendant's defense. **Dowbak v. State**, 666 So.2d 1377, 1386 (Miss.1996); **Shook v. State**, 552 So.2d 841, 851 (Miss.1989).
>
> ¶ 32. The comments made by the prosecutor were not statements on Moss's failure to take the stand and testify in his own behalf. We hold that the above comments were on the defense's failure to offer an available witness to counter or explain the State's evidence or comments regarding the lack of evidence before the jury to support the defendant's defense. Moss's last assignment of error has no merit.

The comments about "what these lawyers come up with" was obviously a response to trial counsel's theory of the case as stated above. R. 174-175. "The key does not show possession" argument and "note all the gaps in the evidence" argument were directed at diverting the jury's attention from the evidence that did establish constructive possession. One of Marshall's keys opened the lock box. No other key to the box was located after a thorough search of everyone present. A suitcase containing Marshall's identification also contained a Walmart receipt for a security box. R. 102.

When officers announced their presence for a search warrant, Marshall fled. R. 60. When apprehended, the keys in his pocket were located. Marshall admitted that the keys were his. R. 119. This was prior to the Officers discovering that one of the distinctively different keys on his key chain

would open the lock box with the weigh scale sitting on top of it. R. 121.

And the comment about having "a right to be told the truth by the lawyer" was a response to these closing arguments cited above. It was directed particularly to the attempt by Marshall's counsel to blame the family living in the home where the drugs were found since they had not testified on behalf of Marshall. R. 173-174.

While trial counsel could have chosen his words, and articulated his argument more carefully, the Appellee would submit that his comments, when viewed in context, did not result in prejudice to Marshall's defense. They were argument directed at the evidence before the jury and inferences from that evidence, given Marshall's defense to the charge.

In **Rose v. Clark**, 478 U.S. 570, 579, 92 L.Ed.2d 460, 471, 106 S. Ct. 3101 (1986), the U.S. Supreme Court found that an improper jury instruction in a murder case was harmless error under the facts of that case. The Court stated:

> Accordingly, if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless error analysis. The thrust of the many constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments. When a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed. As we have repeatedly stated, "the Constitution entitles a criminal defendant to a fair trial, not a perfect one." **Delaware v Van Arsdall**, 475 US, at 682, 89 L Ed 2d 674, 106 S Ct 1431; **United States v. Hasting**, supra, at 508-509, 76 L Ed 2d 96, 103 S Ct 1974.

Marshall was entitled to a fair trial. The record indicates he received it. He was not entitled to a perfect trial. This issue is also lacking in merit.

PROPOSITION III

THESE ISSUES WERE WAIVED AND THE COMMENTS IN CLOSING WERE RESPONSES TO MARSHALL'S DEFENSE.

Marshall believes that in addition to the alleged "plain errors," there was other improper comments made during closing argument by the prosecution. He believes the prosecution's argument was close to, if not the same, as "the send them a message" argument condemned by the Supreme Court. He also opines that the prosecution also improperly commented upon the absence of witnesses available to either party in the instant cause. Appellant's brief page 12-15.

To the contrary, as shown under proposition I and II , there were no trial errors that interfered with Marshall's right to a fair trial. The record reflects no objection was made to comments about the instant cause being one of the biggest drug cases in the history of Jones County. R. 176. Neither was there any objection to the comments about "the relatives" that did not testify for Marshall before the jury. R. 179. These issues were therefore waived.

In **Whigham v. State**, 611 So. 2d 988, 995 (Miss. 1995), this Court stated that it without a contemporaneous objection to the state's closing argument, that this issue was waived.

> Counsel for the first time on appeal complains that the closing argument of the State commented upon Whigham's failure to testify. It is, of course, incumbent upon counsel at trial to make a contemporary argument, and also in his motion for a new trial, failing in which the error is waived. **Dennis v. State**, 555 So. 2d 679 (Miss. 1989); **Dunaway v. State**, 551 So. 2d 162 (Miss. 1989)...

In addition to being waived, the record reflects that the comments about "the relatives" that did not testify were a response to Marshall's counsel's not so subtle argument that these relatives were actually the guilty party since the cocaine in the box was found in their house. R. 173-174.

In **Shook v. State**, 552 So. 2d 841, 851(Miss 1989), the Court found that the prosecutions' comments in closing about the jury's lack of knowledge of Shook's defense were not a comment

upon his failure to testify. They were based upon comments by the defense.

> Moreover the State is entitled to comment on the lack of any defense, and such a comment will not be construed as a reference to a defendant's failure to testify by 'innuendo and insinuation.'Id. (citing **Wilson v. State**, 433 So. 2d 1142,1146 (Miss. 1983). The comments in the case at bar are comments on the defense presented, or lack thereof, and not comments on the failure to testify. Therefore, this part of the appellant's assignment is denied.

The Appellee would submit that these additional closing argument issues were waived for failure to make a contemporaneous objection. They were also comments about evidence before the jury. They were a response to Marshall's counsel's argument about missing conclusive physical evidence and witnesses who could have testified on Marshall's behalf. This issue is also lacking in merit.

CONCLUSION

Marshall's conviction and sentence should be affirmed for the reasons cited in this brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, W. Glenn Watts, 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:

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Honorable Anthony Buckley
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This the 3rd day of June, 2008.

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