IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JAMES BROWNLEE — APPELLANT

VS. — NO. 2006-KA-1399-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

James Brownlee and an unidentified confederate have robbed two men at gunpoint in the parking lot of the Isle of Capri Casino in Coahoma County.

During Brownlee's trial for two counts of armed robbery, both victims made positive out-of-court photographic identifications as well as positive in-court identifications of James Brownlee as one of the robbers.

No objection, pretrial, contemporaneous, or otherwise, to the identifications made by the two victims was made by trial counsel. On appeal substituted counsel targets this omission as one of several grounds for a claim of ineffective assistance of trial counsel.

Although both victims made positive and unequivocal out-of court and in-court identifications of Brownlee as one of the two pistol wielding robbers, Brownlee assails both the sufficiency and the weight of the evidence used to convict him.

JAMES BROWNLEE, an 18-year-old African American male and first offender with close

family ties (R. 152, 205-08), prosecutes a criminal appeal from the Circuit Court of Coahoma County, Albert B. Smith, III, Circuit Judge, presiding.

The sufficiency and weight of the ear and eye witness identification testimony and the effectiveness of trial counsel form the centerpiece of the present appeal.

Following a two (2) day trial by jury conducted on July 24-25, 2006, Brownlee was convicted of two counts of armed robbery. The jury was unable to fix the penalty. (R. 201; C.P. at 30) Following a pre-sentence investigation, and after hearing facts in extenuation and mitigation of sentence during a hearing conducted on August 14, 2006, the trial judge sentenced Brownlee to serve two fifteen (15) year concurrent terms in the custody of the MDOC with eight (8) years suspended and seven (7) years to serve. (R. 204-211; C.P. at 24-28)

An indictment returned on May 30, 2006, charged, in its pertinent parts, that

COUNT I

> " . . . JAMES BROWNLEE . . . on or about March 2, 2006, . . . individually or while aiding and abetting and/or acting in concert with others, did unlawfully, wilfully, and feloniously, with intent to steal, take approximately $4,400.00 in good and lawful money of the United States of America, of the property of Jesse Green, from the person or from the presence of Jesse Green, and against the will of Jesse Green, by putting him in fear of immediate injury to his person by the exhibition of a pistol, a deadly weapon, . ." (C.P. at 2)

COUNT II

> " . . . that JAMES BROWNLEE, on or about March 2, 2006, . . . individually or while aiding and abetting and/or acting in concert with others, did unlawfully, wilfully and feloniously, with intent to steal, take the vehicle keys of a 1997 Chevy S10 pickup truck, of the property of Roger Leslie, from the person or from the presence of Roger Leslie, and against the will of Roger Leslie, by putting him in fear of immediate injury to his person by the exhibition of a pistol, a deadly weapon, . . ." (C.P. at 2)

Two (2) issues are raised by Brownlee in his appeal to this Court.

I. The trial court erred in denying Brownlee's motions for directed verdict, judgment notwithstanding the verdict or, in the alternative, motion for a new trial.

Stated differently, the verdicts of the jury were not supported by sufficient, credible evidence, and were against the overwhelming weight of the evidence.

II. The defendant was denied the effective assistance of counsel throughout the pre-trial and trial stages of this cause.

STATEMENT OF FACTS

On March 2, 2006, Jesse Lee Green, a twenty-two (22) year old Caucasian male, resident of Clarksdale, and recipient of a rather sizeable income tax refund (R. 80, 103), had on his person the sum of $4,400.00. (R. 97-98, 119)

Green had learned from his brother Eric that a black Camaro Z28 was for sale and appeared to be a good buy. (R. 96) Jesse Green telephoned the number Eric Green gave him (R. 85-86) and talked to a handicapped guy named Ricky who lived in Arkansas. They negotiated a price of $4,400.00 and arranged to meet at a location halfway between some location in Arkansas and Clarksdale. (R. 118) The meeting place was the parking lot of the Isle of Capri Casino in Coahoma County. (R. 96-98)

Jesse Green, Jesse's brother Jerryco Green, and Jesse's friend, Roger Leslie, rode in Jesse's 1997 red Chevy show truck to the parking lot of the Isle of Capri where they waited for the appearance of the black Camaro. (R. 89)

It never came. (R. 98)

Jerryco Green left the truck and went inside the Isle of Capri to telephone "Ricky" for the purpose of advising him they were waiting for him in the parking lot and learning whether or not Ricky was going to bring the car to this location. (R. 99)

Around 3:00 or 3:30 p.m., while Jerryco was away, a while Cadillac pulled up behind Jesse's red truck. The events that followed are described by Jesse Green as follows:

> Q. And while y'all were waiting there, after Jerryco left, did anything very unusual happen?
>
> A. Uh, yes, sir. It was a white Cadillac pulled up behind us. And you know, I didn't really think much of it. You know, people was leaving the casino back and forth. I just figured, you know, they was - - they pulled up behind us and they stopped and popped the trunk. Well, I figured, you know, it was somebody leave the casino and had to get something out because it was right there by the entrance way to leave. And so we turned around and started talking again and then this guy over here, James Brownlee, come up to my window, and another person that was with him come around to the driver's side to my friend's window, and they both stuck guns in our face. Which I mean, I really didn't see them running up to my car or my truck, you know. Cause we seen the Cadillac, and we seen the Cadillac pull up and pop the trunk. We started talking, and then all of a sudden, James Brownlee was in my window with a gun and the other dude was in my friend's window with a gun.
>
> Q. Now, you pointed to that dude over there. Could you tell me which one you are talking about?
>
> A. The one with braids, chubby face.
>
> Q. He has a chubby face.
>
> A. Yes, sir.
>
> BY MR. BURDICK: Let the record reflect that he has pointed to and identified the defendant, James Brownlee.
>
> BY THE COURT: The record shall so reflect.
>
> * * * * * *
>
> Q. Did you look at his face?
>
> A. Yes, sir.
>
> Q. About how many seconds or minutes were you able to look at his face?

A. About at least four minutes.

Q. And did he take anything from you?

A. He took $4,400.00 out of my pocket.

* * * * * *

Q. Okay.

A. Well, he reached in that pocket and pulled the four hundred dollars out and he counted it. And then he put the gun back up to my head and kind of butted my head with it and said, "That's not all you got. You don't think I'll kill you?" And when he did that, I reached in my other pocket, you know, because I knew that's where he was - - that he knew what I had then. So, I, you know, like anybody, I really - - I didn't really want him to get the money.

Q. He said what, again? You don't think I know you have more or what did he sa[y]?

A. No, he said, "You don't think I" - - he said, "You don't think that I don't know what you got," or something like that. I can't really - -

Q. Or he would kill you?

A. Yeah, he said that.

Q. And that was James Brownlee that said that?

A. James Brownlee.

Q. And you observed it for three or four minutes, his face?

A. At least.

Q. Facial characteristics?

A. It seemed like more than that, but you know.

Q. Were you afraid for your life?

A. Yes, sir.

Q. You ever going to forget his face or image?

A. No, sir, never will. (R. 101-02)

Similar identification testimony was elicited from Roger Leslie, a 19-year-old youth who was driving the truck owned by Jesse Green. Leslie testified as follows:

> Q. So now, the man who took the [truck] keys from you, did he have any weapon?
>
> A. Yes, sir.
>
> Q. What did he have?
>
> A. He had a pistol with a baseball cap in front of it kind of like this.
>
> Q. Okay. And where did he put it?
>
> A. To my throat and to my temple.
>
> Q. Did he say anything?
>
> A. He said, "I'm going to kill you if you don't give me your money." And I kept telling him, with my hands in the air, I didn't have no money. And he went through my pockets and he didn't find no money.
>
> Q. Now, what was happening to Jesse, at that time.
>
> A. They had the gun to his head and telling him to give him his money and they took about four hundred dollars, rounds about, out of one pocket. And they was like, "No, B, that's not all. I know you got more than that." Jesse put his hand over the other pocket, and they - - that told them that he had more money. So they reached in the other pocket. They pulled the handle back on the gun. That's when Jesse put his arms up in the air, because Jesse was covering his pockets not trying to let them have it.
>
> Q. Now, you say, "they." One of them was with you?
>
> A. One of them was on my side and one of them was on Jesse's side.
>
> Q. Okay. Now, when you say, they were getting into the pocket, do you just mean the one with Jesse?

A. Yes, sir.

Q. Do you recognize him in the courtroom today?

A. Yes, sir.

Q. Could you point him out?

A. He's right over there at that table.

Q. Which one?

A. James Brownlee.

Q. I know, but what is he dressed like?

A. He's dressed with a rainbow colored shirt on with dreads in his hair.

BY MR. BURDICK: We would ask the record reflect he's pointing to the defendant, James Brownlee. (R. 128)

During trial, both Jesse Green and Roger Leslie testified they had previously identified Brownlee in a photographic lineup. (R. 102-03, 128-29) Both men re-identified at trial the photograph of Brownlee they had previously identified at the sheriff's department. (Green - R. 102-03; Leslie - R. 128-30)

Six (6) witnesses testified for the State of Mississippi during its case-in-chief, including Jesse Green and Roger Leslie, the two youthful victims. Green, for no fewer than 4 minutes observed at arms length under well lighted conditions, the bandit who put a pistol to his head and reached in his pockets for Green's money. (R. 100-01)

Both Jesse Green and Roger Leslie made, prior to trial, a positive out-of-court photographic identification and later a positive in-court identification of Brownlee as one of the two robbers. (Green - R. 100, 102-03; Leslie - 128-29)

At the close of the State's case-in-chief, the defendant's motion for a directed verdict was denied. (R. 135-36)

After being advised personally of his right to testify or not, Brownlee elected to testify in his own behalf. (R. 153-161) He admitted he and his family owned a white four door Cadillac which, more often than not, was used by Brownlee. (R. 153) Brownlee, on the other hand, denied he robbed Jessie Green and Roger Leslie. (R. 153)

During cross-examination, Brownlee testified that March 2nd was one of the days he was at the gym with his handicapped nephew. Asked if he " . . . got anybody here from the gym," Brownlee replied, "No, sir." (R. 160)

The defense also produced two other witnesses who testified in Brownlee's defense, neither of whom was an alibi witness. (R. 139-150) Brownlee relied instead upon misidentification of the robber by both Green and Leslie. (R. 187-196) Alleged discrepancies and/or inconsistencies focusing upon the robber's "gold partial tooth" and the Cadillac's "tinted windows" were fully explored during cross-examination. (R. 115-17)

Peremptory instruction was requested by the defendant and denied. (R. 164; C.P. at 47)

The jury retired to deliberate at 3:10 p.m. and returned with the following verdicts 1 hour and 20 minutes later at 4:30 p.m. :

> "We, the jury, find the defendant guilty of Armed Robbery but are unable to fix the penalty, in Count I." (R. 201)

> "We, the jury, find the defendant guilty of Armed Robbery but are unable to fix the penalty, in Count II." (R. 201)

A poll of the jurors, individually by number, reflected the verdicts returned were unanimous. (R. 201-02)

On August 14, 2006, after ordering and reviewing a pre-sentence investigation report and

listening to testimony from two clergymen and Brownlee in extenuation and mitigation of sentence (R. 205-208), the circuit judge sentenced Brownlee to serve two (2) fifteen (15) year sentences to run concurrently. (R. 210-11; C.P. at 24-28) Brownlee was also ordered to pay restitution in the amount of $4,400.00. (R. 212; C.P. at 28)

David L. Tisdell, a practicing attorney in Tunica who was retained by Brownlee (C.P. at 8), represented Brownlee very vigorously and quite effectively at trial.

Richard B. Lewis, a practicing attorney in Clarksdale, has been substituted on appeal. (C.P. at 8) Lewis has filed an impressive brief in this Court on Brownlee's behalf.

At the close of the sentencing hearing conducted on August 14th, Mr. Lewis, who perfected Brownlee's appeal, proffered in support of his motion for a new trial the affidavits of four (4) individuals who would have testified as to Brownlee's where-a-bouts at 3:30 pm. on the afternoon of the robbery. These affidavits were marked for identification only and are a part and parcel of the record in this context. (R. 218) (*See also* exhibit envelope 1 of 2)

SUMMARY OF THE ARGUMENT

I. Accepting as true the victims' identification testimony and disregarding any evidence favorable to Brownlee, including Brownlee's general denial and any alibi defense, it is clear there was sufficient credible evidence to support a verdict of guilty of armed robbery.

The verdict of the jury was not against the overwhelming weight of the evidence because the identification testimony from Jesse Green and Roger Leslie was both substantial and credible.

The trial judge instructed the jury to consider the familiar *Biggers* factors in determining whether the identifications made by Green and Leslie were credible and reliable. (C.P. at 45-46) The jury resolved the issue of credibility in favor of the witnesses for the State.

The jury, and not a reviewing court, is charged " . . . with the responsibility of weighing and

considering conflicting evidence, evaluating the credibility of witnesses, and determining whose testimony should be believed." **Houston v. State,** 887 So.2d 808, 816 (¶38) (Ct.App.Miss. 2004) quoting from **Smith v. State,** 821 So.2d 908, (¶4) (Ct.App.Miss. 2002).

There was no objection - neither pretrial, contemporaneous nor otherwise - to the identifications made by Jesse Green and Roger Leslie. Consequently, Brownlee is procedurally barred from having this issue reviewed on appeal. Moreover, they are not matters that, under the facts, should be reviewed for plain error. **Houston v. State,** *supra*, 887 So.2d 808 (¶14) (Ct.App.Miss. 2004).

In any event, even if trial counsel had objected to the array, the trial judge would not have erred one whit in admitting into evidence the pretrial out-of-court photographic identifications or the in-court identifications made during trial by Green and Leslie. Neither of the two identifications was the product of impermissible suggestiveness, and the familiar **Biggers'** factors clearly favor the State.

II. Brownlee was not denied the effective assistance of counsel because " . . . complaints concerning counsel's failure to file certain motions, call certain witnesses, ask certain questions, and make certain objections fall within the ambit of trial strategy." **Houston v. State,** 887 So.2d 808, 815 (Ct.App.Miss. 2004).

It cannot be said from this record that trial counsel's performance during pretrial and trial was deficient or that any deficiency prejudiced the defendant.

ARGUMENT

I.

THE EVIDENCE WAS LEGALLY SUFFICIENT TO SUPPORT THE DUAL VERDICTS RETURNED BY THE JURY, AND NEITHER VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

James Brownlee's convictions of armed robbery were based largely upon the eyewitness identification testimony of the victim, Jesse Green. His positive identification, together with the testimony of his friend, Roger Leslie, carried great weight, especially where, as here, the identifications pass the familiar *Biggers* test with flying colors.

Brownlee argues the evidence is wanting in both sufficiency and weight and claims that trial counsel was ineffective in the constitutional sense. (Brief of Appellant at 3-4)

We respectfully invite this Court's attention to the case of **Houston v. State,** 887 So.2d 808 (Ct.App.Miss. 2004), which controls the posture of each and every claim, issue, and complaint raised and argued by substitute counsel.

In **Houston,** the appellant made identical arguments in the wake of nearly identical facts. Each argument was rejected by the reviewing court. We defer to the law of the case superbly expressed by Judge King in **Houston.** Brownlee's sufficiency and weight of the evidence argument, as well as his effective assistance of counsel argument, are devoid of merit for the reasons expressed by Judge King in **Houston,** a case which is impossible to distinguish. *See* appellee's exhibit A, attached.

We could, in good faith and with cautious optimism, terminate our argument here but elect to continue the march for good measure.

Motions for a directed verdict, judgments notwithstanding the verdict, and requests for

peremptory instruction all challenge the legal sufficiency of the evidence presented at trial. **Carter v. State,** 869 So.2d 1083 (Ct.App.Miss. 2004); **Richardson v. State,** 868 So.2d 389 (Ct.App.Miss. 2004).

Brownlee waived - forfeited, if you please - his motion for a directed verdict made at the close of the State's case-in-chief when he introduced evidence in his own behalf. **Holland v. State,** 656 So.2d 1192, 1197 (Miss. 1995).

The sufficiency of the evidence, therefore, must be reviewed within the context of the Circuit Court's ruling on the last occasion when the sufficiency of the evidence was challenged before the trial court which, of course, was Brownlee's motion for judgment notwithstanding the verdict. (C.P. at 9-11)

It is clear that Jesse Green made both a photographic identification as well as an in-court identification of Brownlee as the robber and the pistol tot'in tormentor. (R. 100, 102-03)

It is enough to say that Jesse Green's identification of Brownlee, standing alone, was sufficient to prove Brownlee's identity as the robber who removed at gunpoint Green's money from Green's pocket. Green's identification testimony was both substantial and credible and, if believed, carried sufficient weight to support Brownlee's convictions. **McNeal v. State,** 405 So.2d 90 (Miss. 1981); **Burks v. State,** 770 So.2d 960 (Miss. 2000); **Brooks v. State,** 52 So.2d 609 (Miss. 1951).

The jury received jury instruction D-2, the instruction approved by this Court in **Davis v. State,** 568 So.2d 277, 279-80 (Miss. 1990). When the case turns on the identification of the defendant by a single person, this instruction, when requested, must be granted. **Warren v. State,** 709 So.2d 415, 420-21 (Miss. 1998).

It was. (C.P. at 45-46; appellee's exhibit B, attached)

The certainty of Jesse Green's identification of Brownlee is found in the record. (R. 106)

Q. You ever going to forget his face or image?

A. No, sir, never will. (R. 102)

* * * * * *

Q. Is there any doubt in your mind that that is James – that the James Brownlee that you pointed to robbed you on March 2nd?

A. That is the person that robbed me when I got robbed.

Q. I believe you said he had a chubby face?

A. Yes, sir. (R. 106)

The description of Brownlee given by Green in court (R. 86-87), dread locks and all, pretty well matches the description given to the authorities shortly after the robbery. (R. 100, 112-13) We invite this Court's attention to the photographs of Brownlee inside exhibit envelope 1 of 2, *viz.*, defendant's exhibits D-2a through D-2f. If that's not a "chubby face," we don't know what is.

Green had no difficulty in identifying Brownlee either out-of-court or in-court. (R. 60-62, 100, 102-03) During direct-examination he asserted "[t]hat is the person that robbed me when I got robbed." (R. 106)

Brownlee seeks reversal and perhaps a discharge but, if not, at least a remand for a new trial. (Brief of Appellant at 4, 12) Brownlee asserts: "[T]he verdict is against the overwhelming weight of the evidence, due to the testimony of the prosecution witnesses' inaccurate identification of the appellant, and due to the suggestiveness of the photo lineup used to identify the robber." (Brief of Appellant at 6)

Several of Brownlee's complaints focus upon Green's description of the robber as having a "gold partial tooth" and the alleged presence of "tinted windows" and a dent in the white Cadillac. The jury, however, heard testimony from Jesse Green capable of reconciling these alleged discrepancies and inconsistencies. Green was aware of "retractable removable gold plates" that

were worn only "for show," and Green's look at the white Cadillac " . . . was more of a glance at it and then I had a gun stuck to my head." (R. 121) Investigator Bee, likewise, was familiar with "removable gold plated teeth." (R. 73)

Clyde Boykins, a valet for the Isle of Capri, observed the white 4-door Cadillac "going the wrong way" but did not at all notice whether the windows were tinted. (R. 81) Neither did Jerryco Green who also observed the white Cadillac speeding and "going the wrong way." (R. 91-92)

Lest we forget, "[t]he jury has the duty to determine the impeachment value of inconsistencies or contradictions as well as testimonial defects of perception, memory and sincerity." **Houston v. State,** *supra*, 887 So.2d at 816; **Jones v. State,** 381 So.2d 983, 989 (Miss. 1980). *See also* **Blocker v. State,** 809 So.2d 640, 645 (¶18) (Miss. 2002) ["(I)t is up to the jury to weigh any inconsistencies or contradictions in [a witnesses] testimony"; **Greer v. State,** 819 So.2d 1 (Ct.App.Miss. 2000), reh denied.

Brownlee, who primarily seeks a new trial as opposed to discharge, may have inadvertently blurred the distinction between weight and sufficiency. *See* **Pearson v. State,** 937 So.2d 996, 998 (¶6) (Ct.App.Miss. 2006)

"Weight" implicates the denial of a motion for a new trial while *"sufficiency"* implicates the denial of motions for directed verdict, peremptory instruction, and judgment notwithstanding the verdict. **May v. State,** 460 So.2d 778, 781 (Miss. 1984).

"[A] greater quantum of evidence is necessary for the State to withstand a challenge that the verdict is contrary to the overwhelming weight of the evidence, as distinguished from the legal sufficiency of the evidence argument." **Collier v. State,** 711 So.2d at 458, 462 (Miss. 1998).

Stated somewhat differently, "[a] greater quantum of evidence favoring the State is necessary for the State to withstand a motion for a new trial, as distinguished from a motion for

j.n.o.v." **May v. State,** *supra*, 460 So.2d 778, 781 (Miss. 1984).

"If the evidence is found to be legally insufficient, then discharge of the defendant is proper." **Collier v. State,** *supra*, 711 So.2d 458, 461 (Miss. 1998) citing **May v. State,** 460 So.2d 778. 781 (Miss. 1985).

On the other hand, " . . . if the verdict is against the overwhelming weight of the evidence, then a new trial is proper." **Collier v. State,** *supra*, 711 So.2d 458, 461 (Miss. 1998) citing **May v. State,** 460 So.2d 778, 781-82 (Miss. 1985).

In other words, the remedy for a defect in "weight" is a new trial while the remedy for a defect in "sufficiency" is final discharge from custody.

Brownlee, as noted previously, assails both the sufficiency and the weight of the evidence and invites this Court to reverse and grant him a new trial in the interest of justice. (Brief of Appellant at 4, 12)

The gist of Brownlee's weight of the evidence complaint is that the eyewitness identification of both Green and Leslie was too unreliable to be credible.

Our response is summarized in only three words: Classic jury issue.

It is well settled that a victim's uncorroborated identification of a defendant as his/her assailant is both substantial and credible evidence upon which the fact finder can base its verdict. **Brown v. State,** 798 So.2d 629 (Ct.App.Miss. 2001); **Dukes v. State,** 751 So.2d 1129 (Ct.App.Miss. 1999), reh denied. *Cf.* **Peyton v. State,** 796 So.2d 243 (Ct.App.Miss. 2001), reh denied, cert denied. *See also* **Passons v. State,** 239 Miss. 629, 124 So.2d 847, 848 (1960), where we find the following language:

> The character and adequacy of evidence of identification of an accused in a criminal case is primarily a question for the jury, provided evidence could reasonably be held sufficient to comply with

> the requirement of proof beyond a reasonable doubt. The jury need not be controlled by the number of witnesses testifying to the identification of an accused. Identification based on the testimony of a single witness, if complying with the standard in criminal cases, can support a conviction, even though denied by the accused. The jury can appraise the truthfulness of an asserted alibi. In short, positive identification by one witness of the defendant as the perpetrator of the crime may be sufficient as in the instant case. 23 C.J.S. Criminal Law § 920, p.192.

In **Passons,** *supra,* the evidence sustained a conviction of armed robbery as against the defense of alibi.

In the case *sub judice,* the defendant testified in his own behalf and asserted a general denial in defense of the charge as well as an alibi. (R. 153, 160) Brownlee's primary defense was mistaken identification, and Mr. Tisdell, trial defense counsel, covered this matter from A to Z.

Green's eyewitness identification of Brownlee, however, was corroborated to a great extent by eyewitness identification made by Roger Leslie, who also got a good look at the two robbers. (R. 127-28) The accuracy and credibility of Leslie's identification was also a matter for the jury.

Relevant here is the following language found in **Walker v. State,** 799 So.2d 151, 153, (¶5) (Ct.App.Miss. 2001), articulated in the wake of Walker's argument raising the questions of both weight and sufficiency:

> These two issues are combined as they both have the same standard of review and are governed by the same facts. Calvin Walker first argues that the in-court identification by Murphy was insufficient to enable the jury to find Calvin Walker guilty beyond a reasonable doubt. **"The inconsistencies of the in-court identification go only to the credibility and weight of the evidence, which is a factual determination to be made by the jury."** *Kimbrough v. State,* 379 So.2d 934, 936 (Miss. 1980). **Murphy testified that Calvin Walker was one of the two men who robbed her and Catlano. Calvin Walker's attorney questioned Murphy at length on cross-examination concerning her identification of Calvin Walker as the second robber. Who the jury decides to believe is a decision to be made by the jury, *not***

> **for this Court.** *Billiot v. State*, 454 So.2d 445, 463 (Miss. 1984). In this instance the jury decided that Murphy's in-court identification of Calvin Walker was credible. [emphasis ours]

It was the function of the jury in the wake of jury instruction D-2 (Appellee's exhibit B, attached) to decide whether or not the in-court identifications made by Green and Leslie were credible and reliable. The sufficiency and integrity of their identification was fully explored during defense counsel's vigorous cross-examination of them both. (R. 108-121; 30-132)

Ditto with respect to counsel's lengthy and equally rigorous cross-examination of Investigator Fernando Bee (R. 62- 72) who obtained photographs of Brownlee and others from Arkansas and prepared the photographic lineup shown separately to Green and Leslie. (R. 57-61)

The jury was properly instructed on this issue via instruction D-2 which placed the issue of identification squarely in the lap of the fact finder. The jury was told, *inter alia*, that if it was not convinced beyond a reasonable doubt that Brownlee was the person who committed the crimes, then it must find him not guilty. (C.P. at 45-46; Appellee's exhibit B, attached.)

Where, as here, the target of the defendant's complaint is the "weight" of the evidence, as opposed to its "legal sufficiency," such implicates the denial of a motion for a new trial.

"The motion for a new trial is addressed to the sound discretion of the trial court." **Burge v. State**, 472 So.2d 392, 397 (Miss. 1985). This Court reviews the trial court's denial of a post-trial motion under the abuse of discretion standard. **Flowers v. State**, 601 So.2d 828, 833 (Miss. 1992); **Robinson v. State**, 566 So.2d 1240, 1242 (Miss. 1990).

No abuse of judicial discretion has been demonstrated here.

"In determining whether a jury verdict is against the overwhelming weight of the evidence, 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." **Herring**

v. State, 691 So.2d 948, 957 (Miss. 1997), citing **Thornhill v. State,** 561 So.2d 1025, 1030 (Miss. 1989). *See also* **Spann v. State,** 771 So.2d 883, 892 (Miss. 2000).

"[T]he scope of review on this issue is limited in that all evidence must be construed in the light most favorable to the verdict." **Herring v. State,** *supra*, 691 So.2d at 957 citing **Goff v. State,** 572 So.2d 865, 867 (Miss. 1990). In a motion for a new trial, all facts are construed in favor of the non-moving party. **Staten v. State,** 813 So.2d 775 (Ct.App.Miss. 2002).

We reiterate. A reviewing court is duty bound to accept as true the evidence favorable to the State. **Van Buren v. State,** 498 So.2d 1224, 1229 (Miss. 1986). This includes the identification testimony of Jesse Green and Roger Leslie which preponderates heavily in favor of the verdict returned.

Finally, in **Maiben v. State,** 405 So.2d 87, 88 (Miss. 1981), this Court announced that

> . . . . . we will not set aside a guilty verdict, absent other error, **unless it is clearly a result of prejudice, bias or fraud, or is manifestly against the weight of credible evidence.** [emphasis supplied]

The following observations made in **Groseclose v. State,** 440 So.2d 297, 300 (Miss. 1983), are also worth repeating here:

> We will not order a new trial unless convinced that the verdict is so contrary to the overwhelming weight of the evidence that, to allow it to stand, **would be to sanction an unconscionable injustice.** *Pearson v. State,* 428 So.2d 1361, 1364 (Miss. 1983). Any less stringent rule would denigrate the constitutional power and responsibility of the jury in our criminal justice system. [emphasis supplied]

In short, this Court will not set aside a guilty verdict unless the verdict is manifestly against the weight of credible evidence [**Maiben v. State,** 405 So.2d 87, 88 (Miss. 1981)] and unless this Court is convinced that to allow the verdict to stand, would be to sanction an unconscionable injustice. **Hilliard v. State,** 749 So.2d 1015, 1016 (Miss. 1999); **Groseclose v. State,** 440 So.2d

297, 300 (Miss. 1983).

Contrary to Brownlee's suggestion to the contrary, the case at bar does not exist in this evidentiary posture.

II.

THE RECORD FAILS TO AFFIRMATIVELY REFLECT THAT BROWNLEE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

Brownlee claims his trial lawyer was ineffective in the constitutional sense because of several sins of omissions and commission which, he contends, were so egregious as to amount to serious deficiencies which prejudiced the defendant.

The omissions include **(1)** the failure of trial counsel to suppress or to at least object to allegedly suggestive out-of-court photographic identifications and subsequent in-court identifications and **(2)** the failure to investigate and subpoena four (4) alibi witnesses whose affidavits were proffered for identification during the sentencing hearing.

Appellant complains he was the only person in the six (6) man lineup with dread locks. (Brief of Appellant at 10)

No matter.

"[T]he supreme court has suggested that slight or minor differences in the photographs do not necessarily constitute an impermissible suggestion." **Houston v. State,** *supra,* 887 So.2d at 813 (¶17) citing **Brooks v. State,** 748 So.2d 736 (¶27) (Miss. 1999).

The photographic array was not impermissibly suggestive, and trial counsel cannot be faulted for failing to file a motion to suppress the identifications. Brownlee was not "*unreasonably* conspicuous." Stated differently, he did not stand out like the proverbial "sore thumb." The physical features of the six persons in the array are not, in our opinion, so dissimilar as to render

the array *impermissibly* or *unduly* suggestive.

As noted above, this Court has suggested that slight or "minor differences" in the photographs do not *ipso facto* create an *impermissible* suggestion. **Brooks v. State,** 748 So.2d 736, 741-42 (Miss. 1999) citing **Jones v. State,** 504 So.2d 1196 (1987). We note that each of the suspects in the photographic array under scrutiny bore similar facial characteristics, and the man on the far right has a coiffeur similar to Brownlee. It is not required that law enforcement authorities preparing a photographic lineup locate photographs of those who could pass as the defendant's clones.

The in-court identifications made by Green and Leslie pass the familiar **Biggers'** factors with flying colors. *See* **Neil v. Biggers**, 409 U.S. 188, 93 S.Ct. 375, 32 L.Ed.2d 401 (1972), and its five-pronged test.

Even if the out-of-court photographic identification procedure was unduly or impermissibly suggestive, the pretrial procedure failed in this case to create a "very substantial likelihood of irreparable misidentification" [in-court identification] or "a very substantial likelihood of misidentification" [out-of-court identification]. **York v. State,** 413 So.2d 1372, 1381 (Miss. 1982). Indeed, identity of Brownlee as the robber and assailant was supplied by the independent observations of Green and Leslie for a period of over four (4) minutes at arms length.

Where, as here, the **Biggers'** factors favor the State, there is no substantial likelihood of irreparable misidentification. Accordingly, an in-court identification is admissible. **United States v. Buckhalter,** 986 F.2d 875 (5th Cir. 1993), reh den, cert den 114 S.Ct. 203, 126 L.Ed.2d 160 (1993). *See also* **Minnick v. State,** 551 So.2d 77 (Miss. 1988), on remand 573 So.2d 792 (Miss. 1991).

Finally, all of the credibility concerns expressed by Brownlee in his brief were fully explored

by Mr. Tisdell during his extensive cross-examination of Fernando Bee, Jesse Green, and Roger Leslie. Misidentification, a reasonable strategy for the defense, was the centerpiece of trial counsel's closing argument. (R. 187-96)

We respectfully submit there was no viable basis for an objection to Green's and Leslie's out-of-court photographic identification or to their subsequent in-court identifications. These eyewitness identifications were not erroneous as Brownlee argues in his brief at page 11; rather, they pass muster under the familiar **Biggers'** test.

The failure to suppress allegedly bad identification and to investigate and subpoena alibi witnesses form the centerpiece of Brownlee's claim of ineffective assistance. Nearly identical arguments were made in **Houston v. State,** *supra,* 887 So.2d 808, 815 (Ct.App.Miss. 2004), where we find the following language dispositive of Brownlee's complaints:

> "The benchmark for judging any claim of ineffectiveness [of counsel] must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Simon v. State,* 857 So.2d 668 (¶22) (Miss. 2003). To establish a claim of ineffective assistance of counsel, Houston must prove that under the totality of the circumstances (1) counsel's performance was deficient and (2) the deficient performance deprived him of a fair trial. *Id.*
>
> This Court is reluctant to define counsel's trial strategy as ineffective assistance of counsel. On matters of trial strategy, this Court generally defers to the judgment of counsel. *Woods v. State,* 806 So.2d 1165 (¶13) (Miss.Ct.App.2002). **This Court often notes that complaints concerning counsel's failure to file certain motions, call certain witnesses, ask certain questions, and make certain objections fall within the ambit of trial strategy.** *Cole v. State,* 666 So.2d 767, 777 (Miss. 1995). Houston's complaints fall within this general principle. This issue is without merit." [emphasis ours]

Ditto with respect to Brownlee's complaints.

The identical affidavits proffered by Brownlee appear to account for his presence at the gym

from 3:30 to 5:30 p.m. on the day of the robbery. Brownlee testified at trial he was present at the gym but had nobody from the gym corroborating his presence. This would lead one to believe that Brownlee was not aware of any alibi witnesses because he wasn't at the gym. We note that nothing in the affidavits indicates that Brownlee ever told his attorney about these alibi witnesses.

Jesse Green set the time of arrival at the Isle of Capri at 3:00 or 3:30 p.m. (R. 98) while Leslie set the time at between 2:30 and 4:30 p.m. (R. 125) Jerryco Green testified it was "somewhere between lunch and noon." (R. 94) Obviously, Brownlee's belated alibi was not ironclad.

In any event, Brownlee's trial strategy was to assail the integrity of the victims' identifications by pointing out various shortcomings, inconsistencies and discrepancies in their pretrial statements and trial testimony. This was a reasonable trial strategy.

The ground rules for resolving this complaint were first set forth in **Read v. State,** 430 So.2d 832, 841 (Miss. 1983), where this Court stated:

> (1) **Any defendant convicted of a crime may raise the issue of ineffective assistance of counsel on direct appeal, even though the matter has not first been presented to the trial court. The Court should review the entire record on appeal.** If, for example, from a review of the record, as in *Brooks v. State*, 209 Miss. 150, 46 So.2d 94 (1950) or *Stewart v. State*, 229 So.2d 53 (Miss. 1969), this Court can say that the defendant has been denied the effective assistance of counsel, the court should also adjudge and reverse and remand for a new trial. *See also, State v. Douglas*, 97 Idaho 878, 555 P.2d 1145, 1148 (1976).
>
> (2) Assuming that the Court is unable to conclude from the record on appeal that defendant's trial counsel was constitutionally ineffective, the Court should then proceed to decide the other issues in the case. Should the case be reversed on other grounds, the ineffectiveness issue, of course, would become moot. **On the other hand, if the Court should otherwise affirm, it should do so without prejudice to the defendant's right to raise the ineffective assistance of counsel issue via appropriate post-conviction**

> **proceedings. If the Court otherwise affirms, it may nevertheless reach the merits of the ineffectiveness issue where (a) as in paragraph (1) above, the record affirmatively shows ineffectiveness of constitutional dimensions,** or (b) the parties stipulate that the record is adequate and the court determines that findings of fact by a trial judge able to consider the demeanor of witnesses, etc. are not needed.
>
> (3) If, after affirmance as in paragraph (2) above, the defendant wishes to do so, he may then file an appropriate post-conviction proceeding raising the ineffective assistance of counsel issue. *See Berry v. State*, 345 So.2d 613 (MISS. 1977); *Callahan v. State, supra.* Assuming that his application states a claim, *prima facie*, he will then be entitled to an evidentiary hearing on the merits of that issue in the Circuit Court of the county wherein he was originally convicted./5 Once the issue has been formally adjudicated by the Circuit Court, of course, the defendant will have the right to appeal to this Court as in other cases. [emphasis supplied; text of note 5 omitted]

Later pronouncements concerning the scope of review of this issue on direct appeal are found in **Jones v. State,** No. 2005-KA-02135 decided February 20, 2007, ¶¶10, 11,and 16, slip opinion at 4, 6, respectively [Not Yet Reported], where we find this language:

> As Jones recognizes, it is unusual for an appellate court to consider an ineffective assistance of counsel claim on direct appeal because "we are limited to the trial court record in our review of the claim and there is usually insufficient evidence within the record to evaluate the claim." *Wilcher v. State,* 863 So.2d 776, 825 (Miss. 2003) (quoting *Aguilar v. State,* 847 So.2d 871, 878 (Miss.Ct.App. 2002) (citation omitted)). We also note that "where the record cannot support an ineffective assistance of counsel claim on direct appeal, the appropriate conclusion is to deny relief, preserving the defendant's right to argue the same issue through a petition for post-conviction relief." *Wilcher,* 863 So.2d at 825 (quoting *Aguilar,* 847 So.2d at 878). On direct appeal this Court will only rule on the merits of an ineffective assistance of counsel claim if: "(1) the record affirmatively shows ineffectiveness of constitutional dimensions, or (2) the parties stipulate that the record is adequate to allow the appellate court to make the finding without consideration of the findings of fact of the trial judge." *Wilcher,* 863 So.2d at 825 (citations omitted).

> The parties have not made a stipulation as to the record. The focus of our review then is to determine whether the record shows ineffectiveness of constitutional dimensions. The standard of our review here is whether representation of Jones was "so lacking in competence that it becomes apparent or should be apparent that it is the duty of the trial judge to correct it so as to prevent a mockery of justice." *Ransom v. State,* 919 So.2d 887, 889 (Miss. 2005) (quoting *Parham v. State,* 229 So.2d 582, 583 (Miss. 1969)). We are also guided by the standard to demonstrate counsel was constitutionally inadequate by proving deficient performance and that the deficiency prejudiced the defense. *Strickland v. Washington,* 466 U.S. 668, 687 (1984). Prejudice is shown if there is a "reasonable probability" that without the deficiency of counsel Jones would have had a different outcome at trial. *Nicolaou v. State,* 612 So.2d 1080, 1086 (Miss. 1992). This requires us to review all the circumstances at trial. *Id.* The burden of proof is on Jones. *McQuarter v. State,* 574 So.2d 685, 687 (Miss. 1990). Mere allegations are not sufficient to meet this burden of proving prejudice. *Johnson v. State,* 730 So.2d 534, 538 (Miss. 1997).
>
> * * * * * *
>
> We do not examine the record to determine the quality of the representation Jones received but rather the constitutional sufficiency of the representation. Jones did not have a constitutional right to errorless counsel. *Branch v. State,* 882 So.2d 36, 52 (Miss. 2004). A review of the record before us does not demonstrate that the outcome here was a mockery of justice or that counsel was constitutionally inadequate. The record reflects that the fairness of the trial Jones received was not affected by the actions of his counsel. Finding no error we affirm his conviction.

Ditto again with respect to the instant case where no stipulation as to the content of the record has been made.

The centerpiece of our retort is that the official record, in its present posture, fails on direct appeal to affirmatively demonstrate ineffectiveness of constitutional dimension where Mr. Tisdell rendered reasonably effective assistance of counsel.

The test to be applied in cases involving the alleged ineffectiveness of counsel is whether or not counsel's **overall performance** was **(1)** deficient and **(2)** whether or not the deficient

performance, if any, prejudiced the defense [**Strickland v. Washington,** 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)] "in the sense that our confidence in the correctness of the outcome is undermined." **Frierson v. State,** 606 So.2d 604, 608 (Miss. 1992). *See also* **Osborn v. State,** 695 So.2d 570, 575 (Miss. 1997); **Moore v. State**, 676 So.2d 244 (Miss. 1996).

The burden is on the defendant to demonstrate "both prongs" [**Edwards v. State,** 615 So.2d 590, 596 (MISS. 1993)], or to at least state a "claim, *prima facie*," with respect to each prong. **Read v. State,** *supra*, 430 So.2d at 841; **Moore v. State**, *supra;* 676 So.2d at 246; **Blue v. State**, 674 So.2d 1184 (Miss. 1996).

The determination of whether counsel's performance was both deficient and prejudicial must be determined from the "totality of the circumstances." **Osborn v. State,** *supra*, 695 So.2d at 575); **Frierson v. State,** *supra*, 606 So.2d at 608. In other words, the target of appellate scrutiny in evaluating the deficiency and prejudice prongs of **Strickland** is counsel's "overall" performance. **Nicolaou v. State,** 612 So.2d 1080, 1086 (Miss. 1992).

Brownlee has failed to demonstrate a deficiency in counsel's overall performance sufficient to undermine the integrity of Brownlee's trial and convictions. Stated differently, the official record fails to affirmatively reflect ineffectiveness of constitutional dimension.

We respectfully submit it cannot be said that counsel's performance was deficient and that any deficiency prejudiced the defendant.

CERTIFICATE OF SERVICE

I, Billy L. Gore, 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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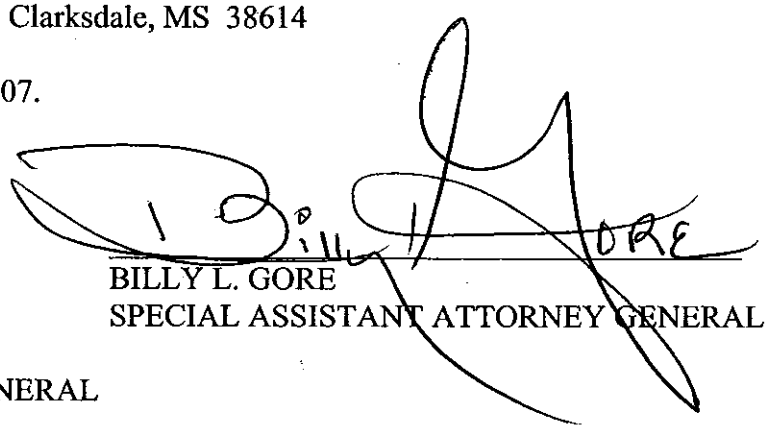
This the 13th day of June, 2007.



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