IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

OCTZAVIUS NEKEITH WEAVER — APPELLANT

VS. — NO. 2007-KA-1423-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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PROCEDURAL HISTORY:

On July 17-18, 2006, Octzavius Weaver, "Weaver," was tried for armed robbery and possession of a fire arm by a previously convicted felon as an habitual offender before a Hinds County Circuit Court jury, the Honorable William A. Gowan, Jr. presiding. R. 1. Weaver was found guilty and given a life sentence in the custody of the Mississippi Department of Corrections. R.188-189. From that conviction, Weaver filed notice of appeal to the Supreme Court. C.P. 49.

ISSUES ON APPEAL

I.

WAS THE IDENTIFICATION PROCESS RELIABLE?

II.

WAS WEAVER'S RIGHT TO COUNSEL VIOLATED?

III.

WAS WEAVER'S SILENCE AFTER A MIRANDA WARNING IMPROPERLY ADMITTED?

IV.

DID WEAVER RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL?

V.

WAS WEAVER PROVIDED A FAIR TRIAL?

STATEMENT OF THE FACTS

On April 12, 2006 , Weaver was indicted for armed robbery and possession of a firearm by a previously convicted felon as an M. C. A. § 99-19-83 habitual offender on May 16, 2003 by a Hinds County Grand jury. C.P. 3-4.

On July 17-18, 2006, Weaver was tried for armed robbery and possession of a fire arm by a previously convicted felon as an habitual offender before a Hinds County Circuit Court jury, the Honorable William A Gowan, Jr., presiding. R. 1. Weaver was represented by Mr. Peter A. Stewart, III. R. 1.

Mr. William Penn testified that he was robbed of his wallet. R. 53-55. This was on the evening of May 16, 2003 around 6: 00 P.M.. This was outside The Green Room, a pool hall, in Jackson, Mississippi. R. 99. Penn testified that a man approached him with a black handgun. The man pointed the gun at Penn and demanded his money. Mr. Penn opened his pockets to show him he had none. The man asked for his wallet which he surrendered. When the man jumped in the car he had exited, Penn wrote down the license plate number. R. 54. It was "524-HCW." R. 88. Penn identified his assailant in the court room as being Weaver. R. 54.

Officer Barry Hale testified that he investigated an alleged armed robbery. It was at The Green Room on Bounds Street. Hale learned through his investigation that a description had been given of the suspect, as well as a tag number. The car tag number was traced to a Ms. O'Banner at 2940 Randolph Street. R. 76. Mr. Weaver and a Mr. Harris, who admitted to having control of the car in question, were located there. They were both taken into custody. R. 76. A loaded semi-automatic black Lorcin .380 handgun was found "laying in the bushes in front of the house." R. 78. It was not far from the car.

Inside the car was found a card with Mr. Penn's name on it, as well as "a spare key" to one

of his vehicles. R. 80. Officer Hales also testified that Weaver had his shirt "on backwards." R. 88. This indicated a possible quick change of clothes. Mr. Penn had described what the suspect was wearing. He was wearing green pants and a black shirt. R. 82.

Mr. Harris testified that he had control and custody of the 1994 Oldsmobile Cutlas owned by his girl friend, Ms. O' Banner. This was on May 16, 2003. R. 90. Ms. O'Banner was away serving in the military. Harris testified that he and "Weezie", aka Weaver, were taken into custody for questioning. Harris testified that Weaver had borrowed and had control of the car belonging to Ms. O'Banner on the day of the alleged armed robbery. R. 92-93.

Officer Kent Daniels with the Jackson Police Department testified that was involved in the investigation at issue. R. 98-109. Daniels testified that property belonging to Penn was found in the car. The hand gun he described was found near the car. R. 101. Weaver was taken into custody along with Mr. Harris.. R. 101. Penn identified Weaver's photograph from a computer generated photographic spread. R. 99-100. There were six photographs in the spread. The photos are arranged by computer as to height, weight and age. R. 100. There was no objection to the way the photographs were arranged. There was no objection to any way in which Weaver's photograph would have been identifiably different from any of the others.

On cross examination, Daniels was asked if Weaver ever "said he did it or anything." R. 108. On redirect, Daniels was asked "Did he ever say he didn't do it?" R. 108. There was no objection to the question or answer. Daniels also testified that Penn identified Weaver as the person who robbed him. Weaver and Harris were placed in separate rooms. Penn, who viewed Harris first, told Daniels Harris was not involved. He then identified Weaver as his assailant. He was in a separate room from Harris. R. 108. Daniels testified that it did not take long for Penn to identify Weaver. R. 109. He as "pretty sure" in his identification. R.109.

The trial court found that Mr. Penn's identification of Weaver was "based upon his observations of him at the time of the commission of the crime." R. 148.

When the prosecution rested its case, trial counsel moved for a directed verdict which was denied. R. 150-151. Weaver chose not to testify. R. 150-151.

Weaver was found guilty and given a life sentence as a M. C. A. § 99-19-83 habitual offender in the custody of the Mississippi Department of Corrections. R.188-189. From that conviction, Weaver filed notice of appeal to the Supreme Court. C.P. 49.

SUMMARY OF THE ARGUMENT

1. The record indicates that the trial court correctly found that Mr. Penn, the victim, identified Weaver based upon "his observations of him at the time of the commission" of the armed robbery." R. 148. The record reflects there was credible, substantial corroborated evidence in support of its decision. The identification procedures used did not "give rise to a very substantial likelihood of irreparable misidentification." **York, infra**, 1383.

Mr. Penn had a good opportunity to view Weaver during the armed robbery. R. 53. He was paying attention to Weaver who was holding a gun only a few feet away from him. It was day light at the time. R. 61. Penn gave the police a description of the suspect. R. 54-55. He also observed a distinctive tattoo on Weaver's neck. R. 58. Penn identified Weaver in the court room based upon his observations without any objection. R. 54. Penn was "sure" Weaver was the person who robbed him. R. 73.

Penn testified to identifying Weaver at a "show up" as well as to selecting his photograph out of a computer generated spread. There was no specific objection as to how the procedures used were "impermissibly suggestive." R. 55-60. The showing of a photographic spread was not "a critical stage" of the proceedings against a defendant. **McGee**, 542 So 2d 228 (Miss. 1989).

The record also reflects "indicia" of reliability. The show up was within a few hours of the robbery. R. 55-56; 99-100. The car identified by Penn through auto license plate number "524-HCW" contained items belonging to Mr. Penn. R.101. A black semi-automatic weapon was found at the scene near the car. R. 78. It fit the description provided by Penn. R. 73. The custodian of the car bearing license plate number "524-HCW" confirmed that Weaver had borrowed and used the car. R. 94; 102.

2. This issue was waived for failure to make a contemporaneous specific objection. Mr. Penn had

already identified Weaver in the court room as the person who robbed him. R. 54.

The record reflects that when Mr. Penn identified Weaver from a photographic spread and at a two man show up, Weaver was a "suspect" not yet eligible for an attorney or a initial appearance. **Thompson v. State** 726 So.2d 233, 237 (Miss. App.1998)

Officer Daniels' testimony about Mr. Penn's identification of Weaver's photograph from a photo spread came before testimony about Penn identifying Weaver at a show up. R. 98-109. The viewing of photographs is not a critical stage of the proceedings against a defendant. **McGee, infra.**

The record reflects that the show up was not impermissibly suggestive. Weaver was identified by Penn only after he had viewed the custodian of the car. He was in a separate room. He informed investigators that Harris was not involved in the robbery. Then Penn identified Weaver who was in another room as the person who had robbed him. R. 54-56; 108-109.

In addition, unlike the circumstances in **Brooks, infra**, Weaver's show up and Penn's selection of his photograph from six others came during an on going investigation. Weaver at the time of the show up was a suspect during an on-going investigation.

3. The record reflects that there was no objection to testimony about Weaver's silence upon being detained by investigators. R. 99. This issue was therefore waived.

In addition, the record reflects that Weaver's counsel "opened up questions" about what Weaver said or did when detained. This was when Officer Daniels was asked on cross examination about what Weaver said when detained. R. 107-108. Finally, an objection was sustained to a question about Weaver's "line of defense." The question was never answered by Officer Daniels. R. 109.

4. The record reflects a lack of either deficient performance or of prejudice to Weaver's defense to the charge as a result of his trial counsel's representation. The record reflects that trial counsel's

actions and representation did not undermine confidence in "the fairness" of Weaver's trial. Rather the record reflects overwhelming evidence of guilt.

Neither Weaver or his counsel objected to his being in prison attire. The record reflects that he had an opportunity to dress otherwise. A suppression hearing under the facts of this case would not have altered the outcome of the hearing or the fairness of Weaver's trial.

Mr. Penn was "face to face" with Weaver under good lighting. He observed his face, what he was wearing, as well as a distinctive round tattoo on his neck. He also wrote down the license plate number of the car he was using. It was "524-HCW." R. 88. That car located within an hour contained property belonging to Penn. The hand gun used by the gun man and described by Mr. Penn was also found near the car. R. 101. The custodian of the car corroborated the fact that Weaver had used the car shortly before officers arrived. R. 96-97.

5. The record reflects that Weaver was given a fair trial. As shown under previous propositions, there were no errors singularly or collectively that interfered with Weaver's being able to defend himself given the evidence presented against him during his trial.

ARGUMENT

PROPOSITION I

THE RECORD REFLECTS THAT PENN'S IDENTIFICATION OF WEAVER WAS BASED UPON HIS OBSERVATIONS UNDER GOOD LIGHTING AT THE TIME OF THE ROBBERY.

Weaver argues that "the show up" procedure used in identifying him was impermissibly suggestive, and should not have been admitted into evidence in the instant cause. Appellant's brief page 4-7.

To the contrary, the record reflects that the trial court correctly found that Mr. Penn's identification of Weaver was "based upon his observations of him at the time of the crime." R. 148. The Appellee would submit that there was credible, substantial evidence in the record in support of the trial court's ruling. We will cite record evidence showing that, as found by the trial court, Mr. Penn had ample opportunity to observe the suspect during the robbery. In short, the five **Neil v. Biggers, infra**. factors for determining if there was "an independent basis" for the identification were satisfied.

Mr. William Penn testified that he was robbed of his wallet. R. 53-55. This was on the evening of May 16, 2003 around 6: 00 P.M. This occurred outside The Green Room, a pool hall, in Jackson, Mississippi. R. 99. It was "summertime, and in broad daylight." R. 61.

Penn testified that a man approached him with a handgun. He pointed the gun at him and demanded his money. Penn opened his pockets to show the gunman he had none. The man asked for his wallet which Penn surrendered. When the man jumped in the car he had exited, Penn wrote down the license plate number. R. 54. It was "524-HCW." R. 88. Penn identified his assailant the court room as being Weaver. R. 54.

Q. If you could point to the individual that is the individual that robbed you?

A. The gentleman right there.

Sanders: **I would ask the Court to reflect that this witness has identified the defendant.**

Court: **Let the record so reflect.** R. 54. (Emphasis by Appellee).

The Supreme Court stated in **Nicholson v. State**, 523 So. 2d 68, 72 (Miss. 1988) that the leading case in Mississippi on **U.S. v. Wade**, 338 U. S. 218, 18 L. Ed. 2d 1149, 87 S. Ct. 1926 (1966), and its progeny is **York v. State**, 413 So. 2d 1372, 1374 (Miss. 1983), which states the **Neil v. Biggers**, 409 U. S. 188, 199, 34 L. Ed. 2d 401, 411 (1972) factors to be considered in assessing the validity of identification testimony.

> **York** goes on to set out the **Neil** factors to consider in determining whether these standards have been fulfilled:
>
> We turn, then to the central question, whether under the "totality of the circumstances" the identification was reliable even thought the confrontation procedure was suggestive. As indicated in our cases, the factors to be considered in evaluating the likelihood of misidentification include
>
> 1. Opportunity of the witness to view the accused at the time of the crime.
>
> 2. The degree of attention exhibited by the witness;
>
> 3. The accuracy of the witness's prior description of the criminal;
>
> 4. The level of certainty exhibited by the witness at the confrontation;
>
> 5. The length of time between the crime and the confrontation. **Nicholson**,. page 72, **Neil, supra**, 411.

In **Scott v. State** 602 So.2d 830, 832 (Miss. 1992), the Supreme Court stated that it would not disturb a trial court's finding on identification. It would support a finding that a pre-trial identification had not impermissibly tainted the in court identification of a defendant. In **Scott**, the robbery victim testified that he gun man was only a few feet away "in a well lighted store." This

provided an independent observational basis for his in court identification.

> The trial court properly ruled that due to the impropriety of the line-up, evidence of this pre-trial identification was inadmissible. Following this ruling, the trial court conducted a voir dire of Pittman out of the presence of the jury, after which it ruled the prior, pre-trial identification had not impermissibly tainted Pittman's ability to make an in-court identification of the robber. In making this ruling, the trial court expressly considered the evidence in light of factors set forth in **Neil v. Biggers**, 409 U.S. 188, 199, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972):...
>
> In reviewing such rulings, we have held that we will not disturb a trial court's determination unless it is not supported by credible evidence. **Magee v. State**, 542 So.2d 228, 231 (Miss.1989); **Nicholson v. State**, 523 So.2d 68, 71 (Miss.1988); **Ray v. State**, 503 So.2d 222, 223-224 (Miss.1986). Pittman testified his pharmacy training had included being taught to recall events in the event of a robbery, and the robbery occurred in a well-lighted store where the robber walked to within several feet of Pittman while brandishing a firearm; therefore, we cannot say the trial court's ruling was not supported by credible evidence.

Weaver testified that the man was near him. He was " about four feet"away R. 58. Penn also remembered that he saw the man holding "a black" semi-automatic hand gun. The man got in the passenger seat of a car. Mr. Penn wrote down the license plate number, 524-HCW. The car and Mr. Weaver were located shortly thereafter. In addition, at trial Penn testified that he remembered that Weaver had a distinctive tattoo visible on his neck. R. 57-58.

> Q. **And how far from you to the defendant were you?**
>
> A. **About four feet.**
>
> Q. **So you had a good visual recollection of what he looked like?**
>
> A. **Yes.**
>
> Q. **Were there any distinguishing characteristics that you observed about this defendant?**
>
> A. **He had a tattoo on the side of his neck, kind of a round tattoo.** R. 57-58. (Emphasis by Appellee).
>
> On redirect, Penn testified that he could "see" Weaver's "face plainly." He was right in front

of him. Penn was "sure" that Weaver was the suspect who robbed him while holding a hand gun on him.

Q. **Could you see his face plainly? Was he right there in front of you?**

A. **Yes.**

Q. **Are you sure that this is him?**

A. **Yes.** R. 73. (Emphasis by Appellee).

Q. The gun, what kind of gun was it?

A. It was a black pistol.

Q. Was it a revolver? Was it an automatic? Was it a machine gun? Do you remember?

A. **Semiautomatic.** R. 73. (Emphasis by Appellee).

Mr. Penn described the suspect as a black male, 180 pounds, five ten, wearing green pants and black t-shirt. R. 83. However, when Weaver was located with others, he was observed to have a shirt "on backwards," indicating that he probably had just changed clothes. R. 88. Weaver was shown a six man photographic display. It contained computer generated photographs of suspects included in police files. Weaver looked through the photographs and identified Weaver's photo as being the image of the man who robbed him. It did not take him long to do so. R.109 . Officer Daniels testified that the photo lineup occurred the same day Weaver was apprehended. R. 102.

The record reflects that both identifications occurred the same day as the robbery. R. 102. Penn testified to being shown two men who were in separate rooms, and not together. R. 55-56. Penn told law enforcement that the man in the first room, Mr. Harris, was not the man who accosted him. When he looked into the second room, he identified Weaver. He also told investigators after viewing Weaver, that he had changed his clothes after the robbery. R. 89. There were no evidence

viewing Weaver, that he had changed his clothes after the robbery. R. 89. There were no evidence that suggestions were made as to which of the two men was Penn's assailant.

> Q. And how did the police approach you? How did he ask you to describe–did he say to you any particular phrase to get you to say that this was the defendant?
>
> A. **They had picked up two guys and they took me in one room. They had two different rooms, and they took me in one room and asked me if the first guy, if that was him, and I told them no. They took me down the hall to the second room and asked me if that was the guy, and I told them yes.**
>
> Q. And is that individual this defendant that you identified today?
>
> A. Yes.
>
> Q. So this defendant, Octzavious Weaver, is the individual who robbed you?
>
> A. Yes.
>
> Q. Did he use a gun?
>
> A. Yes.
>
> Q. What happened after that? Did you subsequently do a photo lineup?
>
> A. Yes.
>
> Q. **And did you make identification of the individual using the photo lineup?**
>
> A. **Yes**. R. 55-56. (Emphasis by Appellee).

The trial court after hearing Weaver's argument about the alleged impermissibly suggestive pre-trial identifications found that Penn's in court identification had an independent basis. The testimony in the record indicated that it was based upon Penn's "observations of him (Weaver) at the time of the robbery."

> However, I feel as though that the pretrial identification of this individual–and I'm saying both identifications–had no influence whatsoever on the in-court identification–had no influence on the in-court identification today at trial. Going back and citing from the U. S. Supreme Court and also from the **Brooks** case that cites the U S Supreme Court case of **Neil v. Biggers**, I find that the record will amply

Weaver was based upon his observation of him at the time of the commission of the crime. R. 148.

...

Based upon the above findings and the lack of timely objection to the introduction of the six pack photo array, the Court is going to overrule the motion to exclude the identification, both as to the initial investigative identification, the six pack identification and the in court identification. R. 150. (Emphasis by Appellee).

Mr. William Harris testified that the police came to his house on Randolph Street. R. 90-97. They took him down town for questioning. The automobile, a maroon Cutlas , belonged to his wife who was away in military service. Harris testified that Weaver had possession of the car prior to the police questioning him. After borrowing it from Harris, Weaver was supposed to have it cleaned and vacuumed .

Q. **Did Octzavious Weaver, "Weezie," have possession of the car prior to the police coming to arrest you?**

A. **Yes, sir.** R. 96-97. (Emphasis by Appellee).

Mr. Kent Daniels testified to investigating the robbery. Through the tag number, a car was located on Randolph Street. Inside the car was found a card belonging to the victim, Mr. Penn. A black semiautomatic handgun was also located near the car. Mr. Harris who had control and use of the car that he loaned to Weaver was taken down town with Weaver.

Weaver was wearing his shirt "backwards" when first observed at the house. R. 88. Mr. Penn looked at Mr Harris who was inside a separate room from Weaver. He did not identify him as his assailant. He identified Weaver who was in a separate room. Penn was also shown a computer generated photo lineup. He identified Weaver's photo without any suggestions having been made. There was no contemporary objection to testimony about Weaver's identification from the photographic line up.

photographic line up.

Q. Okay.

A. **And then the complainant, Mr. Penn, also came to the office. I had developed what we call a photo array where you take six pictures of similar individuals and put them on a photo sheet. I developed the photo array, showed it to Mr. Penn, and he identified Weaver as being the one that robbed him.** R. 99. (Emphasis by Appellee).

...

Q. Okay. Did you have any further investigation involvement?

A. I also, the crime itself happened at six o'clock. An hour or an hour and a half later when the police officer followed up on the tag number that the complainant, Mr. Penn, had wrote down of the subject that robbed him, they went to the address where the tag came back registered to, which was on Randolph. .**The patrol officer went there and found the car, found the weapon and some personal property that belonged to Mr. Penn.** R. 101.

On cross examination, Officer Daniels testified that photo line up was shown to Mr. Penn the same day Weaver was apprehended.

Q. Yeah, he testified it was two weeks later that he was shown the photo lineup?

A. **The photo lineup was shown that day.** R. 102. (Emphasis by Appellee).

On re-direct, Officer Daniels testified that Mr. Penn told him that Harris, the custodian of the car Weaver was driving, was not involved in the robbery. This was the first person Penn observed. He was in a separate room from Weaver. After eliminating Harris, Mr. Penn then identified Mr. Weaver. He informed Daniels Weaver was "the person" who robbed him.

In short, the record indicates that this was not a suggestive single person show up.

Q. Okay. Did William Penn advise you that Octzavious Weaver was the individual who robbed you?

A. Yes.

Q. Did he advise you that William Harris was not an individual who was involved in the robbery?

A. Right

Q. . So from one room to the next, you have two people for him to look at, and he chose one and not the other?

A. Right. R. 108-109.

In **Banks v. State** 816 So.2d 457, 460 -461 (¶16-¶ 17) (Miss. App. 2002), the Court found that Mrs. Franklin's identification of Banks had an independent observational basis. In that case, she identified Banks at a one man show up within fifteen minutes of the robbery. She was "face to face with him." This was not found to be impermissibly suggestive.

> ¶ 16. In applying these five factors to the present case, this Court notes the following: 1) Mrs. Franklin had the opportunity to view Banks when she stood face to face with him, as he demanded her purse; 2) Within five minutes after the robbery, Mrs. Franklin described to Officer Stillman the robber's physical appearance, including his clothing, hair, and weapon; 3) Within minutes, Officer Stillman arrested a person with the same physical appearance, clothing, hair, and weapon; and 4) Within fifteen minutes of the robbery, Officer Stillman brought Banks back to Piggly *461 Wiggly, where Mrs. Franklin positively identified Banks as the person who robbed her.
>
> ¶ 17. The trial court found, and this Court agrees, that there were sufficient indices of reliability to not warrant a suppression of the identification.

In **Magee v State**, 542 So. 2d 228, 233 (Miss. 1989), the Supreme Court found that a viewing of a photographic lineup display was not "a critical stage" of the proceedings against an appellant.

> The point regarding the photographic lineup is even less meritorious. A photographic lineup is not a "critical stage". Accordingly, an accused enjoys no right to counsel in connection with a photographic lineup. **Nicholson v. State**, 523 So.2d 68, 71-72 (Miss.1988); **Johnson v. State**, 359 So.2d 1371, 1374 (Miss.1978); See also **United States v. Ash**, 413 U.S. 300, 321, 93 S.Ct. 2568, 2579, 37 L.Ed.2d 619 (1973). The assignment of error is denied.

The record cited indicates credible, corroborated evidence in support of the trial court's ruling. Mr. Penn had "an independent observational basis" for identifying Weaver. Weaver was only a few feet from him during day light hours. Penn was "face to face" with Weaver. Penn was

paying close attention. He observed his face, his clothing, his black semi-automatic weapon, his car tag, as well as the distinctive tattoo on his neck.

Identification removed from Penn's stolen wallet was found inside the car Penn identified by tag number. The black semi-automatic weapon used in the robbery was found at the scene with the car. R. 101. Penn was "sure" that Weaver was his assailant rather than Mr. Harris, the custodian of the car, or the five other men in the photo-spread he reviewed before picking out Weaver's image. The Appellee would submit that this issue is lacking in merit.

PROPOSITION II

THIS ISSUE WAS WAIVED AS WELL AS LACKING IN MERIT.

Weaver argues that "the show up" process in which he was involved violated his right to counsel. He believes this was "a critical stage" of the proceedings against him. Since Weaver invoked his right to counsel prior to the show up, he believes that his Constitutional right to counsel was violated . Appellant's brief page 7-9.

To the contrary, the record reflects that there was no contemporaneous specific objection to Mr. Penn's identification of Weaver in the court room. R. 54. In addition, when Mr. Penn identified Weaver from a photographic spread and at a two man show up, Weaver was a "suspect" who was not yet eligible for an attorney or an initial appearance.

In **Thompson v. State** 726 So.2d 233, 237 (Miss. App.1998), the Court found that a show up was not a critical stage against an appellant. Where the appellant is still a suspect during an investigation, he has no right to counsel.

> ¶ 18. Consistent with the facts in Nixon, a review of the record before us reveals that Thompson was merely a suspect when the officers presented him to Steele for positive identification. There is no evidence that formal adversarial proceedings had commenced against Thompson prior to Steele's identification of him during the show-up. Consequently, we find that Thompson's Sixth Amendment right to counsel had not attached at the time of the show-up.

As shown under proposition I, there was ample record evidence in support of the trial court finding that Penn's identification of Weaver as his assailant was not impermissibly suggestive. R. 148. Rather, the record reflects that he had an opportunity to see the suspect, his face, his clothing, his weapon, and the license plate of the car he had borrowed from Mr. Harris. In addition, there was evidence that Mr. Weaver had a distinctive tattoo visible on his neck which Penn noticed when he saw him at the scene of the crime. R. 58.

Nor was there any specific contemporaneous objection to the manner in which the two man show up and the six man computer generated photo spread was conducted. The record reflects that the original objection was that the two man show up was improper because the two men were allegedly "in the same room" when Weaver was identified. R. 50. The testimony of Officer Daniels indicated this was not true. R. 99-109. Weaver was in one room, and the custodian of the car Weaver used was in another separate room. R. 55-56; 108.

In **Conner v. State**, 632 So. 2d 1239, 1255 (Miss. 1993), the Court pointed out that it is necessary to make "a specific objection" to the introduction of evidence. An objection can not be "enlarged" on appeal. A trial court can not be faulted for issues not specifically raised during the trial.

> An objection on one or more specific grounds constitutes a waiver of all other grounds. **Stringer v. State**, 279 So. 2d 156, 158 (Miss. 1973); see **McGarrh v. State**, 249 Miss. 247, 276, 148 So 2d 494, 506 (1963) (objection cannot be enlarged in reviewing court or embrace omission not complained of at trial). Cert denied, 375 U.S. 816, 84 S. Ct. 50, 11 L Ed 2d 51 (1963). Since Conner failed to object to the State's form of verdict instruction on grounds that it was incomplete, he is procedurally barred from raising the point here.

Harris, who had control of the car, was in one room and Weaver was in another. R. 55-56; 108. There was no record evidence that any suggestions were made to Weaver. That is no suggestions as to who was his assailant and who was not. Nor was there any specific objection to the six man photo line up based upon any feature, marking or prominent placement in the series of photos that would have made Weaver's photo stand out or be distinguishable from any of the others.

In **Brooks v. State** 903 So.2d 691, 694-695 (¶ 7-¶8) (Miss. 2005), relied upon by Weaver, the appellant was subjected to a lineup after he had been indicted, and extradited from Illinois. This clearly distinguished that case from the instant cause. Weaver was a suspect in an on going

investigation prior to any "initial appearance" or indictment. "All reasonable security measures" for the location of evidence and suspects had not been completed.

> ¶ 7. In **Coleman v. State**, 592 So.2d 517 (Miss.1991), this Court held:
> As a matter of the law of this state, the right to counsel attaches once the accused is in custody (a fact generating the legal conclusion that the individual is under arrest) and all reasonable security measures (of evidence and persons) have been completed. At all critical stages thereafter, the accused is of right entitled to access to counsel, absent a specific*695 knowing and intelligent waiver tied to that stage.
>
> ¶ 8. Adversarial proceedings had certainly commenced against Brooks prior to the lineup. An arrest warrant had been issued, and he had been extradited from Illinois. Furthermore, Brooks had signed a document indicating that he did not want to speak to any law enforcement authorities either in Illinois or Mississippi for any investigation.

In **Jimpson v. State** 532 So.2d 985, 989 (Miss.1988), the Supreme Court found that the failure to have counsel at a lineup identification was "harmless error." It was harmless error because there was sufficient evidence for determining that the identification of the appellant in that case was based "their view of the defendant at the bank." Their independent observations of Jimpson at the time of the criminal confrontation provided a basis for their in court identification..

> In **Chapman v. California**, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), the United States Supreme Court first recognized the doctrine of "harmless constitutional error."
>
> We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the federal constitution, be deemed harmless, not requiring the automatic reversal of the conviction.386 U.S. at 21, 87 S.Ct. at 827, 17 L.Ed.2d at 709.
> This principle is applicable to the case now before this Court. Although Jimpson's right to counsel had attached at the lineup, thereby constituting a technical violation of his Sixth Amendment right to counsel, the record is clear as to both witnesses, that their identification was based on their view of the defendant at the bank and its vicinity and was not based on the lineup identification. See **York v. State**, 413 So.2d 1372, 1380-83 (Miss.1982).
> It should also be noted that in this case, even if the lineup was improper, the amount of evidence favoring conviction was overwhelming. Jimpson here protests his lack of counsel at the lineup, not the lineup itself. Even without the lineup identification, the amount of other evidence present in this case is overwhelming. See **Meadows v.**

> **Kuhlmann,** 812 F.2d 72, 76 (2d Cir.1987); **Robinson v. Percy,** 738 F.2d 214, 220-21 (7th. Cir.1984).
> In summary, this Court holds that even though the constitutional right to counsel had attached at the critical stage of a lineup identification held after arrest, there is no reversible error here. The error is harmless for there is no sufficient showing in the record that the identification testimony was impermissibly tainted by the lineup being held without the presence of legal counsel. **Nicholson, supra** at 77.

In **Wilson v. State** 759 So.2d 1258, 1262 (Miss. App. 2000), the Appeals Court found that a photo spread is not prejudicial unless an appellant's photo is singled out in some way from the others assembled.

> ¶ 10. Our supreme court has established that a photographic array containing pictures of the assailant viewed by the victim is not unduly prejudicial unless the assailant's photograph is notably different from the remaining photographs or the officer conducting the photo line-up makes some comment suggesting the identification of the assailant. **Wilson v. State,** 574 So.2d 1324, 1327 (Miss.1990) (quoting **York v. State,** 413 So.2d 1372, 1383 (Miss.1982)). Further, even if the pre-trial photo line-up is determined to be unduly suggestive, a later in-court identification is still perfectly admissible unless, from the totality of the circumstances, the pre-trial identification was so suggestive as to create a "very substantial likelihood of irreparable misidentification." **Wilson,** 574 So.2d at 1327.

The record reflects there was no specific objection either to the show up or the photo spread as to how it was allegedly "impermissible suggestive." Weaver, like Jimpson, objected to his lack of counsel, not to how the show up and photo spread selection processes was supposedly "impermissibly suggestive." Nor was there any evidence that the investigation of the circumstances under which Penn was robbed had been completed at the time of the show up or the showing of the photographic spread.

The Appellee would submit that under the facts of this issue is also lacking in merit.

PROPOSITION III

THIS ISSUE WAS WAIVED. AND WEAVER'S POST MIRANDA SILENCE WAS OPENED UP BY HIS TRIAL COUNSEL.

Weaver argues that he was not given a fair trial because the prosecution was allowed to comment on his right to remain silent after having been given his **Miranda** rights. While this information did not come during cross examination of the appellant, since he did not testify, it was, nevertheless, brought out and used against him. He argues that this testimony came through state witnesses which had a prejudicial effect upon the jury. Appellant's brief page 9-11.

To the contrary, the record indicates that there was no objection to testimony from Officer Kent Daniels about Weaver stating that he did not want to talk without having an attorney present. R. 99. There was also no objection to the question on redirect by the prosecution. This was a follow up question based upon questions on cross examination. R. 108-109. And the objection to a question to Officer Daniels about whether Weaver ever "provided you with an alibi or any alternative theory to this investigation" was general, and not specific. In addition, the record reflects that the objection was sustained and Officer Daniels never answered the question. R. 109.

In explaining his involvement in the instant cause, Officer Kent Daniels mentioned that Weaver was given his **Miranda** rights. After being given those rights, Weaver informed him that he did not want to talk without having a lawyer present. There was no contemporaneous objection.

> Q. Could you relate to the jury what your involvement was in that case?
>
> A I conducted the follow up investigation...Once they brought him to the office, I advised him of his **Miranda** rights, which he said that he didn't want to talk without a lawyer present, so from there the patrol unit automatically took him to the city holding facility. R. 99

In **Whigham v. State**, 611 So. 2d 988, 995 (Miss. 1995), this Court stated that it without

a contemporaneous objection or argument, issue raised on appeal were 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)...

On cross examination, Officer Kent Daniels was questioned about whether Weaver had ever admitted that "he did it?" On redirect, the prosecution asked whether Weaver ever said that he didn't do it.

> Q. And basically to this day the defendant hasn't given any incriminating statements against himself, has he? **He's never said he did it or anything, is that right?**
>
> A. **Correct**. R. 107-108. (Emphasis by Appellee).

On redirect, the prosecutor asked a follow up question, given the opening up of issues related to Weaver's not providing any incriminating statements to investigators. .

> Q. Did he ever say he didn't do it?
>
> A. No, he didn't. R. 107-108

In **Gill v. State**, 485 So. 2d 1047, 1051 (Miss. 1986), the court found that cross examination opened up questions related to other wrongs. The defense by inquiring on cross-examination about a conversation between Mary Gill and the prosecutrix, Lynn Gill, opened the door. It was relevant for the jury to get an understanding of the context in which the conversation had occurred. As stated:

> Moreover, the objectionable testimony was a continuation of a conversation brought in by the defense in an attempt to show the prosecutrix's hostility toward her father and once having allowed a partial view of the circumstances, the prosecution was rightly allowed to include the remainder of the mother's conversation with the daughter, including accusations against the father of prior sexual assaults. The trial court told the appellant that he could not "shut the door". Where one side opens the door, the other may come in and develop that point in greater detail. See **Jefferson v. State**, 386 So. 2d 200, 202 (Miss. 1980); Cf. **Simpson v. State**, 366 So. 2d 1085,

1086 (Miss. 1979).

The record reflects that a question on redirect about whether Weaver provided any alibi or alternative theory to this investigation was withdrawn. This was after an objection and a bench conference off the record. The record reflects that Officer Daniels did not answer the question.

> Q. At any time has Octzavious Weaver provided you with any alibi or any alternative theory to this investigation?
>
> Stewart: Objection, may we approach?
>
> (Off record discussion at bench)
>
> Sanders: **We'll withdraw the last question, your Honor**. R. 109. (Emphasis by Appellee).

Therefore, the Appellee would submit that there was no evidence provided the jury about Weaver's post **Miranda** silence with regard to any alternative theory of investigation, such as an attempted alibi..

In **Quick v. State**, 569 So. 2d 1197, 1199 (Miss. 1990), relied upon by the appellant, the Supreme Court reversed because of an improper amendment of the aggravated assault indictment against Quick. There was dicta included indicating that commenting upon a defendant's post-Miranda silence could be error. However, as shown with cites to the record above, the facts of this case indicate Weaver "opened up" questions about what he said after he was arrested. R. 107-108.

The Appellee would submit that this issue was waived for failure to make a contemporaneous objection, as well as for having opened up issues related to what Weaver said or did not say relevant to the charges against him in the instant cause. This issue is lacking in merit.

PROPOSITION IV

THE RECORD REFLECTS TRIAL COUNSEL PROVIDED EFFECTIVE ASSISTANCE OF COUNSEL.

Weaver argues that he did not receive effective assistance of counsel. He believes that his trial counsel should have prevented the jury from seeing him in prison attire on the first day of trial. He also argues that failure to request a suppression hearing when objecting to the identification process was inadequate representation. Weaver also thinks that failure to request a new trial was the final failure on the part of his trial counsel. Appellant's brief page 11-18.

To the contrary, the Appellee would submit that when the record is taken in its entirety, there was evidence of "overwhelming evidence of guilt." Th record reflects that the actions or inactions of trial counsel enumerated in the appellant's brief would not have altered "the outcome" of Weaver's trial.

For Weaver to be successful in his ineffective assistance claim, he must satisfy the two-pronged test set forth in **Strickland v. Washington**, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064-65, 80 L. Ed. 2d 674, 693-95 (1984) and adopted by this Court in **Stringer v. State**, 454 So. 2d 468, 476-477 (Miss. 1984).Weaver must prove: (1) that his counsel's performance was deficient, and (2) that this supposed deficient performance prejudiced his defense. The burden of proving both prongs rests with Weaver. **McQuarter v. State**, 574 So. 2d 685, 687 (Miss. 1990). Finally, Weaver must show that there is "a reasonable probability" that but for the alleged errors of his counsel, "the result of the proceedings" would have been different. **Nicolau v. State**, 612 So. 2d 1080, 1086 (Miss. 1992), **Ahmad v. State**, 603 So. 2d 843, 848 (Miss. 1992).

The second prong of the **Strickland v. Washington**,, 466 U.S. 668, 685, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) is to determine whether there is a reasonable probability that but for the

errors of his counsel, the result of Weaver's trial would have been different. This is to be determined from the totality of the circumstances involved in his case.

In **Estelle v. Williams** 425 U.S. 501, 512-513, 96 S. Ct. 1691, 1697 (U.S. Tex.,1976), the Court held that while no one could compel a defendant to appear in prison clothes, failure to object negated any Constitutional violation.

> Accordingly, although the State cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes, the failure to make an objection to the court as to being tried in such clothes, for whatever reason,*513 is sufficient to negate the presence of compulsion necessary to establish a constitutional violation.FN10

While the record reflects that Weaver was possibly seen in prison attire on the first day of the trial, there was no evidence that Weaver or his counsel objected to the prison attire. The trial court stated that the defendant "was given an opportunity to dress himself in civilian clothes and not appear in prison attire." R.6-7. This occurred prior to juror's being in the court room for voir dire.

Weaver had civilian clothes after the first day. The appellee would submit that trial counsel can not be faulted. Weaver was given an opportunity to dress differently but did not avail himself of whatever was available to him to wear, or object when given an opportunity to do so.

As shown under previous propositions there was record evidence in support of the trial court's finding that Penn's identification was based upon his "observations of him while being robbed." R. 148. A suppression hearing would not have altered that outcome. Questioning state witnesses about what Weaver did not do or say when arrested was relevant to his defense since Weaver unlike most appellant's apparently never made any statements to anyone.

As shown under proposition III, there was insufficient evidence for granting a mistrial. This would be based upon comments about Weaver's invoking his right to remain silent, under the facts of this case. There was no contemporaneous objection. And if there was, such a motion could have

only focused to the jury's attention more fully on the fact that Weaver was silent except for requesting an attorney.

Finally, failure to file a JNOV or a New Trial where there is overwhelming evidence of guilt is not evidence of ineffective assistance of counsel. The record reflects that trial counsel preserved the suppression of identification evidence issue for appeal purposes, which appeal counsel is currently arguing in its appeal to the Supreme Court.

The record reflects that trial counsel filed notice of appeal on behalf of Weaver. C.P. 49.

> As stated in **Strickland**: and quoted in **Mohr v. State** , 584 So. 2d 426, 430 (Miss. 1991): Under the first prong, the movant 'must show that the counsel's performance was deficient and that the deficient performance prejudiced the defense. Here there is a strong presumption of competence. Under the second prong, the movant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' The defendant must prove both prongs of the test. Id. 698.

Weaver bears the burden of proving that both parts of the tests have been met. **Leatherwood v State**, 473 So. 2d 964, 968 (Miss. 1985).

> The burden of proving ineffective assistance of counsel is on the defendant to show that the counsel's performance was deficient and that the deficient performance prejudiced the defense.

When an appeal involves post conviction relief, the Mississippi Supreme Court has held, "that where a party offers only his affidavit, then his ineffective assistance of counsel claim is without merit." **Lindsay v. State**, 720 So. 2d 182, 184 (6 (Miss. 1998); **Smith v. State**, 490 So. 2d 860 (Miss. 1986). There was also no statement of "good cause" for why the affidavits could not be obtained from trial counsel or any one else familiar with the trial proceedings. See M. C. A. § 99-39-9(1)(e).

In **Johnston v . State**, 730 So. 2d 534, 538 (Miss. 1997), the Court stated that the burden

of showing prejudice could not be met by merely alleging it.

> Additionally, there is a further requirement which Johnston must hurdle, prejudice. Claims alleging a deficiency in the attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. **Strickland**, 466 U. S. at 693., 104 S. Ct. at 2067. However, Johnston fails to make any allegations of prejudice. As in **Earley**, Johnson must affirmatively prove, not merely allege that prejudice resulted from counsel's deficient performance. *Earley*, 595 So. 2d at 433. Johnston has failed on the second prong of **Strickland**. Having failed to meet either prong of the **Strickland** test, we find that there is no merit to the ineffective assistance of counsel claim raised by Johnston.

In **Ferguson v. State**, 507 So. 2d 94, 97 (Miss. 1987), quoting **Strickland**, 466 U S at 687, 104 S. Ct. 2052 for the proposition that any alleged deficient performance must be serious enough to "undermine confidence" in the fairness of the whole proceeding.

> Although it need not be outcome determinative in the strict sense, it [deficient assistance of counsel] must be grave enough to 'undermine confidence' in the reliability of the whole proceeding.

Appellee would submit that based upon the record we have cited, there is a lack of evidence for holding that there is "a reasonable probability" that trial counsel erred in his representation of Weaver, given the evidence against him in the instant cause.

The Appellee would submit that the record reflects that Weaver received effective assistance of counsel under the facts of this case.

PROPOSITION V

WEAVER RECEIVED A FAIR TRIAL BY A JURY OF HIS PEERS.

Weaver argues that he did not receive a fair trial. He did not receive a fair trial based upon the alleged suggestive identification process, as well as by alleged comments by the prosecution about his right to remain silent. He considers these alleged errors cumulative which take together deprived him of a fair trial. Appellant's brief page 18-19.

To the contrary, the Appellee would submit that, as shown under proposition I and II, that there was credible corroborated evidence for the trial court's finding that Mr. Penn's identification was based upon his "observations" of him while he was being robbed. R. 148. Penn was "face to face" with Weaver during day light. He observed a round tattoo on his neck, described what he was wearing, as well as recorded the tag number of the car within which he was traveling. Mr. Penn's property was found in that car roughly an hour later along with Mr. Weaver. The black semi-automatic hand gun was found near the car Weaver had recently used.

There was no violation of Weaver's right to counsel. The record reflects that the show up occurred during an on-going investigation. Weaver had not yet been formally charged with a crime. **Thompson, supra.**

Under proposition III, we showed with cites to the record, Weaver's post **Miranda** silence was waived for failure to specifically object. **Whigham, supra.** The record also reflects that it was "opened up" by his questions on cross examination about what Weaver did not do or say after he was arrested. It was also waived for failure to specifically object on the same grounds being raised on appeal. **Haddox v. State**, 636 So. 2d 1229, 1240 (Miss. 1994).

In **Coleman v. State**, 697 So. 2d 777, 787 (Miss. 1997), the Supreme Court pointed out that

where there were no reversible errors in any part there were none in the whole.

> This court may reverse a conviction and sentence based upon the cumulative effect of errors that independently would not require reversal...However, where there was no reversible error in any part, so there is no reversible error to the whole, quoting **McFee**, 511 So. 2d 130, 136 (Miss 1987)

The Appellee would submit that this issue is also lacking in merit.

CONCLUSION

Weaver's conviction 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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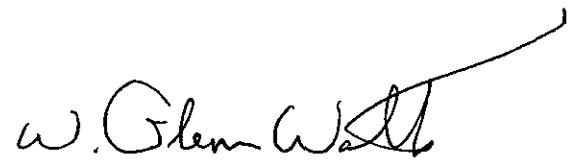
This the 17th day of April, 2008.



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