IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

KENDRICK DARNELL CONNER — APPELLANT

VS. — NO. 2008-KA-0293

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

I. THE APPELLANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

II. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE VERDICT.

III. THE VERDICT WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

STATEMENT OF THE FACTS

Stacie Schaffer and her daughter, Melissa, were working at Ella's Country Store on May 21, 2006. (Transcript p. 122). Stacie testified that while she and her daughter were standing near their registers, a man "came into the store, came around to the front of the counter, pulled out a gun and asked for the money. He had a do-rag turned to the side covering up one - his left side of his face." (Transcript p. 123). He pointed the gun at her and she grabbed her money and threw it on the counter between the two registers. (Transcript p. 125). He then pointed the gun at Melissa and she too threw her money on the counter between the two registers. (Transcript p. 151). Melissa testified

that she heard the man say, "give me all the money." (Transcript p. 148). He grabbed the money and put it in a bag. (Transcript p. 151). He told them not to call the police and ran out the door. (Transcript p. 152).

The two women locked the store and went home. (Transcript p. 152). Stacie went to the store next door to their house and called police. (Transcript p. 152). Both women picked the Appellant, Kendrick Darnell Conner, out of a photo lineup and identified him as the one who robbed the store. (Transcript p. 190 - 191).

Conner was arrested, indicted, and convicted of two counts of armed robbery. He was sentenced as a habitual offender to serve thirty five years in the custody of the Mississippi Department of Corrections for each count.

SUMMARY OF THE ARGUMENT

Conner was not denied effective assistance of counsel. Defense counsel's decisions regarding the admission of evidence are strategic in nature and should be given great deference. Further, defense counsel's decision to allow the photo lineup into evidence did not prejudice the appellant as the witnesses also made in-court identifications. Moreover, there was sufficient evidence to support the verdict and the verdict was not against the overwhelming weight of the evidence.

ARGUMENT

I. THE APPELLANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

Conner first argues that his trial counsel's representation "amounted to ineffective assistance." (Appellant's Brief p. 4). While a defendant may raise the issue of ineffective assistance of counsel on direct appeal, "this Court may determine the merits of the claim only when '(a) ... 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 the trial judge able to consider the demeanor of witnesses, etc. are not needed.'" *Clayton v. State,* 946 So.2d 796, 803 (Miss. Ct. App. 2006). **"A conclusion that the record affirmatively shows ineffectiveness of constitutional dimensions is equivalent to a finding that the trial court should have declared a mistrial or ordered a new trial *sua sponte*."** *Id.* (citing *Colenburg v. State*, 735 So.2d 1099, 1102 (Miss. Ct. App.1999) (*Emphasis added*). The record in this case does not demonstrate that the trial court should have declared a mistrial or ordered a new trial *sua sponte* because of the quality of defense counsel's representation of Conner and, therefore, does not support a claim of ineffective assistance of counsel.

With regard to ineffective assistance of counsel claims, the Mississippi Supreme Court has held the following:

> In order to prevail on a claim of ineffective assistance of counsel, a defendant must prove (1) that his attorney's overall performance was deficient and (2) that the deficient performance, if any, was so substantial as to prejudice the defendant and deprive him of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Furthermore, there is a "strong but rebuttable presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Walters v. State*, 720 So.2d 856, 868 (Miss.1998). To overcome this presumption, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Schmitt v. State*, 560 So.2d 148, 154 (Miss.1990). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "Only where it is reasonably probable that, but for the attorney's errors, the outcome of the trial would have been different will this Court find the counsel's performance was deficient." *Id.*

Smiley v. State, 815 So.2d 1140, 1146-47 (Miss.2002) (quoting *Gary v. State*, 760 So.2d 743, 753 (Miss.2000)) (*Emphasis added*). Moreover, this Court held that "[i]n addition to the presumption that counsel's conduct is reasonably professional, there is a presumption that counsel's decision are strategic in nature, rather than negligent." *Alonso v. State*, 838 So.2d 309, 313 (Miss. Ct. App.

2002).

Therefore, in order for a defendant to prevail on a claim of ineffective assistance of counsel raised on direct appeal, the defendant must show "from the record that his counsel's performance was deficient, and that the deficient performance prejudiced him." *Walker v. State,* 823 So.2d 557, 563 (Miss. Ct. App. 2002) (citing *Strickland*, 466 U.S. at 686) (*emphasis added*). This determination is made based on the "totality of the circumstances." *Cole v. State*, 666 So.2d 767, 775 (Miss. 1995) (citing *Frierson v. State*, 606 So.2d 604, 608 (Miss. 1992)). "The target of appellate scrutiny in evaluating the deficiency and prejudice prongs of *Strickland* is counsel's 'over-all' performance." *Id.*

Accordingly, Conner must, not only show that his counsel was deficient, but he also must show how the alleged deficiencies prejudiced his case. In order to prove prejudice, Conner must show from the record that his counsel's "errors were of such a serious magnitude as to deprive the defendant of a fair trial because of a reasonable probability that, but for counselor's unprofessional errors, the results would have been different." *Cole*, 666 So.2d at 775 (quoting *Martin v. State*, 609 So.2d 435, 438 (Miss. 1992)). Conner has failed to meet this burden.

Conner specifically argues that his counsel "was ineffective by not excluding the photographic line-up because the photos of other individuals in the line-up did not have similar traits as Conner." (Appellant's Brief p. 4). However, the Mississippi Supreme Court first noting that attorneys were given "wide latitude" regarding trial strategy, held that:

> This Court gives much deference to an attorney's trial tactics. As this Court has stated: Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. *Cf. Engle v. Isaac*, 456 U.S. 107, 133-134 [102 S.Ct. 1558, 1574-75, 71 L.Ed.2d 783] (1982). A fair assessment of attorney performance requires

> that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. *Lambert v. State*, 462 So.2d 308, 316 (Miss.1984), citing *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065, 80 L.Ed.2d at 694. **The right to effective counsel does not entitle the defendant to have an attorney who makes no mistakes at trial. The defendant just has a right to have competent counsel**.

Smiley, 815 So.2d at 1148 (quoting *Mohr v. State*, 584 So.2d 426, 430 (Miss.1991)) *(Emphasis added)*. The Court "will only under exceptional circumstances, second guess counsel on matters of trial strategy." *Shorter v. State*, 946 So.2d 815, 819 (Miss. Ct. App. 2007).

Furthermore, Conner provided no insight as to how the results would have been different had the photo lineup not been admitted except to say that "but for the photographic line-up, the two eyewitnesses may not have identified Conner as the robber and, this being the only evidence presented at trial, Conner would have prevailed." (Appellant's Brief p. 6). During the State's case in chief both victims of Conner's crime testified that Conner was the man that robbed them and pointed him out in the courtroom. (Transcript p. 131 and 155). Thus, even if the photo-line up had not been introduced by the defense, both victim's in-court identification of Conner as the robber would have been before the jury. Moreover, this Court recently held in *Brownlee v. State* that "[a]n in-court identification by an eyewitness will not be thwarted by an impermissibly suggestive pre-trial identification unless under the totality of circumstances 'the identification was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.'" 972 So.2d 31, 35 (Miss. Ct. App. 2008)(quoting *Houston v. State*, 887 So.2d 808(¶ 17) (Miss. Ct. App. 2004)). Both victims testified that they got a good look at the robber and that they were certain in their identifications. (Transcript p. 125, 150, 151, 190, and 191). Accurate descriptions were given and both women identified the appellant relatively soon after the crime. (Transcript p. 184, 188). Thus, there was not a "very substantial likelihood of irreparable misidentification." Accordingly, there

was no prejudice.

II. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE VERDICT.

Conner next argues that "the evidence was insufficient to support the verdict." (Appellant's Brief p. 6). This Court has previously noted that "[w]hen on appeal one convicted of a criminal offense challenges the legal sufficiency of the evidence, [the court's] authority to interfere with the jury's verdict is quite limited." *Phinisee v. State*, 864 So.2d 988, 992 (Miss. Ct. App. 2004). The evidence which is consistent with the verdict must be accepted as true. *Lee v. State,* 469 So.2d 1225, 1229-30 (Miss.1985) (citing *Williams v. State,* 463 So.2d 1064, 1067 (Miss.1984); *Spikes v. State,* 302 So.2d 250, 251 (Miss.1974)). The State must also be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. *Id.* (citing *Glass v. State,* 278 So.2d 384, 386 (Miss.1973)). Basically, "once the jury has returned a verdict of guilty in a criminal case, [the court is] not at liberty to direct that the defendant be discharged short of a conclusion on [its] part that the evidence, taken in the light most favorable to the verdict, no reasonable, hypothetical juror could find beyond a reasonable doubt that the defendant was guilty." *Id.* (citing *Fairchild v. State,* 459 So.2d 793, 798 (Miss.1984); *Pearson v. State,* 428 So.2d 1361, 1364 (Miss.1983)). With this standard in mind, there is sufficient evidence in the case at hand to prove each and every required element of armed robbery.

Mississippi Code Annotated §97-3-79 states that "[e]very person who shall feloniously take or attempt to take from the person or from the presence the personal property of another and against his will by violence to his person or by putting such person in fear of immediate injury to his person by the exhibition of a deadly weapon shall be guilty of robbery. . ." The State proved each of these elements beyond a reasonable doubt:

a. Both victims were working at the Family Market in Columbus on the day in

question. (Transcript p. 122 and 124).

b. The Appellant came into the store, pulled a gun, pointed it at both women and demanded money. (Transcript p. 123, 125, 148, and 151)
c. Both victims were in fear for their lives. (Transcript p. 131 and 155).
d. The Appellant left with money which was taken from each victim's register. (Transcript p. 127).
e. Each victim identified the Appellant as the robber both in a photo line-up and in person during the trial. (Transcript p. 131, 155, 190, and 191).

Thus, there was sufficient evidence to support the jury's verdict.

Nonetheless, to support his argument, Conner argues that "the evidence in this case failed to establish beyond a reasonable doubt that Conner committed armed robbery because there was no physical evidence presented to show that he robbed the Family Market" and because the victims "misidentified the robber." (Appellant's Brief p. 7). However, the record clearly indicates that there were two eyewitnesses who positively identified the appellant as the robber. The Mississippi Supreme Court has previously noted that "[w]e have held in a number of cases that the testimony of one eyewitness identifying the defendant is sufficient to sustain a conviction even where the witness is contradicted by other witnesses, which we do not have in this case." *Brockman v. State,* 62 So.2d 362, 363 (Miss.1953). In the present case, Conner was identified by two witnesses and there were no witnesses contradicting that Conner was the robber. Thus, there was sufficient evidence to support the verdict.

III. THE VERDICT WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Lastly, Conner asserts that "the verdict was against the overwhelming weight of the evidence." (Appellant's Brief p. 9). The appellate standard of review for claims that a conviction is against the overwhelming weight of the evidence is as follows:

> [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. A new trial will not be ordered unless the verdict is so contrary

> to the overwhelming weight of the evidence that to allow it to stand would sanction an "unconscionable injustice."

Pierce v. State, 860 So.2d 855 (Miss. Ct. App. 2003) (quoting *Smith v. State*, 802 So.2d 82, 85-86 (Miss. 2001)). On review, the Court must accept as true all evidence favorable to the State. *McClain v. State,* 625 So.2d 774, 781 (Miss.1993).

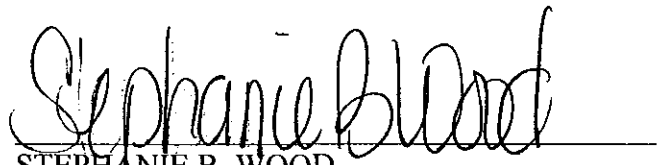
Specifically, Conner argues that "the State only presented two questionable eyewitnesses testimonies as evidence of the offense." (Appellant's Brief p. 9). However, this Court has previously held that "in the situation where there is no competing evidence tending to contradict the testimony offered by a prosecution witness or witnesses covering each of the essential elements of the crime, there can be no logical assertion made that the jury's verdict was against the weight of the credible evidence." *Page v. State,* 843 So.2d 96, 99 (Miss. Ct. App. 2003). Furthermore, the jury has the duty to determine the impeachment value of inconsistencies or contradictions as well as testimonial defects of perception, memory, and sincerity. *House v. State*, 735 So.2d 1128 (Miss. Ct. App.1999) (citing *Noe v. State,* 616 So.2d 298, 302 (Miss.1993)). "It is not for this Court to pass upon the credibility of witnesses and where evidence justifies the verdict it must be accepted as having been found worthy of belief." *Id.* As such, the record clearly indicates that the verdict was not against the overwhelming weight of the evidence.

CONCLUSION

The State of Mississippi respectfully requests that this Honorable Court affirm the conviction and sentence of the Appellant as he did not receive ineffective assistance of counsel, as there was sufficient evidence to support the verdict, and as the verdict was not against the overwhelming weight of the evidence.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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CERTIFICATE OF SERVICE

I, Stephanie B. Wood, 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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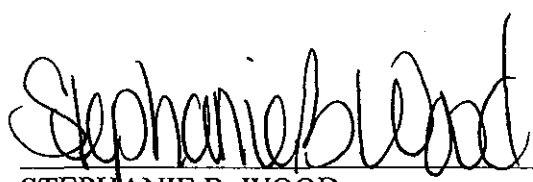

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