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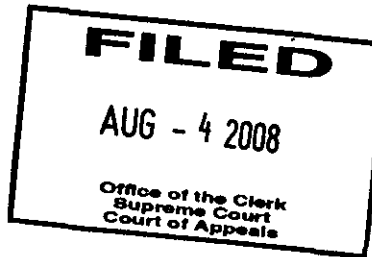
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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

KENDRICK DARNELL CONNER

APPELLANT

V.



NO. 2008-KA-0293-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF THE APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS

Erin E. Pridgen, MS Bar No. [REDACTED]

Stephanie Hughes, Legal Intern

301 North Lamar Street, Suite 210

Jackson, Mississippi 39201

Telephone: 601-576-4200

Counsel for Kendrick Darnell Conner

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Kendrick Darnell Conner, Appellant
3. Honorable Forrest Allgood, District Attorney
4. Honorable James T. Kitchens, Jr., Circuit Court Judge

This the 4th day of August, 2008.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: Erin E. Pridgen
Erin E. Pridgen
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39205
Telephone: 601-576-4200

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BRIEF OF THE APPELLANT

STATEMENT OF ISSUES

ISSUE NO. 1. THE TRIAL COUNSEL'S REPRESENTATION AMOUNTED TO INEFFECTIVE ASSISTANCE.

ISSUE NO. 2. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT.

ISSUE NO. 3. THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Lowndes County, Mississippi, where Kendrick Darnell Conner was convicted of two counts of armed robbery. The Honorable James T. Kitchens, Jr., Circuit Court Judge, presided over the jury trial that began on May 22, 2007. On May 23, 2007, the court sentenced Conner to serve thirty-five (35) years on each count, to run concurrently. Conner is presently incarcerated with the Mississippi Department of Corrections.

FACTS

On Sunday, May 21, 2006, shortly after the lunchtime hour, a partially disguised male

entered the Family Market in Lowdnes County, Mississippi, and robbed the store of an undisclosed amount of money. [Tr. 122-23]. Stacie Schaffer, and her daughter, Melissa Herrion, were the two eyewitnesses present at the time of the robbery. [Tr. 123-24] Stacie and Melissa both worked as cashier clerks in the store. At the time of the robbery, Stacie and Melissa were stationed behind two cash registers, one of the left side of the counter and one of the right side. [Tr. 124] There was a small space in between the registers that separated the women.

According to Stacie, the robber entered the store with his face covered on the left side by a “do-rag” or head scarf. [Tr. 147] The robber entered the store, walked around to the front of the counter, pulled out a gun, and asked for the money. The robber pointed the gun at Stacie and told her to give him the money. She grabbed the money from the cash register and threw the money on the counter. The robber grabbed the money and placed it in bag. Stacie testified that, as the robber walked to the counter, the air conditioner blew the side of his do-rag and she could see the robber’s entire face.

Melissa testified that, at the time the robber approached the counter, she was not looking at the robber, but that she was looking outside of the window. [Tr. 148] She did not notice the robber until he said, “Give me all of the money.” When she noticed the robber, he pointed the gun toward her. [Tr. 151] Melissa opened her register and handed over the money by throwing it on the counter. [Tr. 148] The robber picked the money up and placed it in the brown sack bag. [Tr. 152] As the robber left, he told Stacie and Melissa not to call the police. [Tr. 127]

After the robber left, Stacie ran to the door, locked it, and told her daughter, “Let’s go.” [Tr. 127] Stacie did not call the police right away. [Tr. 136] Instead, she drove home, dropped her daughter off, and went to the corner store to call the police. Stacie gave a signed statement on May 21, 2006, however, Melissa did not give a statement to the police until the next day.

When questioned about the robber's identification, Stacie informed the police that the robber wore a ripped, plaid shirt with some jeans and a "do-rag". [Tr. 132] Melissa described the robber as wearing an orange and white striped shirt, with a full scraggly beard. [Tr. 199] Stacie also informed the police that, minutes prior to the robbery, a female customer leaving the store spotted the robber and referred to him as "Booty." [Tr. 134]

On May 24, 2006, the police presented Melissa and Stacie with a photo lineup of six individuals. [Tr. 143, 153]. The lineup consisted of African American men with various lengths of hair, however, Conner was the only individual with a notably bald head. [Tr. 193, R.E. 5] Although Stacie identified Conner as the robber, she did acknowledge on cross examination, that there had been several African American men throughout the store on the day of the robbery. [Tr. 130, 133] Melissa, concerned about identifying the robber, used a card to cover the left side of the suspects' photos when she reviewed the pictures. [Tr. 190] Using the aid of the paper, Melissa identified Conner as the robber of the store. [Tr. 154-55].

Conner testified that, on May 21, 2006, he was living with his sister in Columbus, Mississippi. [Tr. 197] He frequented the Family Market to purchase beer and cigarettes, as it was around the corner from his brother's house. [Tr. 198, 200] Conner testified that he was in the store on May 21, 2006 in order to purchase some Newports, but that he did not have a gun. [Tr. 199] Conner also testified that neither did he rob Melissa or Stacie nor did he carry away the property of Family Market. [Tr. 199, 200] According to Conner, he wore pajama pants, a t-shirt, and a tie around his neck when he entered the store. [Tr. 156-57, 199] Conner stated that he did not have a hat or "do-rag" on his head on the day he visited the Family Market.

Detective Bill Smith, the investigating officer, testified that the exact dollar amount of the money missing as a result of the robbery was not determined. [Tr. 186] Although Stacie and Melissa

eventually returned to work at the store after the robbery, neither was able to testify as to the amount stolen from the store. [Tr. 158]

Detective Smith also testified that there was a video camera system in place at the Family Market during the time of the robbery. [Tr. 185] However, there was no video recovered from the camera of the robbery.

SUMMARY OF THE ARGUMENT

The verdict was against the overwhelming weight of the evidence and the evidence was insufficient to support the verdict. The evidence presented at trial failed to establish beyond a reasonable doubt the charge of two counts of armed robbery. No physical evidence and only two questionable eyewitnesses were presented at trial. The trial 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. In the line-up, Conner was the only individual with a distinguishable bald head. Therefore, Conner respectfully requests this Court to reverse his conviction of two counts of armed robbery.

ARGUMENTS

ISSUE NO 1. THE TRIAL COUNSEL'S REPRESENTATION AMOUNTED TO INEFFECTIVE ASSISTANCE.

The photographic line-up, that included Conner, was unduly prejudicial and his counsel prejudiced his defense by introducing the photographic line up into evidence. In *Read v. State*, 430 So. 2d 832, 841 (Miss. 1983), the Mississippi Supreme Court established the following procedure for reviewing ineffective assistance of counsel claims on direct appeal. In determining ineffective assistance of counsel on direct appeal, the Court has announced, in pertinent part, the following:

(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...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.

(2) [If] the Court is unable to conclude from the record on appeal that the 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 ineffective issue...would become moot....[I]f the Court should otherwise affirm, it should do so without prejudice to the defendant's right to raise the ineffective assistance issue via appropriate post-conviction proceedings....

Id.

For ineffective assistance of counsel claims, the defendant must show "that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial." *Strickland v. Washington*, 466 U.S. 668, 669 (1984). A photographic line-up containing the defendant is unduly prejudicial if the defendant's photograph is notably different from the other photographs. *Stratford v. State*, 771 So.2d 390, 393 (§10) (Miss. Ct. App. 2000).

This case differs from other cases where this Court has held that a photographic line-up was not impermissibly suggestive. Several cases held that the defendant's hair was not noticeably different from the other photos in the line-up. In *Brownlee v. State* 972 So.2d 31, 36 (§12) (Miss. Ct. App. 2008), this Court determined that the photographic line-up identification was not impermissibly suggestive. In *Brownlee*, the defendant had dreadlocks and the individuals in the line-up had similar hairstyles as the defendant. *Id.* at 35 (§11).

Unlike the defendant in *Brownlee*, there is a distinguishable difference in the length of the men's hair in the photographic line-up in this case. In *Brownlee*, this Court was shown photos of individuals with hair and then compared their hair to determine whether their hair was similar to the

defendant's hair. This Court determined that the hair was similar. In this case, the other individuals have hair, but Conner is the only individual who is bald. Conner asserts that an individual who is bald cannot have a similar hairstyle as someone who has hair. This makes him distinguishably different from the other individuals in the photograph because he does not have a similar hairstyle as them. His baldness makes him noticeably different from the others in the photographic line-up.

Applying the *Strickland* test, the counsel's performance was deficient by introducing the photographic lineup into evidence because Conner's photo was not similar to the other photos in the line-up. Second, Conner's defense was prejudiced because he was the only individual who was bald in the photographic line-up. The two eyewitnesses, who identified Conner in the line-up, were the only evidence presented at trial showing that Conner committed the robbery. A video camera system was in Family Market during the robbery. [Tr. 185] No video was presented at trial. [Tr. 185] There is no record of how much money was taken and no evidence was shown that Conner had the money in his possession.

Likewise, the State did not present any evidence of fingerprints or the gun that was used to commit the crime. 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. The two eyewitnesses presented at trial based their identification of Conner from a prejudicial photographic line-up; thus, this Court should hold that Conner was denied a fair trial.

ISSUE NO 2. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT.

Conner raised the issue of insufficiency of the evidence in his motion for a directed verdict. [Tr. 161] The trial judge denied this motion on both counts. [Tr. 161] In determining the legal sufficiency of a state's evidence, "the court must review the evidence in the light most favorable to

the State, accept as true all the evidence supporting the guilty verdict, and give the prosecution the benefit of all favorable inferences that may reasonably be drawn from the evidence.” *McClaine v. State*, 625 So.2d 774, 778 (Miss. 1993).

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. Conner asserts that Stacie and Melissa misidentified the robber. Other black men had been in the store on the same day. Conner had been in the store numerous times before. Likewise, the photographic line-up was prejudicial. The witnesses’ memories would have begun to fade by the time the photographic line-up was finally shown to them.

No sufficient evidence was presented at trial showing that Conner committed this crime. The prosecution was required to prove beyond a reasonable doubt that Conner was guilty of two counts of armed robbery. According to Detective Smith, a video camera was in place at the time of the incident, but no video was recovered. [Tr. 185] The only evidence available is the two eyewitnesses who claim they saw Conner, even though some type of material was covering the left part of his face. [Tr. 147] Stacie referred to the material as a “do-rag” and she claimed that it was blown up and she could see his face. [Tr. 125]

Conner argues that Stacie identified him as the one who robbed the store solely because he was the only member of the line-up who looked familiar and he was distinguishable from the others in the line-up. Stacie would have been able to identify Conner based on other reasons: Conner was at the store on the day of the robbery, he testified that he had been in the store frequently on other days to buy cigarettes and beer, and he was well known in the neighborhood. [Tr. 198, 200] Even Melissa testified that she had to cover the left part of the photo because she was concerned about

identifying the defendant. [Tr. 157] Conner argues that Stacie and Melissa misidentified him as the one who robbed the store that day. [Tr. 131, 155] Conner urges this Court to consider that this misidentification wrongly convinced the jury that Conner was the one that committed the robbery.

Furthermore, Melissa was alone with her mother after her mother had already made a statement to the police. The identification by a sole individual is more accurate than a group consensus among witnesses as to a criminal's identity. *See United States v. Moore*, 786 F. 2d 1308, 1312 (1986). On the day of the robbery, Stacie signed a statement after she called the police. [Tr. 140] Melissa stayed overnight with her mother before giving her statement to the police and before being interviewed by the police. [Tr. 141]

Additionally, days had passed before a photographic line-up was shown to the witnesses. Although the booking photo line-up that includes Conner was taken the next day on May 22, 2006, it was not shown to Stacie and Melissa until May 24, 2006. [Tr. 186] The witness' memories would have begun to fade because three days had passed before the witnesses were given a photographic line-up that includes the photo of Conner. Further, it is highly probable that the testimony that Stacie was scared would not aid her ability to identify the robber, since studies show that witnesses do not remember better while under stress. *Id.*

In *Wilson v. State* 574 So. 2d 1324, 1327 (Miss. 1990), the Supreme Court established that an identification of a criminal is unduly prejudicial if the criminal's photograph is distinguishable from the other photographs in the line-up. *Wilson v. State*, 574 So. 2d 1324, 1327 (Miss. 1990). The purpose of a photo line-up is to show witnesses photos of individuals with similar physical traits. *Outerbridge v. State*, 947 So.2d 279, 284 (¶15) (Miss. 2006). In the case at bar, there were other young black men present in the store on the morning of the burglary and Conner is the only bald

person that was in the photographic line-up. [Tr. 133, 193] Conner was distinguishable from the others who were in the photographic line-up. Conner argues that Stacie and Melissa picked him because his photograph was noticeably different; they identified the wrong black man in the store that day.

The certainty of the witness' identification of Conner does not show beyond a reasonable doubt that Conner committed the robbery. Studies show that there are common myths about an individual's capacity for perception. *Moore*, 786 F.2d 1308 at 1312. Many individuals believe that the accuracy of a witness' memory rises with the certainty of the witness. *Id.* However, no correlation exists between the certainty of a witness and the accuracy of a witness' recollection. *Id.* In *Arizona v. Youngblood*, 488 U.S. 51,72 (1988), the Court also recognized that eyewitness identification evidence is known for being unreliable.

Many juries are strikingly impacted and convinced when a witness points to an alleged criminal and believes that he can identify the criminal in a courtroom. *Id.* Both Melissa and Stacie pointed to the defendant and alleged that he was the one who committed the robbery. [Tr. 131, 155] As unreliable as this identification was, the accusation in the courtroom undoubtedly impacted the jury to convict Conner. The State has failed to prove beyond a reasonable doubt that Conner committed armed robbery; therefore, Conner urges this Court to reverse his conviction.

ISSUE NO. 3: THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

The prosecution failed to prove beyond a reasonable doubt that Conner committed armed robbery at Family Market. At trial, the State only presented two questionable eyewitnesses testimonies as evidence of the offense. "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 trial court has abused its discretion in failing to grant a new trial.” *Jenkins v. State*, 947 So.2d 270, 278 (§ 24) (Miss. 2006). “Only when the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal.” *Boone v. State*, 973 So.2d 237, 243 (§ 20) (Miss. 2008).

Detective Smith testified that a video camera system was in place at the time of the robbery. [Tr. 185] A video was not presented at trial. Melissa’s identification of Conner is questionable because she was unable to immediately identify him. She had to place a card over his face to determine whether Conner was the person who committed the crime. [Tr. 157] Because other black males were present in the store on the same day, Melissa and Stacie could have easily misidentified Conner as the individual who robbed them.

Furthermore, at trial, even Stacie testified that someone had referred to the robber as “Booty.” [Tr. 134] There was no evidence that Conner has ever been referred to as “Booty” and there was no evidence that the money robbed from the Family Market was in his possession. In fact, the amount of money that was taken from the store is unknown. [Tr. 186] This Court should reverse the Circuit’s Court decision because allowing this verdict to stand would sanction an unconscionable injustice.

CONCLUSION

Conner is entitled to have his conviction reversed because the photographic line-up was prejudicial and this has denied his right to a fair trial. The evidence presented at trial failed to prove beyond a reasonable doubt that Conner committed the robbery at Family Market.

Respectfully submitted,
MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 
ERIN PRIDGEN
MISSISSIPPI BAR NO. 102352

STEPHANIE HUGHES, Legal Intern

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39205
Telephone: 601-576-4200

CERTIFICATE OF SERVICE

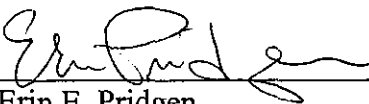
I, Erin E. Pridgen, Counsel for Kendrick Darnell Conner, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

Honorable James T. Kitchens, Jr.
Circuit Court Judge
113 Fifth Street North
Columbus, MS 39703

Honorable Forrest Allgood
District Attorney, District 16
Post Office Box 1044
Columbus, MS 39703

Honorable Jim Hood
Attorney General
Post Office Box 220
Jackson, MS 39205-0220

This the 4th day of August, 2008.


Erin E. Pridgen
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39201
Telephone: 601-576-4200