IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

SHAWN LAWAN MCLAURIN — APPELLANT

VS. — NO. 2008-KA-0814-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

In this out-of-time appeal from a conviction of forcible rape, the questions presented for belated appellate scrutiny are

I. whether or not the defendant received the ineffective assistance of trial counsel;

II. whether or not cross-examination of the victim was unduly suppressed;

III. whether or not the trial judge abused her judicial discretion in overruling the defendant's objection to certain prosecutorial comments allegedly alluding to the defendant's failure to testify or to call certain witnesses;

IV. whether the trial court erred in failing to conduct a balancing test with respect to testimony concerning the defendant's prior criminal acts or misconduct;

V. whether the state's photographic lineup was impermissibly suggestive, and

VI. whether the defendant deserves a new trial based upon cumulative error.

We respectfully submit the answer to each of these questions is a resounding "no."

A companion appeal in the form of cause number 2008-CA-011251-COA is pending disposition in this Court.

SHAWN LAWAN McLAURIN, a twenty-five (25) year old African American male at the time of his trial for forcible rape and a non-testifying resident of Jackson, prosecutes a criminal appeal from the Circuit Court of Hinds County, Tomie T. Green, Circuit Judge, presiding.

Following a trial by jury conducted on February 7-8, 2000, McLaurin, who did not testify, was convicted of forcible rape. (R. 310; C.P. at 14) The jury fixed the penalty for rape at life imprisonment. (R. 310; C.P. at 14)

An indictment returned on October 14, 1998, charged that

> ". . . SHAWN LAWAN McLAURIN . . . on or about the 16th day of January, 1997[,] did wilfully, unlawfully, feloniously and forcibly rape and ravish Lala Eddie, a female fourteen years of age or above, without the consent and against the will of Lala Eddie . . ." (C.P. at 5)

Six (6) issues are raised by McLaurin in his appeal to this Court, *viz.*, ineffective assistance of trial counsel, suppressed cross examination of the victim, comments by the prosecutor on the failure of the defendant to testify or to call a certain witness, failure of the trial court to conduct a balancing test in the wake of testimony concerning prior criminal acts, an impermissibly suggestive photographic lineup, and cumulative error. (Brief for Appellant at iii, 1)

Glen Folse, a practicing attorney in Jackson, was substituted as defense counsel and represented McLaurin vigorously and effectively at trial.

Christopher Klotz, a practicing attorney in Pensacola, Fl, represents McLaurin on appeal. (C.P. 63) Mr. Klotz's representation has been equally vigorous and effective.

STATEMENT OF FACTS

This is an excruciatingly belated out-of-time criminal appeal of a conviction for forcible rape, an offense committed over twelve (12) years ago in January of 1997.

Although McLaurin himself did not testify in this cause, his defense was an alibi and mistaken identification. (R. 222-226)

Lala Eddie, at the time of McLaurin's trial, was a 21-year-old female and 4th year student at Tougaloo College. She was majoring in English with an emphasis in Journalism and maintained a 3.3 grade point average. Eddie worked part-time at night at Trustmark National Bank. (R. 119-20)

In 1997, Lala knew the defendant, Shawn McLaurin, as Brian McDaniels. (R. 120) This was a result of a distant and casual relationship over a period of approximately three years. (R. 121-22) She later found out that was not his real name. (R. 147)

Six (6) witnesses testified for the State of Mississippi during its case-in-chief, including **Lala Eddie** who testified the defendant, Shawn McLaurin, raped her inside his sister's house on January 16, 1997. (R. 123) Lala had been around the defendant "[i]n groups of people" for three (3) years but had never dated him or had any type of relationship with him. (R. 121-22)

"We were just friends." (R. 121)

Lala's version of the incident forming the basis for the charge of forcible rape is quoted as follows:

> Q. [DIRECT EXAMINATION:] Okay. And can you tell me whether you had any connection with him on January 16th of 1997 and how that came about?
>
> A. Yes, I did. I was in my dorm. It was a Thursday night. I called him, he called me back and he mentioned that he wanted to come up there to my dorm to visit. I told him that was okay. And he said we probably would be able to go get something to eat.

Q. Okay. So what, if anything, happened?

A. He came to pick me up. It was dark. It was around maybe 7:30, 8:00, when he came to pick me up. We went riding around, and then we got on the highway and got off around the Capitol Street area. (R. 122)

McLaurin was driving "[a] black Mazda truck" that had the word "outlaw" printed on the back window. (R. 122) He had a key to his sister's house and told Lala he needed to stop there. Both he and Lala entered the house at which time he summoned her to the bedroom where she "sat on the edge of the bed." (R. 124)

Q. And what happened when you walked in the back of the house?

A. We were sitting on the bed watching TV. And after a little while I would say we, maybe had been sitting there about 30 minutes. After a little while he turned around and he said, you know we have known each other for over three years and we've not kissed before. And then he was like we probably never kissed before because you think you're better than everybody else. And he was suggesting that we should have sex, then I told him that I would rather him just take me back to campus.

Q. Now can you describe how the defendant's hair appeared that day?

A. He had braids in his hair, the kind that you can just pull out. They weren't his hair. You could just untwist them and they were like in a bobb, a short bobb. (R. 125)

After Lala told McLaurin she was not interested in having sex, his mood suddenly changed, and he became aggressive toward her. (R. 125) McLaurin walked out of the room and came back with a long gun, either a shotgun or a rifle. (R. 126) He pointed it at her face and demanded that she disrobe. (R. 127) After he began tugging at her clothes she removed them voluntarily because she was afraid of him. (R. 127-28) Although Lala was experiencing her monthly period, McLaurin was unaffected by this state of affairs. He told Lala he would use a condom which she

observed in his hand. (R. 129)

After McLaurin coerced her at gunpoint into saying she would have sex with him, she was blindfolded and handcuffed to the bed. (R. 131) We quote:

> Q. What happened after that?
>
> A. After that, after I had stood there for a while he put a blindfold over my eyes, he put me on the bed and handcuffed me. (R. 131)
>
> * * * * * *
>
> Q. And tell us about that.
>
> A. He handcuffed me when I was on the bed and then he left me there for a while just laying there. And after that he was saying just sit still, somebody wants to see you, meaning somebody wants to look at you. And I knew that there was nobody else in the house. It was his voice going back and forth. I knew he was just changing his voice but he had me laying there for a while.
>
> Q. And so he was telling you that he was allowing people to view your naked body?
>
> A. Yes.
>
> Q. Okay. You did not believe that that was for real?
>
> A. No, I didn't.
>
> Q. Okay. Now at this point, Lala, I have to ask you a very pointed question. Did his penis enter your vagina?
>
> A. Yes, it did.
>
> Q. And did that occur because you wanted it to?
>
> A. No.
>
> Q. Why did that occur?
>
> A. Because he forced me to do so.

Q. And he forced you to do so, how?

A. After he had handcuffed me, he was walking in and out of the room, he came back in and then I heard him fumbling a little bit, and then he put his hand on my thigh and he said open your legs.

Q. Okay. How long did the rape last?

A. Not very long.

Q. Okay. Was he wearing a condom to the best of your knowledge?

A. To the best of my knowledge he said he was wearing one. I remember one being in his hand, he possibly was.

Q. And after it was over, did you have the sensation of seminal fluid.

A. No, I didn't.

Q. Okay. But he did penetrate your vagina with his penis?

A. Yes, he did. (R. 132-33)

After McLaurin's sister pulled into the driveway, McLaurin instructed Lala to get dressed. (R. 134) Lala overheard the sister call McLaurin by the name of "Shawn." (R. 135) Prior to this time, Lala had known McLaurin as Brian McDaniels, but she had heard other people refer to him as "Eshawn." (R. 135)

Q. All right. You got in the car, back into the black pick-up truck, am I correct?

A. Yes.

Q. The Mazda pick-up truck with the outlaw sticker on it?

A. Yes.

Q. And then what happened?

A. He put the blindfold back over my eyes. And then he was talking to me, he was rambling through my purse saying that he was going to take something out of my purse. And afterwards, I found out that he had taken my [driver's] license. And he said as long as they had computers and he knew my social security number he would be able to find me. And so then he put the blindfold back over my eyes, he started driving. He was giving me the perception that he wasn't going to take me to school. He was saying that he was going to take me somewhere and kill me because he didn't believe that I wouldn't tell.

Q. Did you have to replace your driver's license?

A. Yes, I did.

Q. Where did he actually take you?

A. He took me down the street from Tougaloo, and the reason why I know that is because while we were driving down the highway, I was trying to move my face so I could kind of see underneath the blindfold. He took [m]e down the street near Tougaloo but it was a dead-end street, very long street, and he took me back there and he pulled out a gun, a small handgun and he said that he didn't believe that I wouldn't tell anybody and he was debating back and forth to himself whether or not he should kill me.

Q. And when did he pick up that small handgun?

A. This was after we stopped the car.

Q. Had he picked it up before he left the house? Did you see that?

A. Yes, he did.

Q. Okay. Now what did he tell you before you got out of the car?

A. Before I got out of the car he said if I let you go, you better not tell anybody. I'm going to be watching you when you go to class, whatever you do I'm going to be watching you.

Q. Okay. And he put you out of the car?

A. Yes, he did. (R. 137)

* * * * * *

Q. All right. And what day of the month was this?

A. This was in January.

Q. Was it cold?

A. It was very cold.

Q. What time of night was it?

A. It was late. It was about 11:00 at this point. (R. 138)

Several days later, Lala talked to the police who, together with Lala, attempted to find the house where the rape took place. They could not, and the investigation went cold. (R. 141-41)

Fast forward from January of 1997 to June of 1998.

On June 21, 1998, Lala observed the man who raped her inside a nightclub on Woodrow Wilson Avenue in Jackson. (R. 141, 195-96)

Q. What happened one night in June of 1998?

A. In June of '98 my cousin and I saw the defendant there.

Q. Okay. This man here?

A. Yes.

Q. And when you saw him, what did his hair look like?

A. His hair, he had taken the braids out and I remember kind of just like a haircut, just a plain haircut. It looked like it may have almost been an afro but not yet.

Q. Okay. But did that affect your ability to identify him?

A. No, it didn't.

Q. So what did you do?

A. I pointed him out to one of the police officers that were

there that was working security that night.

Q. And what happened then?

A. They went up to him and then all of a sudden this big commotion came out. They told me to go outside and then they arrested him. (R. 141)

Lala and investigator Cordilla Bailey subsequently embarked upon another search in an effort to find the house where the rape took place. (R. 143) This time they were successful. (R. 143) Lala later identified McLaurin as her tormentor from a photographic lineup shown to her by Velma Johnson. (R. 144) She, likewise, identified McLaurin in court as the man who raped her at gunpoint. (R. 120, 146)

Dr. George Ellis, an emergency room physician who examined Ms Eddie the night of the rape, testified that if a rape is accomplished with the use of a condom, the absence of seminal fluid would not be inconsistent with vaginal intercourse. (R. 166-67)

Velma Johnson, a Jackson police detective, testified she went to the house on Sewanee Street where the rape took place for the purpose of photographing it. (R. 176) While there she encountered the defendant who

> " . . . was just ranting and raving to me that I didn't do any thing, you can take these pictures if you want to. I don't know who this girl is, I have never seen her before. They showed me a picture of her and she so ugly I just wouldn't like anybody like that cause she's just ugly. I don't know her. And I kept telling him, you know, you don't have to say anything to me because I'm not here to investigate this case. I just want to take picture of the house. He said, well, I just want you to know, you know. It's going to come out in the trial because I don't know this woman. I have never in my life ever seen this woman. (R. 176)

According to Johnson, McLaurin said "I have never seen this woman before in my life and I

have never had sex with her." (R. 177)

The night of his arrest, McLaurin told the security guard his name was Brian McDaniels. (R. 188) Johnson was unable to locate any black male in the City of Jackson by the name of Brian McDaniel. (R. 177)

Finally, Johnson testified she prepared a photographic lineup consisting of six individuals, including the defendant, with similar physical characteristics and showed the lineup to Ms Eddie at her place of employment. "And immediately as soon as I laid it on the table she looked at number six and she said that's him." (R. 180)

Richard Lowery, an undercover police officer for the city of Jackson, testified that on the night of January 19, 1997, he saw the defendant, i.e., Shawn McLaurin, "in an approximately '90 model black Madza [sic] [pick-up] truck" with the words "outlaw" on the rear window. (R. 190)

Norris Jernigan, a Jackson police officer, testified he was employed as a security guard for a Jackson nightclub on June 21, 1998. (R. 195-96) Lala Eddie told him " . . . that the subject that was in there that she identified as someone who had raped - - not raped her, that a suspect in a case in which Velma Johnson was working." (R. 196) She identified the subject to Jernigan as Brian McDaniels. (R. 197) McLaurin was approached and identified himself to Jernigan as Brian McDaniels. (R. 197) McLaurin was handcuffed and taken into custody. (R. 197)

Cordilla Bailey, a criminal investigator for the district attorney's office, testified Margaret McLaurin, the defendant's mother, came to the impound facility and presented documents in order to obtain the release of a 1991 Mazda pick-up that was impounded in connection with the defendant's arrest. (R. 204) A records check via the computer system in Hinds County showed that the defendant's sister, Monica Ree Robinson, was living at the house on 314 Sewanee Street where the rape took place. (R. 206) The defendant's full name is Shawn Lawan McLaurin. (R.

209)

At the close of the State's case-in-chief, the defendant moved for a directed verdict on the ground the State had failed to meet its burden of showing a *prima facie* case of rape. (R. 215-17)

With respect to the photographic lineup, defense counsel stated for the first time "[t]hat's not a constitutional lineup anywhere in the jurisdiction, anywhere in America." (R. 216)

The circuit judge overruled the motion with the following rhetoric:

> THE COURT: The court is going to deny the motion for directed verdict. The court believes that the State has made out a *prima facie* case. I heard the reference to there being no physical evidence at all. The court notes that Dr. Ellis was in to give testimony regarding the physical examination and the condition of the victim very shortly after the rape. The photo lineup, which should have been challenged prior to trial, but since it was not the court finds that it was permissible, that the prosecution laid the proper foundation and that counsel had ample opportunity to cross-examine the officer about the photo lineup. In terms of the court identification, an out of court identification, the court finds that or notes that there was identification by the victim of the defendant by Detective Velma Johnson, that Officer Lowery identified a truck which was exactly the described truck by the victim, black. It was a Mazda with some kind of sticker or writing that said outlaw, and Officer Jernigan I believe was the security officer, some one and a half years later to which the victim was identified as the defendant who at the time said his name was Brian McDaniels. As such, that provides the foundation for the court's denial of the motion for directed verdict." (R. 218-19)

Upon being advised of his right to testify or not (R. 259-60), McLaurin elected not to testify in his own behalf. (R. 263) McLaurin did, on the other hand, produce four (4) witnesses, including his mother, Margaret McLaurin. (R. 243) His defense was an alibi coupled with misidentification by the victim.

Rochelle Williams testified for the defense that in January of 1997 she and the defendant were engaged in "a loving, caring relationship." (R. 227) Williams and the defendant have children together. (R. 221) Back in January of 1997 the defendant walked with a limp as a result of a gunshot wound he received in November to his right thigh. (R. 221) McLaurin was released from the hospital on December 21, 1996, and was on crutches and couldn't drive. (R. 222)

Williams had known McLaurin for six years and he had never ". . . done anything of a violent nature to [her], threatened [her], [or engaged in] lewd, lascivious behavior or anything like this. " (R. 227)

On Thursday, January 16th, 1997, the entire day and night, Williams, McLaurin, and their baby were at the home owned by his mother at 314 Sewanee Drive. (R. 223) It would not have been possible for McLaurin to slip out by himself. (R. 226)

Monica Ree Robinson, one of the defendant's two sisters, testified that back on January 16, 1997, the defendant and his girlfriend were in town staying at her mother's home at 314 Sewanee Street. (R. 236) Around 8:00 p.m. she received a visit from them at her apartment in Jackson. (R. 236) McLaurin had been shot in the leg and his girlfriend, Rochelle, was driving the black truck. (R. 237-38) They left and went home around 10:15 p.m. (R. 237)

Margaret McLaurin, the defendant's mother, testified she lived at 314 Sewanee Drive. (R. 243) On January16, 1997, she owned a pit bull and a rottweiler. The rottweiler stayed inside the house. (R. 244) Both McLaurin and his girlfriend, together with their baby, stayed at home most of the day on the 16th of January. (R. 244) They left the house at 7:00 p.m. and went to her daughter's apartment off of highway 80 ". . . they came back about 10:00 or 10:30." (R. 245)

Victoria Ratliff testified for the defense she was the defendant's sister. (R. 258) She had never heard of Lala Eddie. (R. 259)

The State produced one witness in rebuttal. (R. 264-72)

James Chappell, a probation officer for the Southern District of Mississippi, testified without objection that on November 4th he spoke with Rechelle Williams who contacted him by telephone. (R. 265) Williams advised Chappell ". . . that she was having some problems with Eshawn [McLaurin] threatening and harassing her by phone basically." (R. 265) "She said that he was threatening her, threatening to take her baby away, watching her and trying to get her to lie for this case." (R. 266)

The jury retired to deliberate at a time not reflected by the record and subsequently returned with the following verdict: "We the jury find the defendant guilty as charged and fix his punishment as imprisonment for life in the state penitentiary." (R. 310; C.P. at 13-14)

A motion for judgment notwithstanding the verdict or alternatively for a new trial was filed on February 14, 2000. (C.P. at 15-16) The motion was overruled February 24, 2000. (C.P. at 17)

For reasons unknown, no direct appeal was perfected in this case.

McLaurin thereafter sought post-conviction relief which was denied, apparently by Judge Green. McLaurin, by and through substituted counsel, Christopher Klotz, subsequently filed a pleading styled "Petition for Out of Time Appeal and to Set Aside Order Dismissing Motion for Post Conviction Relief or a New Trial." (C.P. at 36)

Judge Green, after "extensive briefing," and a review of "affidavits and exhibits," summarily denied post-conviction relief. (C.P. at 36-37) The trial court's denial of post-conviction relief has been appealed to this Court and appears on the Court's docket as cause number 2008-CA-011251-COA. John Henry, Special Assistant Attorney General, is handling the appeal for the State.

Judge Green did, on the other hand, grant on April 2, 2008, McLaurin's request for an out-

of-time appeal. (C.P. at 36-37) Her order was later supplemented by an order issued by Mississippi Supreme Court Justice William L. Waller, Jr. who granted on June 18, 2008, McLaurin's petition to proceed with an out of time appeal under M.R.A.P. 4. (C.P. at 38)

McLaurin seeks a reversal of his conviction and a new trial but, if not, at least an evidentiary hearing for the purpose of adjudicating counsel's effectiveness. (Brief of Appellant at 4, 25)

SUMMARY OF THE ARGUMENT

I. Effective Assistance of Counsel. The record does not on direct appeal affirmatively reflect ineffectiveness of constitutional dimensions. McLaurin has failed to make out a *prima facie* case of ineffective assistance of counsel that would entitle him to an evidentiary hearing.

McLaurin's alibi defense, which was testified to by his sister, Monica; his mother, Margaret; and his girlfriend, Rochelle, cannot be said to have been unreasonable trial strategy.

II. Suppressed Cross-Examination. McLaurin's cross-examination of the victim was not unduly and unfairly suppressed. Ms. Eddie answered the questions she was asked with a "no." We do not know of anything else she could have added to her response(s).

The absence of a profert informing a reviewing court of what else the victim would have added to her response(s) precludes an adequate review of McLaurin's claim.

III. Comments by the Prosecutor. The trial judge did not abuse her judicial discretion in overruling McLaurin's objection to certain comments made by the prosecuting attorney. The failure to object, contemporaneously or otherwise, to the comments complained about procedurally bars McLaurin from raising the issue on appeal.

IV. Prior Bad Acts. McLaurin acknowledges in his brief there were no objections at trial, contemporaneous or otherwise, to any of the testimony complained about on appeal. (Brief for

Appellant at 20-21) This state of affairs precludes appellate review of the questions presented.

Accordingly, the trial judge did not abuse her broad judicial discretion in failing to conduct, *sua sponte*, a balancing test after the State adduced testimony focusing upon the defendant's prior bad acts or previous misconduct.

V. Photographic Lineup. The trial judge did not err in allowing the victim to identify McLaurin in court after she had viewed an allegedly impermissibly suggestive photographic lineup. The photographic lineup, which was not assailed at trial, has not been included with the record. In short, there is nothing for a reviewing court to review.

VI. There being no error to the one, there can be no error to the whole.

ARGUMENT

I.

THE DEFENDANT HAS FAILED ON DIRECT APPEAL TO MAKE OUT A CLAIM *PRIMA FACIE* OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL. THE RECORD DOES NOT AFFIRMATIVELY REFLECT INEFFECTIVENESS OF CONSTITUTIONAL DIMENSIONS.

Appellate counsel, with the refractive aid of hindsight and back-focal lenses, assails the effectiveness of trial counsel, Mr. Glen Folse. (Brief for Appellant at 4-13) McLaurin identifies twenty-three (23) specific instances where trial counsel either failed to do this or failed to do that or else he improvidently did this or improvidently did that. (Brief for Appellant at 4-23)

McLaurin says, *inter alia*, "[i]t is apparent from the record that Defense Counsel did little to avail himself of the evidence in the custody of the State or that which was provided to him by the State, much less conduct and [sic] independent investigation in the month between being retained and the trial." (Brief for Appellant at 12) The alleged lapses of trial counsel include "sins" of both omission and commission. (Brief for Appellant at 4-13) We respectfully submit

these alleged lapses are insufficient to reflect representation lacking in constitutional sufficiency.

Several of McLaurin's 23 claims of ineffectiveness refer to police reports and narrative summaries that have not been made a part of the appellate record; rather, they have been attached as exhibits to appellant's brief or simply included in the record excerpts. *See* specific instances numbers 7 and 8 at pages 6-7 of the Brief for Appellee. These reports and narrative summaries cannot be consider on appeal. **Mason v. State**, 440 So.2d 318, 319 (Miss. 1983).

Post-conviction relief has already been denied summarily by the trial judge who declined to grant an evidentiary hearing on the issue of counsel's effectiveness. (C.P. at 36-37) As stated previously, the denial by Judge Tomie Green of post-conviction relief is presently on appeal to this Court in the form of cause number 2008-CA-011251-COA.

We respectfully invite this Court to first decide McLaurin's direct appeal from his conviction of rape followed by a review of the claims rejected by Judge Green in McLaurin's motion for post-conviction relief, including a *de novo* review of the ineffectiveness of counsel claims and a determination of whether or not Judge Green correctly found that an evidentiary hearing was not required. *See* Brief for Appellant at 13.

Because (1) the record fails to show ineffectiveness of constitutional dimensions and because (2) both parties have not stipulated the record is adequate to allow the appellate court to make the necessary findings of fact, this Court need not rule on the merits of McLaurin's individual ineffective assistance of counsel claims. **Wynn v. State,** 964 So.2d 1196 (Ct.App.Miss. September 4, 2007); **Jones v. State,** 961 So.2d 730 (Ct.App.Miss. February 20, 2007). Rather, it need only determine whether the overall performance of counsel as reflected in the record shows ineffectiveness of constitutional dimension.

It doesn't.

Needless to say, 20/20 hindsight comes easier than 20/20 foresight. While some things could have been done differently and another lawyer might have done this or done that, we respectfully submit McLaurin received representation that was constitutionally sufficient.

The following language articulated by the Court of Appeals in **Reynolds v. State,** 736 So.2d 500, 511 (Ct.App.Miss. 1999), (¶41), is *apropos* to the issue before the Court:

> "[T]here is no 'single, particular way to defend a client or to provide effective assistance.' " *Handley*, 574 So.2d at 684 (quoting *Cabello*, 524 So.2d at 317). Defense counsel is presumed competent. *Johnson v. State*, 476 So.2d 1195, 1204 (Miss. 1985). "There is no constitutional right then to errorless counsel . . . " *See Handley*, 574 So.2d at 683 (quoting *Cabello*, 524 So.2d at 315). * * * "

The burden is on the defendant to overcome the presumption of competency.

We agree with McLaurin we must gauge counsel's performance by the applicable standard supplied by **Strickland v. Washington,** 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

More on that later.

First, we invite the Court's attention to a pre-**Strickland** case where a defendant convicted of attempted armed robbery was denied *coram nobis* relief after complaining his trial lawyer was ineffective. We find in **Berry v. State,** 345 So.2d 613, 614 (Miss. 1977), the following:

> Appellant's counsel had been practicing law five (5) months at the time of his appointment to represent appellant. He had tried civil cases, but had not tried a criminal case. Appellant argues that his counsel was ineffective in the following respects.
>
> (1) He declined to request a special venire for the case. * * *
>
> (2) He failed to file a motion and secure an order for discovery. * * *
>
> (3) He failed to file a motion to suppress an oral confession given to the police sergeant. * * *
>
> (4) He failed to make any objections during the entire trial. *

* *

(5) He failed to poll the jury on its verdict. * * *

(6) He elicited from appellant the fact that he had been arrested on two other occasions. * * *

(7) He failed to request the court to allow appellant to be heard before imposing sentence. * * *

In holding, *inter alia*, that Berry "had competent and effective counsel in the trial of his case," the Supreme Court, quoting from **Rogers v. State,** 307 So.2d 551 (Miss. 1976), stated:

> "It is easy to be a Monday morning quarterback and in retrospect to pick out defects and flaws in the way the game was played the preceding Saturday. The same is true in analyzing trial tactics and strategy of trial counsel, after the trial is over and the verdict in. We all have 20/20 vision in hindsight; the difficulty is in having 20/20 vision in foresight." 307 So.2d at 552.

Also relevant here are the following observations made by Justice Cobb in **Jackson v. State,** 815 So.2d 1196, 1200 (¶ 8) (Miss. 2002):

> Our standard of review for a claim of ineffective assistance of counsel is a two part test: the defendant must prove, under the totality of the circumstances, that (1) his attorney's performance was deficient and (2) the deficiency deprived the defendant of a fair trial. *Hiter v. State*, 660 So.2d 961, 965 (Miss. 1995). This review is highly deferential to the attorney, with a strong presumption that the attorney's conduct fell within the wide range of reasonable professional assistance. *Id.* at 965. **With respect to the overall performance of the attorney, 'counsel's choice of whether or not to file certain motions, call witnesses, ask certain questions, or make certain objections fall within the ambit of trial strategy' and cannot give rise to an ineffective assistance of counsel claim.** *Cole v. State*, 666 So.2d 767, 777 (Miss. 1995). [emphasis ours]

See also **Harris v. State,** 822 So.2d 1129 (Ct.App.Miss. 2002).

Add to this list counsel's choice of whether or not to file certain instructions and present certain defenses. The selection of a defense falls within the amorphous zone of trial and litigation strategy. "[T]here is a presumption that decisions made are strategic." **Leatherwood v. State**, 473 So.2d 964, 969 (Miss. 1985).

Mr. Folse's Representation.

McLaurin's defense, from the get-go, was an alibi coupled together with a case of mistaken identification by the victim. This was a reasonable trial strategy, perhaps the only strategy available to counsel.

The failure to request any jury instructions, coupled with other alleged shortcomings of trial defense counsel, was not so shocking that it should have been apparent to the trial judge of her duty to reform counsel's representation. **Wynn v. State,** *supra,* 964 So.2d 1196, 1200 (Ct.App.Miss. 2007) ["The relevant inquiry here is whether the representation of Wynn 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.' " McLaurin does not claim the jury was improperly instructed, and the instructions have not been included in the official record.

Assuming one or more of the 23 alleged lapses of trial counsel can be deemed a deficiency, the deficiencies, if any, failed to result in any real prejudice to McLaurin. **Strickland v. Washington,** *supra,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). We argue there is no "reasonable probability" that, but for trial counsel's unprofessional errors, the result of the trial would have been any different. Stated differently, there is no probability sufficient to undermine confidence in the outcome of trial.

At best, any scrutiny of trial counsel's omissions must await a new horizon in a post-conviction environment where trial counsel will have an opportunity to explain the reasons for his

actions and/or inactions. It is a rare case indeed where an appellate court will find constitutional ineffectiveness in trial counsel without granting to counsel a meaningful opportunity to be heard.

There are many reasons why defendants in criminal cases are found guilty by a jury of their peers. A majority of the time it is because they are hopelessly guilty and not because they were denied the effective assistance of trial counsel. Some cases are simply indefensible.

In the case at bar, the victim, despite the lapse of time between the rape and the trial of the man she claimed committed it, had more than an ample opportunity to observe the defendant. Ms Eddie had seen him on and off in the company of others for three years. She identified him, both in and out of court, with a great deal of certainty. (R. 120-21, 144-45) We quote:

> Q. [BY PROSECUTOR:] Okay. Is this the man who raped you?
>
> A. Yes, it is.
>
> Q. And how is it that you remember that man?
>
> A. I will never forget his face.
>
> Q. Tell me why.
>
> A. It doesn't matter how much he changes himself I am never going to forget his face because [of] the way he did me. He took my life away from me. He took everything I had away from me the way he treated me that night. I thought I was going to die. He made me feel like I was going to die. And for the next few months I couldn't go outside without looking behind my back thinking that after he found out I told somebody that he would really send people to kill me like he has said. I was really afraid that he was going to come after me.
>
> Q. To your knowledge now after having had all of this time and throughout all this investigation, to your knowledge, does there exist an individual named Brian McDaniels?
>
> A. Now I know that that is not his name.
>
> Q. Do you know of any individual who exists named Brian

McDaniels?

A. No, I don't know. (R. 147)

What then is the lawyer to do other than make the best of a challenging situation?

Our position, in a nutshell, is that McLaurin has failed to sufficiently rebut the presumption of counsel's competency. He has failed to show on direct appeal that any aspect of his lawyer's performance was actually deficient and that the deficient performance, if any, actually prejudiced the defense.

The record is inadequate and fails in its present posture of imperfection to affirmatively reflect ineffectiveness of constitutional dimensions. Only an evidentiary hearing in a post-conviction environment can furnish insight into the reasons for trial counsel's alleged omissions. In this particular case, such a hearing has already been denied by the trial court.

The ground rules for resolving this complaint are 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]

We need not respond any further to the individual shortcomings or alleged lapses of counsel, if any, because the centerpiece of our retort is that the entire record, in its present posture, fails on direct appeal to affirmatively demonstrate ineffectiveness of constitutional dimensions under both **Read** and **Strickland**.

The *Strickland* Standard.

The standard for constitutionally effective assistance of counsel is not errorless counsel and not counsel judged ineffective by hindsight. 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,** *supra*, 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).

The "overall" performance in this case begins with Mr. Folse's voir dire examination (R. 39-74), moves past his invocation of the witness sequestration rule (R. 103) to his opening statements (R. 113-18), then to trial on the merits at which time counsel vigorously cross-examined each one of the State's witnesses.

Following his motion for a directed verdict, Mr. Folse produced four witnesses, three of whom were alibi witnesses, who testified on McLaurin's behalf. (R. 220-263) Counsel's performance includes a decent, although not dynamic, closing argument (R. 288-303) and concludes with a motion for judgment notwithstanding the verdict or for a new trial. (C.P. at 15-16)

There is a strong, yet rebuttable, presumption that counsel's conduct falls within the wide range of reasonable professional assistance. **Frierson v. State,** *supra*. There is, likewise, a presumption that decisions made by defense counsel are strategic. **Leatherwood v. State,** 473 So.2d 964, 969 (MIss. 1985); **Armstrong v. State,** 573 So.2d 1329, 1334 (MIss. 1990). Trial lawyers, especially on direct appeal, should be given the benefit of these presumptions unless they

are overcome by the strength of counsel's deficiencies.

"Judicial scrutiny of counsel's performance [is] highly deferential." **Osborn v. State,** *supra*, 695 So.2d at 575 quoting from **Strickland v. Washington,** 466 U.S. at 689, 104 S.Ct. at 2065.

Under the **first** or **deficiency prong,** the defendant must demonstrate that counsel was not functioning as the counsel guaranteed by the Sixth Amendment so as to provide reasonably effective assistance.

Under the **second** or **prejudice prong** the defendant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." **Cabello v. State,** 524 So.2d 313, 315 (MIss. 1988).

Stated somewhat differently, the defendant must prove that "the lawyer'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." **Martin v. State,** 609 So.2d 435, 438 (Miss. 1992).

A desirable starting point in evaluating counsel's performance - especially with respect to the prejudice prong of **Strickland** is to look at the strength of the prosecution's case. *See* **Indiviglio v. United States**, 612 F.2d 624, 629 (2d Cir. 1979).

Here the identification testimony elicited from Lala Eddie was credible because it was supported by corroborating evidence in the form of a description of both McLaurin's truck and the house where the rape took place. The evidence, in its entirety, was quite compelling, especially where, as here, Eddie identified her assailant with a great deal of certainty.

As stated previously, the selection of a defense falls within the amorphous zone of trial and litigation strategy. "[T]here is a presumption that decisions made are strategic." **Leatherwood v. State**, *supra*, 473 So.2d 964, 969 (Miss. 1985).

We have reviewed the entire record and have concluded that even if McLaurin's allegations pass muster under the "deficiency" prong of **Strickland**, McLaurin has failed to make out a *prima facie* case with respect to the "prejudice" prong.

Put another way, he has, as stated previously, failed to demonstrate "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," of course, is "a probability sufficient to undermine confidence in the outcome." Such does not exist here where McLaurin was found guilty in the wake of testimony that was both substantial and credible.

McLaurin has presented, at best, minor lapses of counsel, tactical errors, and judgment calls. He has failed to demonstrate on direct appeal that trial counsel's "over-all" performance was deficient and that the deficiency actually prejudiced the defendant. In other words, the official record fails to affirmatively reflect ineffectiveness of constitutional dimension.

After all, it was not trial counsel's performance that sealed Shawn McLaurin's fate. Rather, it was the positive and unequivocal ear and eyewitness identification made by Lala Eddie, together with all reasonable inferences to be drawn from all the evidence, that pointed to guilt beyond a reasonable doubt.

II.

THE ABSENCE OF A PROFERT PRECLUDES AN ADEQUATE REVIEW OF McLAURIN'S CLAIM THAT HIS CROSS-EXAMINATION OF THE VICTIM WAS IMPROPERLY SUPPRESSED.

IN ANY EVENT, THE VICTIM ANSWERED THE QUESTION.

It was McLaurin's position at trial that

> "[d]uring the time frame of the rape [January 16, 1997], McLaurin required crutches to get around and walk, he could not drive his own car (a standard transmission with a clutch), he walked with a limp and had a healing flesh wound on his upper leg near his groin." (R. 221-22, 237-38, 245-46)

McLaurin claims " . . . the trial judge prohibited McLaurin from asking his accuser about these issues." (Brief for Appellant at 15)

Specifically, his concerns are found in the following colloquy:

> Q. [By Defense Counsel]: Okay. Was there anything unusual about him at that point [around January lst of '97?]
>
> A. [By Ms Eddie]: During that night?
>
> Q. Well, during that time anything unusual about his person or anything like that?
>
> A. **No, there wasn't.**
>
> Q. Okay. So if he was shot in the right leg with a .38 caliber pistol and under a doctor's care, you would know that. You wouldn't have the opportunity to have seen that?
>
> A. **At that time I didn't realize anything like that, no.**
>
> Q. Okay. Did that come up in conversation that I had been shot in November of '96 and was finally released from doctor's care on 12-21-96, about two weeks before the event?
>
> MS. SPEETJENS: May it please the court.
>
> THE COURT: Objection sustained, counsel.
>
> MS. SPEETJENS: Thank you, Your Honor.
>
> MR. FOLSE: Your Honor, sustained as to what?

THE COURT: Objection sustained.

MR. FOLSE: Yes, ma'am, as to why?

MS. SPEETJENS: My objection, Your Honor, **would be counsel testifying** after giving no such documents to back up what he is going to say. So if in fact that is true he's just - - I have no reason to believe it's true and I have no reason to believe that there's any substantiating documentation, **so I object to counsel testifying.**

THE COURT: The court sustains the objection. Also on the issue of relevance. (R. 149-50) [emphasis ours]

We note the absence of a profert.

What more could the victim have added to her negative response? She had already answered the question with an emphatic "no." Counsel should have requested that the witness be required to answer outside the hearing and presence of the jury. *See* **McGee v. State**, 365 So.2d 302, 304 (Miss. 1978) [No proffer was made of testimony nor was a statement dictated into the record to indicate what was to be shown by the excluded cross-examination.]

"When testimony is not allowed at trial, record of proffered testimony must be made in order to preserve [the] point for appeal." **Metcalf v. State**, 629 So.2d 558, 559 (Miss. 1993); **Gates v. State,** 484 So.2d 1002, 1008 (Miss. 1986). *See also* **King v. State,** 374 So.2d 808, 812 (Miss. 1979) ["In order to put the court in error, appellant should have stated into the record the testimony he expected to obtain though the proffered witness, [the defendant's eight year old son."]; **Fanning v. State,** 249 Miss. 124, 161 So.2d 199 (1964) [Defendant's claim that trial court erred in refusing him permission to call the district attorney as a witness was devoid of merit where the record failed to reflect what the defendant desired to prove by the district attorney.]

What did McLaurin intend to prove by the question he propounded to Lala Eddie? We shall never know because of the lack of an adequate profert or a request that the witness answer the question outside the hearing and presence of the jury. *See* **Bell v. State**, 443 So.2d 16, 19-20 (Miss. 1983). A profert must be full and specific and not left in an indefinite shape. **Kinney v. State**, 336 So.2d 493, 495 (Miss. 1976). In the case at bar, there was no profert at all. The lack thereof is fatal to McLaurin's complaint.

In **Temple v. State**, 165 Miss. 798, 145 So. 749, 751 (1933), this Court penned the following language:

> Objection is made to the action of the court in declining to allow the witness to answer a question as to a dying declaration made by the deceased. It is a sufficient answer to this objection that we do not now know what the statement would have been, had the witness been permitted to answer the question. **Counsel should have stated what he proposed to prove in the court below for information there, and for our information here.** *Moore v. State*, 131 Miss. 662, 95 So. 638, and *Reece v. State*, 154 Miss. 862, 123 So. 892. [emphasis supplied]

A party seeking to reverse a case because of excluded testimony must show in the record what the testimony would have been if the witness had been allowed to testify. **Jones v. State**, 306 So.2d 57 (Miss. 1975). *See also* **Nalls v. State**, 651 So.2d 1074 (Miss. 1995) [Primary reason for profert is to get the proposed answer and expected proof in the record for the benefit of the appellate court, so that appellate court may know what evidence is being excluded by trial court]; **King v. State**, *supra*, 374 So.2d 808 (Miss. 1979)[Defendant should have stated into record testimony he expected to obtain through eight-year-old witness]; **Brown v. State**, 338 So.2d 1008 (Miss. 1976) [Counsel must either state into record what is expected to be proved, or in absence of jury have the witness answer the questions.]

This is not a case where cross-examination was suppressed. Rather, it is a case where defense counsel's question was in the form of actual testimony. The trial judge did not abuse her judicial discretion in sustaining the State's objection.

Finally, "[b]y virtue of Rule 103(a), Miss.R.Evid., '[b]efore error can be predicated at all upon an adverse evidentiary ruling it must appear that a substantial right of the party is affected.' " **Jackson v. State,** 594 So.2d 20, 25 (Miss. 1992). In other words, the admission or exclusion of evidence must result in prejudice or harm if the cause is to be reversed on that ground. **Jackson v. State,** 594 So.2d at 25 quoting from **Knight v. State,** 248 Miss. 850, 161 So.2d 521, 522 (1964).

No harm has been demonstrated here because the evidence against McLaurin is simply overwhelming, and McLaurin has neither demonstrated, nor even suggested, how Ms Eddie's excluded testimony was relevant to a defense of misidentification.

In short, McLaurin's complaint is not grounds for reversal. The absence of an adequate profert is fatal to his claim of testimony wrongfully suppressed.

If not, any error was innocuous and harmless beyond a reasonable doubt given the strength of the prosecution's case.

III.

THE TRIAL COURT DID NOT ERR IN OVERRULING McLAURIN'S OBJECTION WHEN THE PROSECUTOR ALLEGEDLY COMMENTED UPON McLAURIN'S FAILURE TO CALL A MEDICAL WITNESS.

THE LACK OF A CONTEMPORANEOUS OBJECTION TO TWO OTHER SIMILAR COMMENTS PRECLUDES APPELLATE REVIEW OF THESE ISSUES.

McLaurin contends the trial judge erred when she sustained the state's objection during defense counsel's cross-examination of the victim, Lala Eddie.

Applicable colloquy is repeated as follows:

Q. [By Defense Counsel]: Okay. Was there anything unusual about him at that point [around January lst of '97?]

A. [By Ms Eddie]: During that night?

Q. Well, during that time anything unusual about his person or anything like that?

A. No, there wasn't.

Q. Okay. So if he was shot in the right leg with a .38 caliber pistol and under a doctor's care, you would know that. You wouldn't have the opportunity to have seen that?

A. At that time I didn't realize anything like that, no.

Q. Okay. Did that come up in conversation that I had been shot in November of '96 and was finally released from doctor's care on 12-21-96, about two weeks before the event?

MS. SPEETJENS: May it please the court.

THE COURT: Objection sustained, counsel.

MS. SPEETJENS: Thank you, Your Honor.

MR. FOLSE: Your Honor, sustained as to what?

THE COURT: Objection sustained.

MR. FOLSE: Yes, ma'am, as to why?

MS. SPEETJENS: My objection, Your Honor, **would be counsel testifying** after giving no such documents to back up what he is going to say. So if in fact that is true he's just - - I have no reason to believe it's true and I have no reason to believe that there's any substantiating documentation, **so I object to counsel** testifying.

THE COURT: The court sustains the objection. Also on the issue of relevance. (R. 149-50) [emphasis ours]

The State's objection was properly sustained because defense counsel was, in effect, testifying to facts and matters that had not been introduced into evidence via testimony or by other means. Facts should come from the mouth of a sworn witness and not from the lips of a lawyer for either side.

McLaurin identifies two (2) other instances where the prosecutor allegedly commented improperly upon the failure of the defense to call a medical witness who could have allegedly attested to the presence of a gunshot wound to McLaurin's leg at the time of the rape. His complaint is devoid of merit for several reasons.

First, there was no objection, contemporaneous or otherwise, to the comments made during prosecutor's cross-examination of McLaurin's mother, Margaret McLaurin (R. 25--51), or to the portion of the prosecutor's closing argument complained about for the first time on appeal. (R. 283-84)

We respectfully point out the testimony and comments criticized "here and now" were not so obviously egregious and prejudicial "then and there." *Second*, Dr. Fisher was an unknown entity who was not equally accessible to the State. McLaurin's mother was not even sure of the doctor's name. "[I]f I'm not mistaken, it might have been Dr. Fisher. I'm not for sure." (R, 250)

Third, the prosecutor did not call Dr. Fisher by name during closing argument. (R. 283-84) Her comments were neither "blatant" nor "vigorous." Unlike the situation in **Holmes v. State**, 537 So.2d 882 (Miss. 1988), cited and relied upon by McLaurin, no prejudicial error ensued.

These observations, standing alone, are fatal to McLaurin's complaint raised here for the first time on appeal.

In short, any error was waived or forfeited when McLaurin failed to object during trial. Accordingly, McLaurin has "forfeited" his right to raise these claims on appeal. *See* **United States**

v. Dodson, 288 F.3d 153 (5th Cir. 2002), reh denied, cert denied 123 S.Ct. 32 [Forfeiture is the failure to make the timely assertion of a right, generally by failure to object to an error in the proceedings.]

Now the law.

It is elementary that a contemporaneous objection is required in order to preserve an error for appellate review. **Caston v. State,** 823 So.2d 473 (Miss. 2002), reh denied; **Logan v. State,** 773 So.2d 338 (Miss. 2000); **Florence v. State,** 755 So.2d 1065 (Miss. 2000); **Jackson v. State,** 766 So.2d 795 (Ct.App.Miss. 2000); **Goree v. State,** 750 So.2d 1260 (Ct.App.Miss. 1999).

Otherwise the error, if any at all, is waived for appeal purposes. **Caston v. State,** *supra,* 823 So.2d 473 (Miss. 2002), reh denied.

Stated differently, "[t]he failure to object at trial acts as a procedural bar in an appeal." **White v. State,** 964 So.2d 1181, 1185 (Ct.App.Miss. 2007), citing **Jackson v. State,** 832 So.2d at 579, 581(¶3) (Ct.App. Miss. 2002), citing **Carr v. State,** 655 So.2d 824, 853 (Miss. 1995).

A defendant is not entitled to raise new issues on appeal that he has not first presented to the trial court for consideration. **Hodgin v. State,** 964 So.2d 492 (Miss. 2007). This rule is not diminished in a capital case. **Flowers v. State,** 947 So.2d 910 (Miss. 2007). Moreover, it also applies to constitutional questions. **Williams v. State,** 971 So.2d 581 (Miss. 2007) ["As a general rule, constitutional questions not asserted at the trial level are deemed waived."] *See also* **Ross v. State,** 954 So.2d 968, 987-88, 1015 (Miss. 2006); **Rogers v. State,** 928 So.2d 831, 834 (Miss. 2006).

In **Gonzales v. State,** 963 So.2d 1138, 1144 (Miss. 2007), the Supreme Court reaffirmed the rule with the following rhetoric:

> Where an argument has never been raised before the

> trial court, we repeatedly have held that 'a trial judge will not be found in error on a matter not presented to the trial court for a decision.' *Purvis v. Barnes,* 791 So.2d 199, 203 (Miss. 2001).

The contemporaneous objection rule has been applied to speedy trial violations, discovery violations, ***Batson*** violations, in-court identifications, admission of wrongfully obtained evidence, trial *in absentia*, and the like. *See* **Miller v. State,** 956 So.2d 221 (Miss. 2007) [speedy trial]; **Jackson v. State,** 962 So.2d 649 (Ct.App.Miss. 2007), reh den, cert den [discovery]; **Flowers v. State,** 947 So.2d 910 (Miss. 2007) and **Roles v. State,** 952 So.2d 1043 (Ct.App.Miss. 2007) [***Batson***]; **Black v. State,** 949 So.2d 105 (Ct.App.Miss. 2007) [in-court identifications]; **Gonzales v. State,** *supra*, 963 So.2d 1138 (Miss. 2007)[wrongfully obtained evidence]; **Mallard v. State,** 798 So.2d 539 (Miss. 2001) [trial *in absentia*]; **Hill v. State,** 432 So.2d 427 (Miss. 1983) [Prosecutor's improper closing argument]; **Brown v. State,** 936 So.2d 447, 453 (Ct.App.Miss. 2006) [Prosecutor's improper argument and remarks].

The contemporaneous objection rule is in place in order to enable the trial judge to correct error with proper instructions to the jury whenever possible. **Slaughter v. State,** 815 So.2d 1122 (Miss. 2002), reh denied.

A trial court cannot be put in error unless it had an opportunity to first pass on the question. **Palm v. State,** 748 So.2d 135 (Miss. 1999); **Fulgham v. State,** 770 So.2d 1021 (Ct.App.Miss. 2000). *See also* **Mallard v. State,** *supra*, 798 So.2d 539, 542 (Miss. 2001), where this Court held that Mallard's complaint that she was tried in her absence was waived, for the purposes of appeal, since she failed to object to her trial *in absentia.*

Miss.Code Ann. § 99-35-143 is precisely in point. It reads, in its pertinent parts, that

> [a] judgment in a criminal case **shall not be reversed** because the transcript of the record does not show a proper organization of the court below or of the grand jury, or where the court was held, or that the prisoner was present in court during the trial or any part of it, or that the court asked him if he had anything to say why judgment should not be pronounced against him upon the verdict, **or because of any error or omission in the case in the court below, except where the errors or omission are jurisdictional in their character, unless the record show that the errors complained of were made ground of special exception in that court.** [emphasis added]

The underlying bases for the existence of a contemporaneous objection rule are contained in **Oates v. State**, 421 So.2d 1025, 1030 (Miss. 1982), where we find the following:

> There are three basic considerations which underlie the rule requiring specific objections. It avoids costly new trials. Boring v. State, 253 So.2d 251 (Miss. 1971). It allows the offering party an opportunity to obviate the objection. Heard v. State, 59 Miss. 545 (Miss. 1882). Lastly, a trial court is not put in error unless it had an opportunity to pass on the question. Boutwell v. State, 165 Miss. 16, 143 So. 479 (1932). These rules apply with equal force in the instant case; accordingly, we hold that appellant did not properly preserve the question for appellate review.

In **Leverett v. State**, 197 So.2d 889, 890 (Miss. 1967), this Court, quoting from **Collins v. State**, 173 Miss. 179, 180, 159 So. 865 (1935), penned the following language:

> The Supreme Court is a court of appeals, it has no original jurisdiction; it can only try questions that have been tried and passed upon by the court from which the appeal is taken. Whatever remedy appellant has is in the trial court, not in this court. This court can only pass on the question after the trial court has done so.

In **Sumner v. State,** 316 So.2d 926, 927 (Miss. 1975), we find the following language concerning the time for making an objection:

> The rule governing the time of objection to evidence is that it must be made as soon as it appears that the evidence is objectionable, or as soon as it could reasonably have been known to the objecting party, unless some special reason makes a postponement desirable for him which is not unfair to the proponent of the evidence. *Williams v. State*, 171 Miss. 324, 157 So. 717 (1934) and cases cited therein. See also cases in Mississippi Digest under Criminal Law at 693.

We reiterate. "A trial judge will not be found in error on a matter not presented to him for decision." **Ballenger v. State**, 667 So.2d 1242, 1256 (Miss. 1995) citing numerous cases. *See also* **McLendon v. State,** 945 So.2d 372 (Miss. 2006), reh den, cert den; **Howard v. State,** 945 So.2d 326 (Miss. 2006), reh den, cert den. "[The Supreme Court] cannot find that a trial judge committed reversible error on a matter not brought before him to consider." **Montgomery v. State,** 891 So.2d 179, 187 (Miss. 2004) reh den.

No egregious violation of a fundamental or substantial right is involved here, and the procedural bar/waiver/forfeiture rule is applicable to Shawn McLaurin.

Plain Error.

Waiver/forfeiture notwithstanding, McLaurin relies upon plain error. (Brief for Appellant at 19-20)

Miss.R.Evid. 103 (d) reads as follows: "Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court."

We continue to adhere to our view that "plain error" is something for a reviewing court to notice and not a crutch for an appellant to argue.

In any event, the plain error doctrine is inapplicable here because in order to find "plain" error there must be "error" and it must be "plain, clear, or obvious." **McGee v. State,** 953 So.2d 211, 215 (Miss. 2007).

"The plain error doctrine requires that there be an error and the error must have resulted in a manifest miscarriage of justice." **Williams v. State,** 794 So.2d 181, 187 (Miss. 2001).

In **McGee v. State,** *supra,* 953 So.2d 211, 215 (Miss. 2007), we find the following language dispositive of McLaurin's "plain error" argument:

> * * * However, if there is a finding of plain error, a reviewing court may consider the issue regardless of the procedural bar. A review under the plain error doctrine is necessary when a party's fundamental rights are affected, and the error results in a manifest miscarriage of justice. *Williams v. State,* 794 So.2d 181, 187-88 (Miss. 2001). **To determine if plain error has occurred, we must determine "if the trial court has deviated from a legal rule, whether that error is plain, clear or obvious, and whether the error has prejudiced the outcome of the trial."** *Cox v. State,* 793 So.2d 591, 597 (Miss. 2001) (relying on *Grubb v. State,* 584 So.2d 786, 789 (Miss. 1991);,*Porter v. State,* 749 So.2d 250, 260- 61 (Miss.Ct.App. 1999).

The Supreme Court applies the "plain error" rule " . . . only when it affects a defendant's substantial/fundamental rights." **Williams v. State,** *supra,* 794 So.2d at 187.

None of this criteria is found to exist in the case at bar,

First, Judge Green did not deviate from a legal rule. In the absence of a contemporaneous objection, the trial judge never had the opportunity to rule on the prosecutor's comments. Thus, there is no error, plain or otherwise, to review.

Second, even if there is the spectre of error, it is neither "plain" nor "clear" nor "obvious." The comments did not prejudice the outcome of the trial where, as here, evidence of McLaurin's guilt was at least "whelming" if not overwhelming. **Heidelberg v. State,** 584 So.2d 393, 394 (Miss. 1991) [Corroboration of state witnesses testimony while not "overwhelming," was at least "whelming."] In other words, any error did not result in a "manifest miscarriage of justice."

Harmless Error.

Assuming, arguendo, there is "plain error," it was clearly harmless beyond a reasonable doubt because the evidence preponderates heavily in favor of the guilty verdict, and any error could not have contributed to the defendant's conviction. *See* **Chapman v. California,** 386 U.S. 18, 87 S.Ct.824, 17 L.Ed.2d 705 (1967), reh den 17 L.Ed.2d 705.

IV.

THE TRIAL JUDGE DID NOT ABUSE HER JUDICIAL DISCRETION WHEN SHE FAILED TO CONDUCT, *SUA SPONTE*, A "BALANCING TEST" WITH RESPECT TO THE ADMISSIBILITY OF PRIOR CRIMINAL ACTS.

McLaurin claims the trial judge erred when she failed to conduct, sua sponte, a balancing test, *viz.*, probative value versus prejudicial effect, with respect to the admissibility of certain prior criminal acts. Specifically, McLaurin points to testimony elicited from state witness-in-chief Lowery, defense witness Williams, and state's rebuttal witness Chappell. (Brief for Appellant at 20-21)

Because no balancing test was requested, none was required. *Cf.* **Brown v. State,** 890 So.2d 901, 912-13 (Miss. 2004) [The burden fall upon the defendant to request a rule 404(b) limiting instruction.]

Another problem with McLaurin's argument is that none of this testimony was objected to. McLaurin admits as much in his brief, *viz.*,

> "[n]o objection was made by Defense counsel. Lowrey, an undercover officer, was allowed, without objection, to testify that he was 'aware of the existence' of Shawn McLaurin. On cross-examination Trial Counsel solicited that 'another officer impounded his [McLaurin's] vehicle.' (Tr. 192) On redirect, without objection, the State elicited that there were rifles and guns taken from the black truck. (Tr. 193)."

This state of affairs precludes appellate review for the reasons expressed in our response to issue III, *supra.*

As stated in our response to III, a contemporaneous objection is required in order to preserve a point for appellate review. The authorities relied upon in support of the argument advanced in point III, *supra*, are equally applicable here.

McLaurin fails to succinctly identify in his brief any allegedly objectionable testimony of Williams and Chappell. His argument is devoid of merit for this reason if for no other.

In any event, assuming prosecutorial misconduct in probing to deeply into extraneous matters, the following language found in **Blackwell v. State**, 44 So.2d 409, 410 (Miss. 1950), is still good law and compares favorably with the facts found here:

> It is now well settled that when anything transpires during the trial that would tend to prejudice the rights of defendant, he cannot wait and take his chances with the jury on a favorable verdict and then obtain a reversal of the cause in this Court because of such error, but **he must ask the trial court for a mistrial upon the happening of such occurrence** when the same is of such nature as would entitle him to a mistrial. * * * [emphasis supplied]

See also Rule 3.12, Uniform Rules of Circuit and County Court Practice (1995), which requires a mistrial " . . . if there occurs during the trial, either inside or outside the

courtroom, misconduct by the party, the party's attorneys, or someone acting at the behest of the party or the party's attorney, resulting in substantial and irreparable prejudice to the movant's case."

We note that the testimony of Lowery describing the guns observed in the defendant's truck did not come to light until after McLaurin, during cross-examination, "opened the door" by asking if Lowery saw " . . . any handguns, blindfolds, handcuffs or anything like that on the front seat anywhere, in the back, the trunk, anywhere." (R. 193) This testimony was both relevant and probative because the victim had testified she was raped and threatened at gunpoint, *viz.*, with both a long gun (R. 126) and a small handgun. (R. 137)

During re-examination by the defendant, the following colloquy took place:

> Q. [BY DEFENSE COUNSEL:] But for clarification, there was an SKS rifle, there was handguns or - -
>
> A. Yes, there was an SKS and handguns in the vehicle. I did not recover them. Through our investigation, that's how I know. (R. 194)

Finally, "[b]y virtue of Rule 103(a), Miss.R.Evid., '[b]efore error can be predicated at all upon an adverse evidentiary ruling it must appear that a substantial right of the party is affected.' " **Jackson v. State,** 594 So.2d 20, 25 (Miss. 1992). In other words, the admission or exclusion of evidence must result in prejudice or harm if the cause is to be reversed on that ground. **Jackson v. State,** 594 So.2d at 25 quoting from **Knight v. State,** 248 Miss. 850, 161 So.2d 521, 522 (1964).

The case at bar does not exist in this posture.

V.

APPELLATE REVIEW OF THE STATE'S PHOTOGRAPHIC LINEUP AND LINEUP PROCEDURES IS NOT POSSIBLE BECAUSE THERE IS NOTHING IN THE RECORD TO REVIEW.

McLaurin's challenge on appeal to the allegedly suggestive nature of the State's photographic lineup procedure(s) is all for naught because no challenge was made to the photographic array in the trial court. The argument is barred for want of any objection or motion to suppress the victim's identifications made by her either in or out of court. *See* authorities in our response to issue III.

More importantly, the photographic array itself has not been made a part of the official record on appeal. Accordingly, there is nothing in the record for an appellate court to review.

"The burden is upon the defendant to make a proper record of the proceedings." **Genry v. State,** 735 So.2d 186, 200 (Miss. 1999). *See also* **Schuck v. State,** 865 So.2d 1111 (Miss. 2003); **Byrom v. State,** 863 So.2d 836 (Miss. 2003); **Steen v. State,** 873 So.2d 155 (Ct.App.Miss. 2004), reh denied; **Brown v. State,** 875 So.2d 214 (Ct.App.Miss. 2003), reh denied.

The photographs that McLaurin describes as depicting parties "substantially dissimilar" are not found in the official record which consists only of the clerk's papers (volume 1 of 3) and the record of trial (volumes 2 of 3 and 3 of 3). There is no exhibit envelope containing photographs, police reports, *et cetera,* included with the clerk's papers and the transcript of trial.

This will not do at all.

We are told in **Saucier v. State,** 328 So.2d 355, 357 (Miss. 1976), that the Supreme

Court can act " . . . only on the basis of the contents of the official record, as filed after approved by counsel for both parties. It may not act upon statements in briefs or arguments of counsel which are not reflected by the record."

The case of **Wortham v. State,** 219 So.2d 923, 926-27 (1969), is particularly applicable. In **Wortham** an affidavit contained in appellant's brief could not be considered on appeal. This court opined:

> * * * * * Appellant attempts to raise this question by including in the brief filed by his counsel a photostatic copy of an affidavit alleged to have been filed in the justice of the peace court. We have always adhered to the rule that we will not consider anything on appeal except what is in the record made in the trial court. **We will not go outside the record to find facts and will not consider a statement of facts attempted to be supplied by counsel in briefs.** The rule is so well settled that it is unnecessary to cite authority to support it, but in spite of this we still get many cases where counsel seek to have us notice facts not in the record. This amounts to an exercise in futility and is a waste of time and effort. It should not be done. [emphasis supplied]

As stated in **Mason v. State,** *supra,* 440 So.2d 318, 319 (Miss. 1983), this Court " . . . must decide each case by the facts shown in the record, not assertions in the brief, *however sincere counsel may be in those assertions.* Facts asserted to exist must and ought to be definitely proved and placed before [this Court] by a record, certified by law; otherwise, we cannot know them."

Regrettably, McLaurin's complaint targeting the photographic array must fall upon deaf ears because none of the photographs are in the record. Any effort to place them before the eyes of the Court by attaching them to a brief or submitting them as record

excerpts " . . . amounts to an exercise in futility and is a waste of time and effort." **Mason v. State**, *supra.*

Several police narratives and witness statements - but no photographs - have been included with appellant's record excerpts which consists largely of copies of the trial testimony. The narratives and statements are not a part and parcel of the official record and cannot be considered here.

We note that a copy of the six (6) person photographic array appears to be included as a record excerpt in the companion case, cause number 2008-CA-011251-COA. It can be considered neither here nor there.

In **Genry v. State**, *supra*, 735 So.2d 186, 200 (Miss. 1999), this Court opined:

> * * * * * * The burden is on the defendant to make a proper record of the proceedings. **Jackson v. State**, 689 So.2d 760, 764 (Miss. 1997); **Russell v. State**, 670 So.2d 816, 822 n. 1 (Miss. 1995); **Lambert v. State**, 574 So.2d 573, 577 (Miss. 1990). This court "cannot decide an issue based on assertions in the brief alone; rather, issues must be proven by the record." **Medina v. State**, 688 So.2d 727, 732 (Miss. 1996); **Robinson v. State**, 662 So.2d 1100, 1104 (Miss. 1995). Accordingly, the matter is not properly before this Court. This assignment of error is without merit.

"We repeat . . . that on direct appeal we are confined to the record before us [and] that record gives us no basis for reversal." **Watson v. State**, 483 So.2d 1326, 1330 (Miss. 1986).

The claims made by McLaurin are devoid of merit for this reason alone.

We reiterate!

"The burden is upon the defendant to make a proper record of the proceedings." **Genry v. State,** *supra*, 735 So.2d 186, 200 (Miss. 1999). *See also* **Schuck v. State,** 865

So.2d 1111 (Miss. 2003); **Byrom v. State,** 863 So.2d 836 (Miss. 2003); **Steen v. State,** 873 So.2d 155 (Ct.App.Miss. 2004), reh denied; **Brown v. State,** 875 So.2d 214 (Ct.App.Miss. 2003), reh denied.

In view of the deficient and imperfect record, the photographic identification issue presented by McLaurin is not properly before the reviewing Court. **Genry v. State,** *supra.*

In short, there is nothing to review.

VI.

THERE BEING NO ERROR IN ANY INDIVIDUAL PART, THERE CAN BE NO ERROR TO THE WHOLE.

Our response to McLaurin's "cumulative error" argument is found in **Genry v. State**, *supra*, 735 So.2d 186, 201 (Miss. 1999), where we find the following language:

> This court may reverse a conviction and sentence based upon cumulative effect of errors that independently would not require reversal. **Jenkins v. State**, 607 So.2d 1171, 1183-84 (Miss. 1992); **Hansen v. State**, 592 So.2d 114, 153 (Miss. 1991). However, where "there was no reversible error in any part, so there is no reversible error to the whole." **McFee v. State**, 511 So.2d 130, 136 (Miss. 1987).

See also **Wheeler v. State,** 826 So.2d 731, 741 (¶ 39) (Miss. 2002)[Each alleged error discussed individually and no cumulative error found].

Contrary to McLaurin's suggestion otherwise, this is not a proper case for application of the doctrine of either "cumulative" error or "plain" error. It was true in the **Genry** case, and it is equally true here, that since the appellant failed " . . . to assert any assignments of error containing actual error on the part of the trial judge in this case, this Court finds that this case should not [be] reverse[d] based upon cumulative error." 735

So.2d at 201.

CONCLUSION

Appellee respectfully submits this case is devoid of reversible error. The judgment of conviction and life sentence imposed by the jury for the crime of forcible rape should be forthwith affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: _____

BILLY L. GORE
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

CERTIFICATE OF SERVICE

I, Billy L. Gore, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the above **BRIEF FOR THE APPELLEE** to the following:

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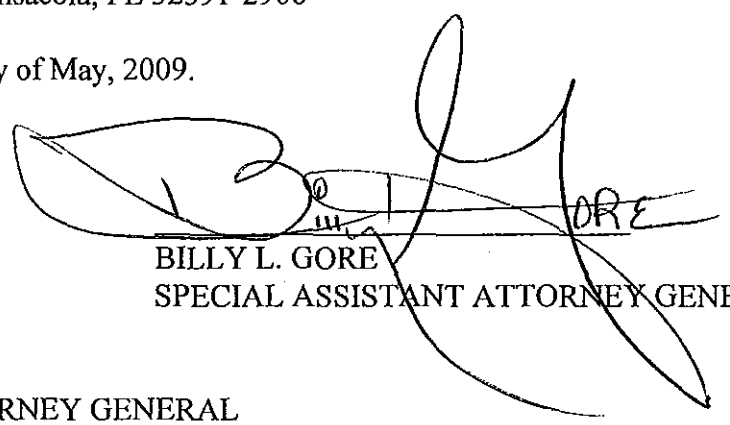
This the 13th day of May, 2009.



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