IN THE SUPREME COURT OF MISSISSIPPI, COURT OF APPEALS OF THE STATE OF MISSISSIPPI

SHAWN MCLAURIN — **APPELLANT/DEFENDANT**

VS. — **No. 2008-KA-00814-COA**

STATE OF MISSISSIPPI — **APPELLE/PLAINTIFF**

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 the Supreme Court may evaluate possible disqualification or recusal:

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STATEMENT REGARDING ORAL ARGUMENT

Mr. McLaurin requests that this Court allow oral argument to help resolve the issues of his case. Oral Argument is permitted pursuant to M.R.A.P. 34 and needed to help the understanding of Mr. McLaurin's appeal.

STATEMENT OF ISSUES

Defendant Shawn McLaurin Raises the following issues on appeal:

I. The Defendant deserves a new trial based on ineffective assistance of counsel as specifically described herein and, in considering the trial transcript as a whole.

II. The trial court impermissibly denied the defense the opportunity to cross examine the Complainant on the issue of her failure to describe to the police McLaurin's healing gunshot wound to the leg, an identifying mark recognizable at the time of the alleged rape.

III. The trial court overruled McLaurin's objection to the State's comment on his failure to provide testimony to the jury regarding his healing gunshot wound to the leg, thus permitting an unconstitutional comment on the Defendant's right not to testify or present evidence. This happened during witness testimony and again (without objection) in the state's closing argument.

IV. Defendant was prejudiced by the trial court's failure to conduct a balancing test regarding the admissibility of alleged prior criminal acts of McLaurin brought through witness Officer Lowrey, witness Williams and witness Chappelle.

V. The state's lineup and photo array procedures were so suggestive as to unconstitutionally taint the identification of the Defendant.

VI. Defendant deserves a new trial based on cumulative error in the trial coupled with the denial of effective assistance of counsel.

STATEMENT OF THE CASE AND FACTUAL BACKGROUND

I. Nature of the Case and Course of the Proceedings:

Currently, Shawn McLaurin, "McLaurin", has two pending appeals before this Court. They concern the same case, but different issues. This brief is the direct appeal of the trial of the case in which Shawn McLaurin, hereinafter "Defendant" was convicted of rape. To prevent confusion, Defendant highlights that his other pending appeal (Case Number **2008-CA-01251-COA**) is his appeal of the final order of the trial court denying his motion to set aside the dismissal of his Motion for Post Conviction Relief. The issue of ineffective assistance is also extensively briefed in that appeal, 2008-CA-01251 COA with more extensive documentation and attached exhibits. The Supreme Court has previously granted permission to proceed on this direct appeal in an out of time manner.

II. Facts :

The Complainant accused McLaurin of raping her on January 16, 1997. (TR, 121). At the time of the incident, the Complainant states she had known her assailant for about three years. (TR, 152). She had her assailant's phone number and called him on the night of the alleged rape. (TR, 122). She had met him through her own cousin who was dating her assailant's friend. (TR, 155). Because the complainant originally told the police she did not know the "real name" of her assailant, an arrest was unable to be made for 17 months in the case. At first she told the police that she thought her assailant's name was Brian McDaniels. (TR, 120). Because she did could not give the police any other names for her assailant, the case was inactive for 17 months as no Brian McDaniels could be found. (TR, 141) Oddly, the Complainant failed to mention to any officer, as evidenced by the many police reports, that she

knew her assailant by the nick name, "Eshawn", or heard anyone else call him Eshawn. This was revealed for the first time at trial. (TR, 135).

Seventeen months after the alleged rape, the Complainant identified her attacker the4 Convention Center Nightclub on Woodrow Wilson Avenue at approximately midnight where she was out with a cousin. (TR, 141). She talked to an off duty police officer working at the club and had McLaurin arrested that night. The Complainant was, two days after seeing him in the nightclub, shown a photo line up, which included Shawn McLaurin. She identified him 17 months after the fact as her attacker. (TR, 154).

Shawn McLaurin was tried and convicted in a one day trial for the crime of rape and sentenced to life in the State Prison.

SUMMARY OF THE ARGUMENT

After reading the discovery and reading the transcript, it becomes apparent that this was an exceptionally poorly defended case and that McLaurin did not receive a fair trial in large part because of his own lawyer. There are at least 21 significant issues of ineffective assistance of counsel that caused major prejudice and are outlined below. There are countless other un-cited failings through out the trial transcript that the Court will see contribute to the overall prejudice to McLaurin. He was ineffectively represented and deserves a new trial with competent counsel.

During the course of the trial, the trial court disallowed cross examination of the Complaining witness on issues highly relevant and key to proving that the Complainant misidentified her assailant. Specifically, the trial court did not allow McLaurin to cross examine the Complainant on her observations of his medical state or her knowledge of his medical condition at the time of the alleged assault. These issues were highly relevant to identification.

The prosecution was permitted to inappropriately comment on the failure of McLaurin to call certain witnesses. This violated his constitutional right to a fair trial. Also preventing McLaurin from receiving a fair trial was the trial court's failure to conduct a balancing test on other crimes and other bad acts evidence solicited by the prosecution. This occurred, despite the trial court's pretrial ruling that she was not going to allow other crimes or other bad acts evidence if the defendant did not testify. He did not testify.

The prosecution was allowed to conduct an in court identification despite the fact that a suggestive out of court photo array had been shown to the Complainant.

Finally, the cumulative effect of the ineffective representation coupled with the courts errors and prosecutors misconduct warrant a new trial for McLaurin.

Respectfully, McLaurin prays for a remand and retrial on the merits of the case, or in the alternative, a remand for evidentiary hearing on the issues of ineffective assistance of counsel.

ARGUMENT

I. The Defendant deserves a new trial based on ineffective assistance of counsel as specifically described herein and, in considering the trial transcript as a whole.

McLaurin argues the following conduct of Defense Counsel, considered individually or cumulatively, provides a reasonable basis of an appellate finding of ineffective assistance of counsel resulting in a probable adverse outcome for McLaurin in the trial of this case.

A. Specific Instances of Ineffective Assistance

1. Despite accepting a $2500.00 retainer to do so, Defense Counsel failed to appeal the jury verdict of guilty. Defense Counsel later promised to file a PCR after missing the direct appeal deadline, but never did so despite sending correspondence to McLaurin assuring he was doing so.

2. Defense Counsel had ability to view an incriminating identifying photo of McLaurin used by the State at trial, but admittedly never went to prosecutor's office to review it and never filed motion to exclude it based on the suggestive procedure in which it was presented to the Complainant. (TR, 99).

3. After McLaurin's arrest and apparent appointment of counsel, the prosecution sent an investigator to the his house to take photographs of the house. The investigator engaged McLaurin in a conversation outside of the house while she was taking pictures and received an alleged statement that was used in trial against McLaurin. Defense Counsel never filed a motion to challenge this statement, or objection to it's use, though it was used to the detriment of McLaurin at trial. (TR, 112, 176).

4. The opening statement and closing arguments of trial counsel are so bizarre, disjointed and, in places, appear so incoherent, that they must have had a profound negative impact on the jury to the detriment of the Defendant. (TR, 113-118 and 288-303). Respectfully, counsel for the appellant requests that the Court review *in toto* the opening and closing of Defense Counsel along with the conduct of Defense Counsel throughout the trial. (RE, A).

5. Defense Counsel filed no motion regarding or objection to an in-court identification of McLaurin despite the fact that the Complainant had been shown a suggestive out of court photo lineup of McLaurin (a procedure recognized to be unduly suggestive). (TR, 120-121).

6. Defense Counsel failed to timely object to the six person photo spread of McLaurin that was shown to the Complainant subsequent to his arrest. The array was impermissibly suggestive and highly prejudicial to the defendant at trial. Supporting the allegation of the suggestive nature of the photo array is the fact that it was shown after an in-person identification of McLaurin by the Complainant a mere days before the photo lineup. (TR, 142). Though he

did eventually object to it, both the Court and the Prosecutor commented on the fact that Defense Counsel's Motion to exclude the photo array was untimely made when he did so for the first time after the evidence was already admitted and during his Motion for Directed Verdict. (TR, 217-218).

7. The Complainant testified there was vaginal penetration by the assailant's penis. (TR, 132-133). But, the original police report states that the Complainant reported the perpetrator was unable to achieve an erection. See Exhibit "B", JPD Police Report, page styled "General MO", Section 74: "Suspects Characteristics", #3. "Not Achieve Erection". Defense Counsel failed to cross examine at all on the issue of vaginal penetration versus the reported inability of the assailant to achieve an erection. The penetration issue is a central element to the crime of rape and this major inconsistency should have been thoroughly explored on cross examination of the Complainant.

8. Defense Counsel failed to cross examine Officer Velma Johnson or the Complainant on the fact that the Complainant never told the police that she heard her assailant's sister call him "Shawn" just after the alleged rape. (TR, 135). This came out at trial for the first time. This fact exists nowhere in the original or supplemental police reports taken from the Complainant. In fact, the case was closed by JPD due to the fact that the Complainant could not provide any identifying name for the suspect. Compare Complainant's trial testimony regarding the assailant's nickname to JPD reports, "Exhibit B & C" which wholly lack Shawn or as the suspects name or nickname. (See specifically "Exhibits B&C", "JPD Offense/Supplementary", dated January 17, 1997, where a suspect description is given and no nickname is provided in box #28 "Alias" and Velma Johnson's supplemental report. Additionally, this damaging testimony from the

Complainant constitutes a discovery violation to which Defense Counsel never objected and would likely have benefited from a Box challenge. Box v. State, 437 So.2d 19 (Miss.1983). Failure to follow the Box guidelines is prejudicial error, requiring reversal and remand." Duplantis v. State, 644 So.2d 1235, 1249-50 (Miss.1994) (citations omitted). Failure to ask for a continuance under Box can be ineffective; "Swington's attorney was deficient in not requesting an opportunity to interview the witness again, which meets the first prong of Strickland" Swington v. State, 742 So.2d 1106, Miss.,1999. Defense Counsel did not avail himself of this procedure in McLaurin's case. The information about a previously undisclosed nickname was highly damaging and its exclusion very likely would have led to a different outcome in the trial.

9. Defense Counsel failed to object to the introduction into evidence of an arrest mug shot of McLaurin that was taken subsequent to an unrelated prior arrest. (TR, 142).

10. Defense Counsel failed to investigate the identity of the Complainant's cousin who introduced the Complainant to the alleged assailant. This cousin was dating the assailant's friend and would have known the assailant's identity. (TR, 121). Additionally, Defense Counsel failed to cross examine the Complainant on the totally inconsistent statements of the Complainant regarding the reasons she could not locate or identify a person she allegedly knew through mutual friends and relatives and dated over a period of three years.

11. Defense Counsel failed to investigate and tender discovery in the form of medical records to the State that would have proved that McLaurin, at the time of the alleged rape, was on crutches and had been the victim of a recent gunshot wound to the leg. The assailant described by the Complainant lacked any such wound, limp or crutches and was able to drive, facts all disputed by his medical condition. The State successfully objected to cross examination

of the Complainant on this issue because none of this information was provided to the State by the Defense prior to the trial. (TR, 149-150). In addition to sustaining the State's discovery violation objection, the Court inappropriately limited cross examination on this issue because of a *sua sponte* finding of lack of relevance. (TR, 149-150). Defense counsel could easily have described to the Court why this evidence was highly relevant, but failed to do so. The trial court's ruling will be addressed below as a separate error by the Court.

12. During the trial, the State attempted to show through collateral testimony that McLaurin possessed a car very similar to the one described by the Complainant. This testimony took the form of JPD undercover officer Richard Lowrey stating that he had on a previous, unrelated date seen McLaurin in a small black truck with the word "outlaw" across the back window. ("Outlaw" refers to a brand of custom truck parts). This previous, unrelated date concerned the officer's investigation of unrelated criminal activity, a fact that became very apparent to the jury, with no objection by Defense counsel. In fact, Defense Counsel exacerbated the testimony of Officer Lowrey by opening the door and drawing out from Lowrey the fact that guns were found in McLaurin's car in a search unrelated to the rape accusation. (TR, 193-194). Lowrey, an undercover officer, was allowed, without objection, to testify that he "was aware of the existence" of Shawn McLaurin. On cross examination Defense 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). All of this information was evidence of other crimes which were prohibited by the trial court's pretrial ruling and should have been objected to. (TR, 91-94). No hearing was conducted as to whether the prejudice of this information was outweighed by is probative value. In fact, during pretrial motions, the trial court ruled that evidence of other crimes was not going

to be permitted as related to using officer Lowrey's testimony. (TR, 91-94). Despite this, Defense Counsel never objected, and even helped elicit the testimony.

13. In his motion for directed verdict at the close of the state's case, Defense Counsel argues that the suggestive lineup procedures and suggestive photo arrays should be considered a persuasive factor in his oral motion to dismiss. However, as the trial court and the prosecutors both pointed out, this issue should have more appropriately been raised in a pretrial motion. (TR, 215-218). It never was.

14. One of the witnesses called by McLaurin was Rochelle Williams, the mother of McLaurin's child. In it's cross examination, the State, with no objection from Defense Counsel, asked Williams about a prior affidavit she had allegedly signed accusing McLaurin of domestic violence. The State never revealed it was about to attempt to introduce evidence of a prior alleged domestic violence charge against McLaurin by Williams. Compounding the State's error, Defense Counsel did not object, ask for a cautionary instruction or move for a mistrial. (TR, 230). Later in the case, the State moved and was allowed to admit into evidence a certified copy of an affidavit allegedly signed by Williams alleging domestic violence unrelated to the alleged rape. Williams denied on the stand that the affidavit was hers, but the seed was planted in the jury's mind anyway. (TR, 230). There was no objection from Defense Counsel to the admission of the purported prior affidavit of Rochelle Williams against McLaurin for domestic violence. (TR, 264). There was no request for a balancing test by the court on the document's probative value versus it prejudicial effect. (TR, 264). The court took no action to enforce its pretrial ruling regarding other crimes evidence. (TR, 91-94).

15. Defense Counsel did not object to the state asking Rochelle Williams questions that revealed that McLaurin was on probation from an unrelated charge, thus allowing the jury to

infer prior convictions of McLaurin without a probative/prejudicial evaluation by the Court. (TR, 231-233). Defense Counsel did not object, ask for a cautionary instruction or, move for a mistrial. The Defendant did not ultimately testify and was not subject to impeachment by prior conviction.

16. As the Defense's last witness, Defense Counsel called Defendant McLaurin to the stand while the jury was present in the courtroom. The Court asked the jury to step outside so that it could make its usual determination that the Defendant was informed of his right to testify or not to testify. No motion had been made to exclude McLaurin's prior conviction. While the jury was still out, the prosecutor brought up the fact that she wanted to impeach McLaurin with his prior felony conviction. When the Court said she would allow the State to question McLaurin on the prior conviction, McLaurin changed his mind and decided not to testify. It is obvious from reading the exchange in the trial record that McLaurin had never been advised by counsel on this issue until the Court made its ruling. Unfortunately, the jury could not escape the fact that Defense Counsel had just represented to them that McLaurin would testify before they were sent out of the room. When the jury came back, McLaurin had suspiciously (to the jury) decided not to testify. This appears very bad for McLaurin. This whole scenario, brought about by McLaurin's attorney, could have been completely avoided by a simple pretrial or even oral motion to exclude the prior conviction before announcing in the jury's presence that McLaurin intended to testify. (TR, 259-263). However the trial court would have ruled on the Motion, at least McLaurin would have been able to make a decision to testify, or not, before he announced he would testify to the jury members.

17. No objection was made to the State calling U.S. Probation Officer James Chappell. Defense witness Rochelle Williams had supposedly called Officer Chappell alleging she had

been threatened by McLaurin. (TR, 265-266). This is evidence of impermissible "other crimes evidence" of McLaurin in two ways. First, the alleged criminal act of the threats to the witness and second due to the fact that it called the jury's attention to the fact that Chappell was McLaurin's probation officer. Further, Chappell had never previously spoken to Williams and could not verify the identity or voice of the caller to actually be that of Rochelle Williams. So, Chappelle's testimony did not meet authentication standards under MRE 901 or satisfy any hearsay exception under MRE 803 or 804. There was absolutely no objection from Defense Counsel on any of these critical issues. (TR, 264-271). It also appears that this evidence was provided to the defense in discovery.

18. Defense Counsel submitted no jury instructions.

19. Defense Counsel failed to object or demand hearing, cautionary instruction or mistrial after the state's comment in closing about McLaurin failing to put on medical evidence or medical testimony regarding his gunshot wound. The wound existed at the time of the alleged rape and would have been obvious to the Complainant. (TR, 284).

20. Defense Counsel failed to object to the State's argument that McLaurin had apparently assaulted his own witness, Rochelle Williams, in the past. (TR, 287). This is impermissible evidence of other crimes. No balancing test was ever conducted or requested by Defense Counsel.

21. Defense Counsel advised the jury of the wrong legal standards and burdens of proof in the case, a fact highlighted by the state, adding to the cumulative negative impression of counsel and confusion to the jury. (TR, 298-304).

22. Defense counsel repeatedly called his client the wrong name in front of the jury during the trial. (TR, 151, 226, 237, 245, 268).

23. Defense Counsel failed to point out to the jury that the house initially described by the Complaint was a "……very, very, very small white house. It had one bedroom" See Exhibit "C", Velma Johnson typed police report. P.2. But at trial, and 17 months later, the Complainant had identified a different house on a different street than originally reported and said the rape happened in a larger two bedroom house. (TR, 182).

B. Relevant Law in Ineffective Assistance of Counsel.

"The benchmark for judging any claim of ineffectiveness [of counsel] must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A defendant must demonstrate that his counsel's performance was deficient and that the deficiency prejudiced the defense of the case. Id. at 687, 104 S.Ct. 2052." Cited in Burns v. State, 913 So.2d 668 (Miss. 2001).

The combination of these errors by counsel acted cumulatively to prejudice the Defendant in the eyes of the jury, and procedurally deprived him of a fair trial. Mississippi's Courts have said:

> "at a minimum, counsel has a duty to interview potential witnesses and to make independent investigation of the facts and circumstances of the case." *Nealy v. Cabana*, 764 F.2d 1173, 1177 (5th Cir.1985) (emphasis added). See also, *Bell v. Watkins*, 692 F.2d 999, 1009 (5th Cir.1982); *Rummel v. Estelle*, 590 F.2d 103, 104 (5th Cir.1979). It appears to us that trial counsel made little or no effort to conduct an independent investigation; rather, he seems to have relied almost exclusively on material furnished to him by the state during discovery.

Ferguson v. State, 507 So.2d 94, (Miss. 1987).

It 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 independent investigation in the month between being retained and the trial.

Defendant asserts that Defense Counsel's performance was deficient in the preceding manners and that these deficiencies prejudiced the defense of the case resulting at a different outcome than otherwise could have been had at trial. It is necessary for the Defendant to be able to supplement the record with additional findings of fact that can only be obtained by remand for evidentiary hearing in this matter. Respectfully, Defendant believes he has made a prima facie showing of ineffectiveness and remand to the lower court for an evidentiary hearing is justified if a new trial request is premature.

The above errors denied McLaurin his rights to due process and effective assistance of counsel under the 5th, 6th and 14th Amendments of the US Constitution and those corollary rights under the Mississippi Constitution.

Should the Court find that some or all of the above issues are premature or more properly brought via a motion for post conviction relief, McLaurin respectfully requests that the issues be preserved for pursuit at a later time via such a Motion pursuant to Rule 22 of the M.R.A.P. and the holdings of Havard v. State, 988 So.2d 322, (Miss.,2008), and also, Walton v. State, No. 2006-KA-01065-COA (¶15) (Miss. App. November 13, 2007), aff'd, Walton v. State, No. 2006-CT-1065-SCT (Miss. November 13, 2008).

However, unless this Court grants the request in McLaurin's other pending appeal before this Court (2008-CA-01251 COA) wherein McLaurin requests his right to file a PCR be reinstated, it is arguable that the unique situation of having exhausted his PCR option before a ruling on a direct appeal may exist. Denial of the request in 2008-CA-01251 would make this direct appeal Mr. McLaurin's only appellate vehicle for post conviction type claims.

II. The trial court impermissibly denied the defense the opportunity to cross examine the Complainant on the issue of her failure to describe to the police McLaurin's healing gunshot wound to the leg, an identifying mark recognizable at the time of the alleged rape.

Limitations placed on cross-examination by the trial court are reviewed for abuse of discretion. Ellis v. State, 661 So.2d 177, 184 (Miss.1995). In McLaurin's case, the identification of McLaurin as the assailant could have been strongly disproved if Defense Counsel had been allowed to cross examine the Complainant on the issue of his severe leg wound that existed at the time of the alleged rape.

Although Defense counsel was precluded from providing medical documentation of his leg wound because Defense Counsel failed to tender the medical records in discovery, he still should have been allowed to cross examine his accuser thoroughly about her personal observations and her personal knowledge, if any, of her assailant having been previously wounded in the leg.

The Complainant testified that she had talked to the assailant approximately two weeks before the rape. (TR, 148-149). They had reportedly been friends for three years. (TR, 152). On the night of the rape, the assailant drove to the Complainant in his car to pick her up and later drove to drop her off. (TR, 122, 136). The Complainant and assailant walked in and out of the house where the assault occurred and the Complainant watched her assailant walk around the house for more than one hour. (TR, 124, 126). In her initial report to Officer Johnson (IBM 236), the Complainant reported "that [the assailant] pulled his pants down and tried to force her to perform oral sex on him but when she began to cry he abandoned that idea" See Officer Johnson hand written report, p4-5, Attached as Exhibit "B". All of these reports and descriptions are contradicted by the medical state of McLaurin existing at the time of the alleged

rape. But, the trial judge prohibited McLaurin from asking his accuser about these issues. (TR, 149-150).

During the time frame of the rape, 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. (TR. 221-222, 237-238, 245-246). The Complainant never at any time identified her assailant as having any of these characteristics and never stated her assailant had mentioned being recently hospitalized for a very serious gunshot. Defense counsel was deprived of the opportunity to cross examine her about the apparent inconsistency in the description of the physical abilities of her attacker compared to McLaurin's medical condition at the time.

"The right to confront and cross-examine the witnesses for the state is fundamental and cannot be substantially restricted." Murphy v. State, 453 So.2d 1290, 1292 (Miss.,1984) citing Myers v. State, 296 So.2d 695 (Miss.1974); Valentine v. State, 396 So.2d 15 (Miss.1981).

Lastly, if anything, the Court should have followed the Box procedure for admission of the "undiscovered evidence" concerning the medical condition of McLaurin. Instead, Defense Counsel's cross examination of the Complainant was summarily stopped on this particular issue by the trial court.

McLaurin's confrontation right under the 6th Amendment of the US Constitution and his rights to due process under the 5th, 6th and 14th Amendments of the US Constitution, and all corollary rights under the Mississippi Constitution, were abridged by the trial courts limitation of free cross examination of his accuser. This error effected a substantive right and does not constitute harmless error. Respectfully, McLaurin requests remand for a new trial.

III. The trial court overruled McLaurin's objection to the State's comment on his failure to provide testimony to the jury regarding his healing gunshot wound to the leg, thus permitting an unconstitutional comment on the Defendant's right not to testify or present evidence. This happened during witness testimony and again (without objection) in the state's closing argument.

During the trial and in the presence of the jury, the prosecution commented three times on McLaurin's failure to call a medical witness regarding the issue of the gunshot wound to his leg. (TR. 149-150, 251, 284). Part of McLaurin's defense was that the Complainant identified the wrong assailant. At the time of the alleged rape, McLaurin was recovering from a gunshot wound to his right upper leg which would have been apparent to anyone who was around him. (TR 222). During the period of the rape, McLaurin required crutches to get around, 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. (TR. 221-222, 237-238, 245-246). The Complainant never at any time identified her assailant as having any of these characteristics.

Unfortunately for McLaurin, his lawyer did not provide the medical documents in discovery to the prosecution. Tangible evidence of McLaurin's November, 2007 hospitalization for three days in Jackson's Methodist Hospital was not admitted. (TR. 149-150). The following colloquy occurred in the presence of the jury when defense counsel attempted to cross examine the Complainant on the identification/leg issue:

> **Defense Counsel**: 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?
>
> **Complainant**: At that time I didn't realize anything like that, no.
>
> **Defense Counsel**: Okay. Did that come up in conversation that I [sic] had been shot in November of '96 and was finally released form doctor's care on 12-21-96, about two weeks before the event [of the alleged rape].
>
> **Prosecutor**: May it please the Court?
>
> **Court**: Objection sustained, counsel.
>
> **Prosecutor**: Thank you Your Honor.

Defense Counsel: Your Honor, sustained as to what?
Court: Objection sustained.
Defense Counsel: Yes ma'am, as to why?
Prosecutor: 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 it is true he's just – I have no reason to believe it's true and I have no reason to believe there's any substantiating documentation, so I object to counsel testifying.
Court: the court sustains the objection. Also on the issue of relevance. (TR. 149-150).

Though defense counsel had McLaurin's medical records, they were never tendered to the prosecution in discovery and he was prevented from cross examining the Complainant on this highly relevant and critical issue of identification.

Twice after the above exchange, the prosecution made reference to McLaurin's failure to present medical evidence or testimony on the issue of the healing gunshot wound, which certainly would have been something the Complainant would have observed if McLaurin was the perpetrator. The following two exchanges happened in the presence of the jury.

McLaurin called his mother, Margaret McLaurin as a witness. On cross examination, the prosecutor made these points:

Prosecutor: Okay. Now lets talk about when he got shot. Who treated him?
Witness: Methodist Hospital.
Prosecutor: Methodist Hospital, right here in Jackson?
Witness: Yes, ma'am.
Prosecutor: And, of course, that means he would have been treated by a doctor right here in Jackson; is that right?
Witness: Yes, ma'am.
Prosecutor: Who is that doctor?
Witness: Now, if I'm not mistaken, it might have been Dr. Fisher. I'm not for sure. I'm saying I'm not sure about that. I'd have to go home and – they got it on record at Methodist.
Prosecutor: Sure, they do.
Witness: Yes, ma'am, it's there.
Prosecutor: And so if you wanted to prove the he was unable to walk, you would have had Dr. Fisher come down here, wouldn't you?
Witness: If ya'll need him he'll come down.
Prosecutor: how long have you known this trial was going to happen?
Witness: Ma'am.

Prosecutor: How long have you known that your son was going to be placed on trial for rape?
Defense Counsel: To which we object your honor. We are under no burden to subpoena anyone to offer evidence of any kind.
Court: Objection overruled. She can answer if she can.
Prosecutor: How long have –
Witness: Yes, ma'am, how long I know?
Prosecutor: Uh-huh.
Witness: When he was in the custody of the U.S. Marshall, I knew that, all that was going on.
Prosecutor: And how long was that?
Witness: This been about a year or so, going on two years now.
Prosecutor: And at any time during that year or so did you go see Dr. Fisher and say I need you to come prove that my son couldn't walk?

(TR. 250-251).

Later in the trial, during her closing argument, the prosecutor argued:

Prosecutor: Now they want to say he's shot, he's on crutches. Now I don't know about you, ladies and gentleman. But it appears to me that if you have a whole year to prove that and the doctor is right here in Jackson, would you not have him here? If your life was on the line to prove he couldn't walk during that period of time, wouldn't you do that?

(TR 283-284).

This is a textbook example of an improper and unconstitutional comment on a defendant's right to call or not to call witnesses. This has been repeatedly condemned by our courts:

> This Court further finds the reasoning set out in Brown v. State, supra, is controlling in this case. Brown and its progeny (Madlock v. State, 440 So.2d 315 [Miss.1983]; Morgan v. State, 388 So.2d 495 [Miss.1980]; Phillips v. State, 183 So.2d 908 [Miss.1966]) stand for the proposition that **the failure of either party to examine a witness equally accessible to both parties is not a proper subject for comment before a jury.**
>
> Applying this reasoning to the facts at hand, one might readily contend that the prosecutor's comment, "Mr. Mason, his good friend. Have you heard from him?", was clearly unacceptable behavior and reversible error per Brown.
>
> In this case, the state sought and obtained a motion in limine. One purpose of this motion was to prevent the defense from commenting on "the failure of the state to call witnesses that are equally available to the state as well as to the defendant." The lower court sustained the motion in limine. Despite the state's

own motion and the subsequent sustaining thereof, the prosecuting attorney in his closing statement violated the standard which the state requested the court to establish. This Court can find no justification in the prosecution's procedure. In Madlock v. State, 440 So.2d 315 (Miss.1983), this Court faced a situation similar to the case at bar. More precisely, the witness in Madlock, similar to the witness in this case, was equally accessible to both parties. This Court, elaborating on this topic, stated:

> Rosemary Petty was equally accessible to be subpoenaed as a witness by both the state and the appellant. In fact, as she was the deceased's common law wife and bore his name, this would tend to make her more accessible to the prosecution. Regardless of this, there is no proof in the record as to her accessibility or inaccessibility. We have held that particularly in criminal law, the failure to call a witness equally accessible to both the defendant and the state is not a proper subject for comment by either party.
>
> Id. at 318. The Madlock court went on to hold:
>
> Because of the prejudicial and erroneously vigorous statements of the prosecuting attorney in his final arguments and the lower court's overruling appellant's objection thereto, we are forced to reverse the cause and remand for another trial. Id.
>
> Applying the holding in Madlock to the facts in this case, the Court points out that Mr. Cox blatantly commented on the failure of the defense to call Mr. Mason. This Court submits that these actions amount to prejudicial error. This error is obviously a denial of the appellant's rights as supported by our existing case law. Following the holding in Madlock, this Court has no alternative but to reverse and remand for a new trial.

Holmes v. State, 537 So.2d 882, (Miss.,1988).

Should the Appellee raise the issue of waiver regarding the statement made by the Prosecutor in closing argument with out objection by defense counsel, McLaurin argues that the error was plain error and subject to the exception in Rule 103(d) of the Mississippi rules of Evidence. The Court has stated:

> If no contemporaneous objection is made at trial, a party must rely on the plain error rule to raise the assignment of error on appeal. Foster v. State, 639 So.2d 1263, 1289 (Miss.1994) (citing Gray v. State, 487 So.2d 1304, 1312 (Miss.1986)). "The plain error doctrine requires that there be an error and that the error must have resulted in a manifest miscarriage of justice." Williams v. State, 794 So.2d 181, 187 (Miss.2001) (citing Gray v. State, 549 So.2d 1316, 1321 (Miss.1989)).

> The plain error rule will only be applied when a defendant's substantive or fundamental rights are affected. Grubb v. State, 584 So.2d 786, 789 (Miss.1991).

Flora v. State, 925 So.2d 797, 811(¶ 42) (Miss.2006).

The effect of the improper comments by the prosecutor create unjust prejudice against McLaurin resulting in a decision by the jury which was potentially influenced by prejudice. This is an impermissible result. Bright v. State, 894 So.2d 590. ¶30, (Miss.App.,2004) citing Taylor v. State, 672 So.2d 1246, 1270 (Miss.1996).

McLaurin argues that the repeated comments by the prosecution concerning his failure to provide the doctor's testimony or medical documentation in support of his defense is a violation of his constitutional rights to present, or not present, testimony under the 5th Amendment of the U.S. Constitution and those corollary rights under the Mississippi Constitution. The improper comments also violate McLaurin's right to a fair trial and due process under the 5th, 6th and 14th Amendments of the U.S. Constitution and those corollary rights under the Mississippi Constitution.

IV. Defendant was prejudiced by the trial court's failure to conduct a balancing test regarding the admissibility of alleged prior criminal acts of McLaurin brought through witness Officer Lowrey, witness Williams and witness Chappelle.

There were several instances of testimony which highlighted prior bad acts or criminal history of Mr. McLaurin. Officer Richard Lowrey stated at trial that he had on a previous, unrelated date, seen McLaurin in a small black truck with the word "outlaw" across the back window. ("Outlaw" refers to a manufacturer of custom truck parts). This previous, unrelated date concerned the officer's investigation of another criminal matter, a fact which became very apparent to the jury. No 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). All of this information was evidence of other crimes to which Trial Counsel should have objected and requested a hearing outside of the presence of the jury. No hearing was conducted as to whether the prejudice of this information was outweighed by is probative value.

> ¶ 18. The admissibility of evidence of other crimes or bad acts committed by the defendant is governed by Rule 404(b). White v. State, 842 So.2d 565, 573(¶ 24) (Miss.2003). "The reason for the rule is to prevent the State from raising the inference that the accused has committed other crimes and is therefore likely to be guilty of the offense charged." Id. Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of *899 unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 404(b) provides:
>
> > Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Denham v. State, 966 So.2d 894, Miss.App., 2007.

Worthy of note is that the trial court prior to the beginning of testimony instructed that parties that it was not going to allow prior bad acts of McLaurin to be discussed through the above witnesses. (TR, 93-95). Despite this pretrial ruling, the prosecution elicits evidence of prior bad acts, crimes and convictions, contrary to the court's pretrial ruling and with no interjection from the Court regarding it's prior ruling.

These errors violate McLaurin's right to a fair trial and due process under the 5th, 6th and 14th Amendments of the U.S. Constitution and those corollary rights under the Mississippi Constitution. Respectfully, he prays for a new trial.

V. The state's lineup and photo array procedures were so suggestive as to unconstitutionally taint the identification of the Defendant.

In cases where an initial photographic array shown to a victim was impermissibly suggestive or otherwise risked causing an initial misidentification, a court may suppress any subsequent line-up identification or in-court identification because:

> Regardless of how the initial misidentification comes about, ***the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen***, reducing the trustworthiness of subsequent lineup or courtroom identification.

Simmons v. United States, 390 U.S. 377, 383-4 (1968). In Simmons, the Supreme Court established the rule for determining when an in-court identification, preceded by an identification by photograph, should be suppressed. Courts should suppress the in court identification "if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Simmons, 390 U.S. at 383.

Courts use a two prong-test to determine if, in a given case, an in-court identification should be suppressed under Simmons. A court should first ask whether the initial array was impermissibly suggestive, and then ask whether this suggestiveness led to a "substantial likelihood of irreparable misidentification" Branch v Estelle, 631 F.2d 1229, 1234 (5th Cir. 1980) (citing Simmons, supra). Courts in Mississippi use the same test. Minnick v. State, 551 So. 2d 77, 91 (Miss. 1988); Nicholson v. State, 523 So. 2d 68, 72 (Miss. 1988); Latiker v. State, 2005 Miss. LEXIS 714, 13 (Miss. 2005). The Mississippi cases have also made it clear that the purpose of this review is to avoid the "primary evil" of misidentification. Smith v. State, 430 So.

2d 406, 407 (Miss. 1983) (citing Fells v. State, 345 So.2d 618, 620 (Miss. 1977) in turn citing Neil v. Biggers, 409 U.S. 188, 198 (1972)). The identification of Mr. McLaurin by the Complainant clearly satisfies both prongs of the test.

The Complaint in this case was shown an array that contained a photo of someone she had singled out two days before the lineup. (TR, 178). This is an impermissibly suggestive procedure which has been condemned. It is impermissibly suggestive when the accused is "conspicuously singled out in some manner from others...." York v. State, 413 So.2d 1372, 1383 (Miss.1982). Further, the parties in the array were substantially dissimilar.

The concern quoted above that was expressed by the Supreme Court in Simmons, supra, regarding irreparable tainting of an identification procedure based on an initially suggestive photographic array has been supported by the most recent findings on the subject of eyewitness identification and the phenomenon of *source confusion*. Source confusion takes place when a witness identifies a defendant based on their recollection of the photograph seen and not on their recollection of the perpetrator of the crime. In this case there is a heightened risk that the procedure used led to a misidentification since McLaurin was the only person in the array that she had seen in the Convention Center Nightclub 17 months after the fact of the alleged rape.

Currently, the law governing the suppression of an in-court identification after a suggestive array requires the court to assess the danger of misidentification under the totality of the circumstances using the Biggers factors.

> [The factors] include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Neil v. Biggers, 409 U.S. 188, 199 (1972); Nicholson v. State, 523 So.2d 68 (Miss. 1988). The facts of the identification in this case are such that according to these criteria the identifications should be suppressed.

The fact that the complainant initially described the perpetrator as 180-190 pounds and 5'11" in height, compared to McLaurin's actual description of 5'4" and 150 pounds is a strong indication that the identification of Mr. McLaurin was a mistake. See Exhibit "B" Officer Johnson (IBM 326) notes of the Complainant's description of her assailant versus Exhibit "D", Officer Flannigan's description of Shawn McLaurin on the day he was arrested. Additionally, it was over seventeen months after the crime when the Complainant identified Mr. McLaurin in a photo array. Modern studies show that periods of over a week between the event and the identification increases the chance of error and this is especially true, as in this case, when there is contact between the witnesses and law enforcement personnel.[1]

Of the remaining Biggers factors, it is true that the complainant did display certainty when identifying Mr. McLaurin. However, it is now known that there is either no or at best a very weak correlation between an eyewitnesses certainty and their accuracy.[2] As a result several states' courts now ignore a witness's certainty when assessing if there is a danger of misidentification. (Georgia and Utah courts recognize this Biggers factor is "flatly contradicted by well-respected and essentially unchallenged empirical studies." Brodes v. State, 279 Ga. 435, 440 (Ga. 2005); State v. Long, 721 P.2d 483, 491 (Utah 1986) and Massachusetts courts do not

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[1] Loftus, E. F., & Ketcham, K. (1983). *The malleability of eyewitness accounts.* In S. Lloyd-Bostock & B. Clifford (Eds.), *Evaluating witness evidence: Recent psychological research and new perspectives* (pp. 159-171). Chichester, Wiley, Shaw, J. S. III, Garven, S., & Wood, J. M. (1997). *Co-witness information can have immediate effects on eyewitness memory reports. Law and Human Behavior, 21,* 503-524.

[2]Cutler, B. L. & Penrod, S. D.(1995). *Mistaken Identification: The Eyewitness, Psychology, and the Law.* (pp 94-96); Bradfield, A. L. & Wells, G. L. (2000). *The Perceived Validity of Eyewitness Identification Testimony: A Test of the Five Biggers Factors,* 24 Law & Hum. Behav. 581, 590-592; Deffenbacher, K. A. (1980) *Eyewitness Accuracy and Confidence: Can We Infer Anything About Their Relationship?,* 4 Law & Hum. Behav. 243, 258.

instruct the jury to take account of a witnesses certainty. Commonwealth v. Santoli, 680 N.E.2d 1116, 1121 (Mass. 1997)).

The danger of relying on the certainty of a witness is also starkly illustrated by the mistake in the assailant's physical description compared to McLaurin's actual build.

Respectfully, suggestive lineup procedures were used in this case and the out of Court and in court identification of McLaurin should be suppressed.

VI. Defendant deserves a new trial based on cumulative error in the trial coupled with the denial of effective assistance of counsel.

> This Court may reverse a conviction and sentence based upon the 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).

Bright v. State, 894 So.2d 590, ¶31, (Miss.App.,2004).

The aforementioned assignments of error by the trial court and misconduct by the prosecutor may be considered in conjunction with the points regarding ineffective assistance. The cumulative effect of all of the errors is that McLaurin was not given a fair trial. Respectfully, Appellant requests remand for a new trial based on the combination of all errors.

CONCLUSION

McLaurin was deprived a fair trial both by the lack of effective representation and the errors of the trial court cited above. Respectfully, he prays for a new trial or in the alternative, remand for consideration of evidentiary issues concerning the issue of ineffective assistance of counsel.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I, J. Christopher Klotz, Attorney for Defendant, have this day mailed by United States mail, postage prepaid, a true and correct copy of the Out of Time Direct Appeal Brief to the following:

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