

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

EDDIE TIMMS

APPELLANT

VS.

NO. 2009-KA-0955

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

- I. WHILE THE STATE OF MISSISSIPPI CONCEDES THAT IT WAS ERROR TO ALLOW EVIDENCE OF THE APPELLANT'S PRIOR CHARGE FOR POSSESSION OF A STOLEN WEAPON BEFORE THE JURY, THE APPELLANT IS PROCEDURALLY BARRED FROM RAISING THE ISSUE ON APPEAL AND IS, THEREFORE, NOT ENTITLED TO HAVE HIS CONVICTION REVERSED AND THE MATTER REMANDED BACK TO THE TRIAL COURT BECAUSE THE ERROR DID NOT AFFECT THE OUTCOME OF THE TRIAL.
- II. THE APPELLANT IS PROCEDURALLY BARRED FROM ARGUING THAT CERTAIN COMMENTS MADE DURING THE PROSECUTION'S CLOSING ARGUMENT DEPRIVED HIM OF HIS RIGHT TO A FAIR TRIAL AND THE COMMENTS DO NOT RISE TO THE LEVEL OF PLAIN ERROR.
- III. THE APPELLANT FAILED TO ESTABLISH THAT HE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.
- IV. THE APPELLANT IS NOT ENTITLED TO A NEW TRIAL BASED UPON CUMULATIVE ERROR.

STATEMENT OF THE FACTS

On the evening of February 18, 2008, Officer Leo Ellington and Chief Noah Coffee of the Goodman Police Department, parked in separate cars at the BP in Goodman, received a call that someone had displayed a gun at Goodhaven Apartments. (Transcript p. 68 - 69 and 77). Upon receiving the call, the officers immediately saw a vehicle drive by the BP matching the description given of the vehicle thought to be transporting the person displaying the weapon. (Transcript p. 69 and 91). Both officers pursued the vehicle. (Transcript. 69 and 91). DeAndre Moore was identified as the driver of the vehicle in question and the passengers were identified as the Appellant, Eddie Timms, Phyllis Moore, and Joel Landfair. (Transcript p. 70, 91, and 99).

After the vehicle was stopped, Mr. Moore and the Appellant stepped out of the vehicle. (Transcript p. 91 - 92). The Officers asked Mr. Moore if there were weapons inside the vehicle. (Transcript p. 70 and 92). Mr. Moore stated that there were no weapons and was asked to pop the trunk. (Transcript p. 70 and 92). As Mr. Moore popped the trunk, the Appellant was leaning over the trunk. (Transcript p. 70 and 92). Chief Coffee asked him to move and opened the trunk finding two guns. (Transcript p. 71 and 92 - 93). As the guns were removed from the trunk, the Appellant said "don't take my gun, man. I've had 'em for a long time." (Transcript p. 71 and 93). He then asked if he could at least keep one of the guns. (Transcript p. 95).

A background check conducted later indicated that one of the guns was stolen from the Goodman Police Department. (Transcript p. 75 and 94). It was also determined that the Appellant had previously been convicted of a felony. (Transcript p. 85 - 86). The Appellant was charged with Count I, being a convicted felon in possession of a firearm and Count II, being in possession of a stolen weapon. He was tried and convicted for each count. He was sentenced to five years in the custody of the Mississippi Department of Corrections with three years suspended and two to serve

for Count I and to five years in the custody of the Mississippi Department of Corrections for Count II, with the sentences to run consecutively.

SUMMARY OF THE ARGUMENT

The State of Mississippi concedes that it was error to allow evidence of the Appellant's prior charge for possession of a stolen weapon before the jury as the Appellant was never convicted of said charge. However, the Appellant is procedurally barred from raising the issue on appeal as he did not contemporaneously object to the admission of the evidence nor did he raise it in motion for new trial. As such, the Appellant is entitled to have his conviction and sentenced reversed and the matter remanded back to the trial court for a new trial if, and only if, his substantial and fundamental rights were violated by the error and if the error prejudiced the outcome of the trial.

The Appellant is also procedurally barred from arguing that certain comments made during the prosecution's closing arguments deprived him of his right to a fair trial as there was no contemporaneous objection and as the issue was not addressed in the Appellant's motion for new trial. Thus, the Appellant's only available argument is that allowing the comments in question rises to the level of plain error. But, the prosecutor's comments do not rise to the level of plain error as the comments did not impact a fundamental right nor did they prejudice the outcome of the trial. Factors evidencing that the verdict was not affected by the comments include the jury being properly instructed with regard to closing arguments prior to closing argument and the sufficiency of the evidence presented supporting the verdict.

The Appellant failed to establish that he was denied effective assistance of counsel. On direct appeal, ineffective assistance of counsel must be established from the record. The deficiencies asserted on appeal are considered trial strategy and appellate courts only second guess matters of trial strategy in exceptional circumstances. Moreover, two of the three deficiencies asserted were "failure

to object” claims which cannot give rise to an ineffective assistance of counsel claim. Additionally, the Appellant did not show how his counsel’s over-all performance prejudiced his case other than to assert that it did prejudice his case.

ARGUMENT

I. WHILE THE STATE OF MISSISSIPPI CONCEDES THAT IT WAS ERROR TO ALLOW EVIDENCE OF THE APPELLANT’S PRIOR CHARGE FOR POSSESSION OF A STOLEN WEAPON BEFORE THE JURY, THE APPELLANT IS PROCEDURALLY BARRED FROM RAISING THE ISSUE ON APPEAL AND IS, THEREFORE, NOT ENTITLED TO HAVE HIS CONVICTION REVERSED AND THE MATTER REMANDED BACK TO THE TRIAL COURT BECAUSE THE ERROR DID NOT AFFECT THE OUTCOME OF THE TRIAL.

Mississippi law states that “[e]vidence of prior offenses committed by a defendant, not resulting in a conviction, is generally inadmissible either for impeachment purposes or as a part of the State’s case in chief.” *Neal v. State*, 451 So.2d 743, 758 (Miss. 1984). *See also Brown v. State*, 483 So.2d 328, 330 (Miss. 1986). As noted by the *Neal* Court, there are some exceptions to this rule including, but not limited to, the State’s right to tell a rational and coherent story and when the prior criminal activity is so interrelated to the crime to be proved as to constitute a single transaction or occurrence. However, none of these exceptions were present in the case at hand.

The State, in order to prove a necessary element of the crime of being a convicted felon in possession of a firearm, submitted evidence that the Appellant was, in fact, previously convicted of a felony. In so doing, the State entered into evidence various documents regarding the Appellant’s prior conviction for possession of cocaine enhanced by possession of a firearm at the time of arrest. (Exhibit S-3). The indictment entered into evidence as part of this exhibit indicated that the Appellant was being charged with one count of possession of cocaine enhanced by possession of a firearm at the time of arrest and one count of being in possession of a stolen firearm. (Exhibit S-3, p. 2-3). The sentencing order entered into evidence as part of this exhibit indicated that the Appellant

was convicted of the charge of possession of cocaine enhanced by possession of a firearm at the time of arrest and sentenced to “five (5) years in the Mississippi Department of Corrections, suspended upon completion of six (6) months in the House Arrest Program.” (Exhibit S-3, p. 4). The motion/order for nolle prosequi which was also part of this exhibit indicated that the charge of being in possession of a stolen firearm was nolle prossed. (Exhibit S-3, p. 5).

In light of the above mentioned case law, and more recent case law noting the possibility of the jury being prejudiced by evidence of a prior conviction or charge for the same crime as the one in which the defendant is currently being tried, the State now concedes that the jury should not have been allowed to see evidence of the Appellant’s prior charge. *See Williams v. State*, 991 So.2d 593, 605-06 (Miss. 2008) and *Sawyer v. State*, 2 So.3d 655, 660-61 (Miss. Ct. App. 2008).

This issue is, however, procedurally barred as the Appellant failed to contemporaneously object to the admission of the evidence. Mississippi law provides that “if no contemporaneous objection is made, the error, if any, is waived.” *Smith v. State*, 984 So.2d 295, 307 (Miss. Ct. App. 2007) (quoting *Walker v. State*, 671 So.2d 581, 597 (Miss.1995)). Additionally, the matter was not raised in the Appellant’s motion for new trial.

When a matter is not brought to the trial court’s attention during trial, the Appellant’s only argument on appeal is that the matter rises to the level of plain error. This Court has previously held that it “may address an issue as plain error only when the trial court’s error has impacted a fundamental right of the defendant.” *Id.* (*emphasis added*). *See also Ratliff v. State*, 906 So.2d 133, 136 (Miss. Ct. App. 2004) (holding the Court “applies the plain error rule only when it affects a defendant’s substantive/fundamental rights”). “To determine if plain error has occurred, [the Court] 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.’” *Smith*, 984 So.2d

at 307. (quoting *Cox v. State*, 793 So.2d 591, 597 (Miss.2001)).

While the State agrees that an error occurred, the error is only grounds for reversal “if it affects the final result of the case.” *Vardaman v. State*, 966 So.2d 885, 891 (Miss. Ct. App. 2007). It appears from the record in this case that it did not. The record indicates that the jury could have easily found the Appellant guilty regardless of the improper evidence. Two police officers testified that the Appellant admitted that the guns belonged to him. (Transcript p. 71, 84, 93, 95 and 101). There was evidence that the Appellant was a previously convicted felon supporting his conviction of being a felon in possession of a firearm and there was evidence that one of the guns was stolen supporting his conviction of being in possession of a stolen weapon. (Transcript p. 75, 86 - 87, and 94). Clearly, the jury had sufficient evidence to convict the Appellant of both charges.

Further evidencing that the jury was unaffected by the evidence are the notes exchanged between the jury and trial judge. The original verdict in Count II was written as follows: “We, the jury find the Defendant Eddie Timms, guilty of possession of a stolen firearm by a convicted felon charged in Count II of the indictment.” (Record p. 32). The trial judge responded to the verdict with the following instruction: “Does your finding the defendant guilty of Count II have anything relevant to the finding that the defendant is a convicted felon? If no, look at instruction 6 and return your verdict in accordance with instruction 6. If yes, leave as is.” (Record p. 32). In response, the jury returned the verdict in accordance with instruction 6 indicating that they did not consider the fact that the defendant was a convicted felon in reaching their verdict.

In conclusion, the State concedes that an error occurred; however, the Appellant is entitled to have his conviction and sentenced reversed and the matter remanded back to the trial court for a new trial ONLY if this Court finds that his substantial and fundamental rights were violated and if the Court finds that the error prejudiced the outcome of the trial. The State asserts that this error

does not constitute a reversible error the jury was not prejudiced by the evidence.

II. THE APPELLANT IS PROCEDURALLY BARRED FROM ARGUING THAT CERTAIN COMMENTS MADE DURING THE PROSECUTION'S CLOSING ARGUMENT DEPRIVED HIM OF HIS RIGHT TO A FAIR TRIAL AND THE COMMENTS DO NOT RISE TO THE LEVEL OF PLAIN ERROR.

The Appellant argues that he “was deprived of his Sixth Amendment right to a fair and impartial trial when the prosecutor commented during closing arguments that [he] failed to call the occupants of the vehicles as witnesses to his defense.” (Appellant’s Brief p. 10). He specifically takes issue with the portion of the prosecutor’s closing argument wherein the prosecutor discusses the Appellant’s failure to call certain witnesses. (Appellant’s Brief p. 12). The Appellant is, however, procedurally barred from raising this issue on appeal because no contemporaneous objection was raised and because the matter was not raised in his motion for new trial. The Mississippi Supreme Court held in *Walker v. State*, that it had on numerous occasions refused to consider the issue of prosecutorial misconduct in the form of improper closing arguments where the defendant did not raise it at trial. 913 So.2d 198, 238 (Miss. 2005). The *Walker* Court also noted its previous holding in *Williams v. State*, wherein defense counsel did not object to prosecutor's closing argument, and the Court held that “[t]he failure of an objection is fatal.” *Id.* (quoting *Williams v. State*, 512 So.2d 666, 672 (Miss.1987)). Therefore, the Appellant must again rely on the plain error doctrine.

As noted in the State’s argument regarding the first issue, this Court may only address an issue as plain error “when the trial court's error has impacted a fundamental right of the defendant.” *Smith*, 984 So.2d at 307 (*emphasis added*). Mississippi law also states that in order “[t]o determine if plain error has occurred, [the Court] 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.”” *Id.* (*emphasis added*). The Appellant argues that these arguments “created unjust prejudice” against him; however, the State would counter that the arguments did not prejudice the outcome of the trial. First, as set forth above, there was substantial evidence of the Appellant’s guilt. Additionally, the jury was instructed that their decision was to be based on the evidence and that the arguments of counsel are not evidence. Specifically, the jury was instructed that:

. . . Your decision about what happened must be based entirely upon the evidence, which is the testimony and exhibits produced here in court during this trial, and must not be based upon any guesswork or speculation. . . . After I have completed reading these instructions, the attorneys will make closing arguments. These arguments are intended to help you understand the evidence and apply the law. But, the arguments are not evidence. Therefore, if a statement is made during the argument which is not based upon evidence, you should disregard the statement entirely. . . .

(Record p. 21 - 22). The Mississippi Supreme Court has held that “when a jury is properly instructed that statements made by counsel are not evidence, reversal is not required.” *Burns v. State*, 729 So.2d 203, 229 (Miss.1998) (citing *Ormond v. State*, 599 So.2d 951, 961 (Miss.1992) (*emphasis added*)). Further, “[j]urors are presumed to follow the instructions of the court.” *Long v. State*, 934 So.2d 313, 316 (Miss. Ct. App. 2006)(citing *Grayson v. State*, 879 So.2d 1008, 1020(Miss.2004)). “To presume otherwise would be to render the jury system inoperable.” *Id.*

Accordingly, the comments at issue do not rise to the level of plain error. As such, a new trial is not warranted based upon this issue.

III. THE APPELLANT FAILED TO ESTABLISH THAT HE WAS DENIED INEFFECTIVE ASSISTANCE OF COUNSEL

The Appellant next argues that his “trial counsel’s performance was so deficient that it deprived [him] of his constitutional right to counsel and a fair and impartial trial.” (Appellant’s Brief p. 10). While a defendant may raise the issue of ineffective assistance of counsel on direct appeal, “this Court may determine the merits of the claim only when ‘(a) ... the record affirmatively

shows ineffectiveness of constitutional dimensions, or (b) the parties stipulate that the record is adequate and the Court determines that findings of fact by the trial judge able to consider the demeanor of witnesses, etc. are not needed.” *Clayton v. State*, 946 So.2d 796, 803 (Miss. Ct. App. 2006). **“A conclusion that the record affirmatively shows ineffectiveness of constitutional dimensions is equivalent to a finding that the trial court should have declared a mistrial or ordered a new trial *sua sponte*.”** *Id.* (citing *Colenburg v. State*, 735 So.2d 1099, 1102 (Miss. Ct. App.1999) (*Emphasis added*)). The record in this case does not demonstrate that the trial court should have declared a mistrial or ordered a new trial *sua sponte* because of the quality of defense counsel’s representation of the Appellant and, therefore, does not support a claim of ineffective assistance of counsel.

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

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

Smiley v. State, 815 So.2d 1140, 1146-47 (Miss.2002) (quoting *Gary v. State*, 760 So.2d 743, 753 (Miss.2000)) (*Emphasis added*). “The target of appellate scrutiny in evaluating the deficiency and prejudice prongs of *Strickland* is counsel’s ‘over-all’ performance.” *Cole v. State*, 666 So.2d 767,

775 (Miss. 1995) (*emphasis added*). Moreover, this Court held that “[i]n addition to the presumption that counsel’s conduct is reasonably professional, there is a presumption that counsel’s decision are strategic in nature, rather than negligent.” *Alonso v. State*, 838 So.2d 309, 313 (Miss. Ct. App. 2002).

The Appellant contends that his counsel was ineffective for three reasons, each of which can be classified as “trial strategy.” The *Smiley* Court, first noting that attorneys were given “wide latitude” regarding trial strategy, held that:

This Court gives much deference to an attorney's trial tactics. As this Court has stated: Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. *Cf. Engle v. Isaac*, 456 U.S. 107, 133-134 [102 S.Ct. 1558, 1574-75, 71 L.Ed.2d 783] (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. *Lambert v. State*, 462 So.2d 308, 316 (Miss.1984), citing *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065, 80 L.Ed.2d at 694. The right to effective counsel does not entitle the defendant to have an attorney who makes no mistakes at trial. The defendant just has a right to have competent counsel.

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

The Appellant first asserts that his counsel was ineffective because he “failed to seek a stipulation that [the Appellant] was a prior convicted felon before the trial commenced.” (Appellant’s Brief p. 13). When faced with a similar issue, this Court in *Williams v. State*, held that “counsel was under no duty to stipulate to the past convictions.” 819 So.2d 532, 538 (Miss. Ct. App. 2001). In so holding, the *Williams* Court noted one possible trial strategy for not stipulating, stating that “counsel may have felt that a stipulation to these crimes would have given the jury the

impression that the defendant had some reason to hide facts of the prior cases from them.” *Id.* Thus, the alleged deficiency was not a deficiency at all. As to how this alleged deficiency prejudiced his case, the Appellant simply stated that “in the instant case, there is no question that there is a reasonable probability that, but for counsel’s unprofessional errors, a different outcome would have resulted at trial.” (Appellant’s Brief p. 18). Mere speculation that another outcome would have occurred does not meet the burden required by *Strickland*. See *Mohr v. State*, 584 So.2d 426, 430 (Miss.1991) (holding that in order to determine the second prong of prejudice to the defense, the standard is “a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different” and further holding that this means a “probability sufficient to undermine the confidence in the outcome.”) Neither prong of *Strickland* was met with regard to this claim of deficient performance.

The Appellant’s two remaining reasons for claiming that he received ineffective assistance were both for failing to object. One criticism was regarding his counsel’s failure to object to the evidence discussed above dealing with the Appellant’s prior criminal history; the other for failing to object to the closing arguments at issue in this appeal. However, the Mississippi Supreme Court has held that decisions regarding whether to “make certain objections falls within the ambit of trial strategy and **cannot give rise to an ineffective assistance of counsel claim.**” *Howard v. State*, 945 So.2d 326, 357 (Miss. 2006) (quoting *Powell v. State*, 806 So.2d 1069, 1077 (Miss.2001)) (*Emphasis added*) See also *Golden v. State*, 968 So.2d 378, 388 (Miss. 2007).

Accordingly, the Appellant failed to establish from the record that his counsel’s over-all performance was so deficient that it not only prejudiced his case but also that it was of such constitutional dimensions that the trial court should have ordered a new trial *sua sponte* as required by Mississippi law. Counsel’s decision not to stipulate was strategic and is therefore, to be given

great deference. Further, the Appellant did not establish how the decision prejudiced his case. Also, the Appellant's assertion regarding his counsel's "failures to object" cannot give rise to a claim of ineffective assistance of counsel. As such, the Appellant was not denied effective assistance of counsel.

IV. THE APPELLANT IS NOT ENTITLED TO A NEW TRIAL BASED UPON CUMULATIVE ERROR.

Lastly, the Appellant contends that "the cumulative errors in this case denied [him] his right to a fair trial." (Appellant's Brief p. 10). The State does concede that error occurred in the Appellant's trial. "However, a necessary predicate to an inquiry of that nature is a determination that multiple errors in the conduct of the trial, in fact, occurred." *Sheffield v. State*, 844 So.2d 519, 525 (Miss. Ct. App. 2003)(*emphasis added*). "No reversible error as to any part means there is no reversible error as to the whole." *Berry v. State*, 980 So.2d 936, 944 (Miss. Ct. App. 2007). Moreover, "a defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials." *Clark v. State*, 891 So.2d 136, 140-41 (Miss. 2004) (quoting *Brown v. United States*, 411 U.S. 223, 231-32, 93 S.Ct. 1565, 1570, 36 L.Ed.2d 208 (1973)).

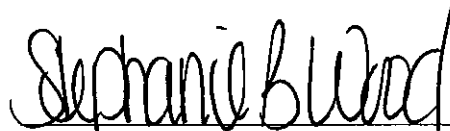
CONCLUSION

For the foregoing reasons, the State of Mississippi respectfully requests that this Honorable Court affirm the Appellant's conviction and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

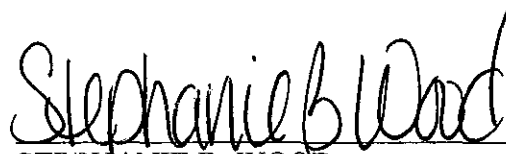
I, Stephanie B. Wood, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 19th day of May, 2010.

A handwritten signature in black ink that reads "Stephanie B. Wood". The signature is written in a cursive style and is positioned above a horizontal line.

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