IN THE MISSISSIPPI COURT OF APPEALS

No. 2010-KA-00504-COA

KENDRICK LAMAR WILLIAMS APPELLANT

Vs.

STATE OF MISSISSIPPI APPELLEE

REBUTTAL BRIEF OF APPELLANT

Appeal from the Circuit Court of Pike County, Mississippi

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LAW AND ARGUMENT

1. **The trial court erred in refusing defendant's challenge for cause of juror Spears.**

The State is correct, the Court, after first refusing to strike venireperson Spears for cause, later reconsidered his decision and granted the strike. T. 77-78. Undersigned counsel was not counsel for Williams at trial and the judge's reconsideration of the challenge was overlooked by appellate counsel. Undersigned counsel apologizes profusely for her mistake and withdraws this issue.

2. **The prosecution erred in eliciting testimony that Williams' codefendants pleaded guilty.**

4. **The prosecution erred in eliciting testimony that could have been considered as witness intimidation evidence.**

6. **The trial court erred in allowing the prosecution to place Lewis's prior statement into evidence.**

8. **The prosecution committed misconduct in arguing to the jury that by convicting the defendant, they would be doing their duty as citizens of Pike County.**

The State argues that all of these issues are barred because trial counsel (who is not the same lawyer as undersigned counsel) failed to object to these errors and, thus refuses to address the merits of these issues. *See State's Brief p. 12* ("We decline to address the merits of any of these complaints because there was no objection, contemporaneous or otherwise, to any of the evidence,

testimony, or argument complained about contemporaneous or otherwise, to any of the evidence, testimony, or argument complained about now.").

However, as to each of these errors, Williams has argued that trial counsel was ineffective for failing to object and, in the instance of the limiting instruction regarding Lewis's prior statement, that the trial court erred in not *sue sponte* granting a limiting instruction. *See Issues 7, 9 and 10.*

If trial counsel was ineffective for failing to object to the errors outlined in Issues 2, 4, 6 and 8, or the trial court failed to do its job in seeing to it that the jury was properly instructed, the contemporaneous objection rule will not prevent this Court from considering the issues.

The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense." U.S. Const., Amend. VI. Because the right to counsel is essential to fair adjudication, (*see Powell v. Alabama*, 287 U.S. 45 (1932)), the right to counsel has long been considered "fundamental." *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel so fundamental that it is binding on the states through the doctrine of incorporation); *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938) ("This is one of the safeguards . . . deemed necessary to insure fundamental human rights of life and liberty."); *see also*, *Chapman v. California*, 386 U.S. 18, 23 & n. 8 (1967) (right to counsel is so fundamental to our adversarial system that its deprivation can never be deemed harmless).

An attorney who fails to object to inadmissible evidence renders

constitutionally ineffective assistance of counsel. *Davis v. State*, 743 So.2d 326, 338 (Miss. 1999). *See also Holland v. State*, 656 So.2d 1192, 1198 (Miss. 1995) (holding that counsel who failed to object to an arguably inadmissible confession was constitutionally ineffective where, as here, the evidence was highly damaging); *Holland v. State*, 656 So.2d 1192 (Miss. 1995) (failure to preserve error for review constitutes ineffective assistance of counsel); *United States v. Demelio*, 2009 WL 3698110, 3 (W.D.Pa.) (ordering evidentiary hearing on petitioner's issues including issue whether counsel was ineffective for failing to object to 404(b) evidence). See also, *State v. Al Bayyinah*, 356 N.C. 150 (2002). (Reversing death row inmate's convictions because evidence improperly admitted under 404(b)) "The dangerous tendency of Rule 404(b) evidence to mislead and raise a legally spurious presumption of guilt requires that its admissibility should be subject to strict scrutiny by the courts." *Al Bayyinah*, at 154. In this case, trial counsel was ineffective in failing to object to the testimony that Williams' co-defendants had all pleaded guilty.

The test for whether such amounts to ineffective assistance of counsel is not whether the court believes the outcome would have been different had counsel done the right thing but whether there was a reasonable probability the outcome would have been different had the correct procedure taken place. *See, e.g.*, *Raygoza v. Hulick*, 474 F.3d 958, 965 (7th Cir. 2007). *Strickland v. Washington*, 466 U.S. 668, 690-694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

A reasonable probability is a probability sufficient to undermine confidence

in the outcome. *Id.; Davis v. State*, 743 So.2d 326 (1999). The *Strickland* Court elucidated this test further: "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.*, 466 U.S. at 695.

In this case, the errors committed by the prosecution that went unobjected-to by trial counsel were such that there is a reasonable probability the outcome would have been different had the correct procedure taken place.

Furthermore, courts will not accord deference to an attorney's omissions where, as here, they present "no advantage" to the defense. *Profitt v. Waldron*, 831 F.2d 1245, 1249 (5th Cir. 1987). To excuse errors in this case under the rubric of trial "strategy" would render that term devoid of all substance or meaning. *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994).

The Mississippi Supreme Court has held that it may consider the merits of a claim of ineffective assistance of counsel raised for the first time on direct appeal only in instances where: "(1) the record affirmatively shows ineffectiveness of constitutional dimensions, or (2) the parties stipulate that the record is adequate to allow the appellate court to make the finding without consideration of the findings of fact of the trial judge." *Wilcher v. State*, 863 So.2d, 776 825 (Miss. 2003). In this case, the State refuses to stipulate that the record is sufficient to allow consideration of the ineffectiveness issues raised. Notwithstanding the State's refusal to stipulate, the record is sufficient to allow this Court to conclude that trial

counsel was ineffective when he failed to object to errors that any reasonably competent attorney would know to which to object.

The relevant inquiry is whether the representation of Williams 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." *Ransom v. State*, 919 So.2d 887, 889 (Miss.2005).

Evidence of accessories' guilty pleas: As the State admits in its brief on page 13, "if the defense wishes to exclude such testimony (the co-defendants' guilty pleas) from consideration by the jury, he is duty bound to object. *Palm v. State*, 724 So.2d 424, 426 (Miss.App. 1998)." It is clear from the record before the Court that although trial counsel was duty-bound to object, he failed to do so. This was ineffective. The jury, having heard that Williams' co-defendants had pleaded guilty in the case, would naturally tend to give more credence to their testimony[1] when, in fact, the defendant is entitled to have the jury instructed that accomplice or co-defendant testimony should be viewed with suspicion.

In this case, there was no legitimate reason to inform the jury that all of Williams' codefendants pleaded guilty. This evidence did nothing but prejudice

[1]In *Fulgham v. State*, 386 So.2d 1099 (Miss. 1980), the Mississippi Supreme Court reversed where the judge accepted the codefendant's plea of guilty in front of the jury panel that was about to start hearing the defendant's case. *Fulgham*, 386 So.2d at 1100. "[T]he fact that both men were called for trial in the same case with one changing his plea and being sentenced in the presence of the jury panel that was to try both at the same time would, in all probability, cause to consider this situation as laymen." *Fulgham*, 386 So.2d at 1101. See also *Darden v. State*, 498 So.2d 1224, 1229 (Miss. 1986) ("As a general rule a trial judge should not hesitate to grant the cautionary instruction when the State is relying upon the testimony of co-conspirators.")

the jury. As such, Williams' convictions and sentences should be reversed and remanded for a new trial.

Witness intimidation testimony: Because trial counsel made no objection to this testimony, the State does not address the merits of this issue. The evidence of Williams' statement to Lewis some weeks after the alleged robbery and Lewis's testimony that he had to carry a gun after he learned that Williams was out on bond were not relevant to Williams' guilt or innocence but could have led the jury to believe that Williams was attempting to intimidate Lewis. As such, the introduction of this evidence was reversible error. Trial counsel's failure to address to inadmissible 404(b) evidence was error. *See, e.g., Davis v. State*, 743 So.2d 326, 338 (Miss. 1999). *See also Holland v. State*, 656 So.2d 1192, 1198 (Miss. 1995) (holding that counsel who failed to object to an arguably inadmissible confession was constitutionally ineffective where, as here, the evidence was highly damaging).

Prosecutorial misconduct in closing argument: Again, the State does not address this argument relying on the contemporaneous objection rule.. Defense counsel made no objection to any of the argument; however, this Court has repeatedly held that "in cases of prosecutorial misconduct, we have held 'this Court has not been constrained from considering the merits of the alleged prejudice by the fact that objections were made and sustained, or that no

objections were made.'" *Randall v. State,* 806 So.2d 185, 210 (Miss. 2001) quoting *Mickell v. State,* 735 So.2d 1031, 1035 (Miss. 1999).

In *Randall,* the Court found error because of the prosecution's comments on the accused's failure to call witnesses when the witnesses were equally available to both the state and the defendant. *Id.*

11. The trial court erred in refusing the defense's instruction on the credibility of accomplices.

Plainly, the refusal to instruct the jury to consider the accomplices' testimony with great care and caution was reversible error in this case. *Wheeler v. State*, 560 So.2d 171 (Miss. 1990) (Instruction telling jury to view testimony with "great care" insufficient; defendant entitled to an instruction that testimony should be viewed with "caution and suspicion"). Other courts have so held. For example, in *United States v. Partin*, 493 F.2d 750 (1974), the Fifth Circuit held that the trial court committed reversible error in failing to instruct the jury to approach with great care and caution the testimony of an interested witness or a witness who had given prior inconsistent statements. The failure to specifically instruct was prejudicial error despite a general instruction on how to assess witness credibility. *Id.*, at 760.

The State argues that since the testimony of Joseph and Thompson was corroborated by other evidence, a cautionary instruction was not necessary. The Mississippi Supreme Court in *Williams v. State,* 32 So.3d 486 (Miss. 2010), held that a defendant was not required to show that an accomplice's testimony was

unreasonable, self-contradictory, or substantially impeached in order to obtain a cautionary instruction telling the jury that such testimony should be viewed with great care and caution. Rather, the Court held that a defendant is entitled to a cautionary instruction whenever the accomplice's testimony is the sole basis for conviction and the defendant's guilt is not otherwise clearly proven. In determining whether an instruction is warranted, the testimony of the accomplice which must be corroborated is the portion which ties the defendant to the crime. According to the Court, it is "irrelevant" whether the accomplice's testimony is corroborated as to other details. *Id.*, at 491-92.

The State also argues that Joseph and Thomas were mere accessories after the fact and not co-conspirators and, thus, the instruction was not warranted. But the instruction applies to accessories whether they are accessories before, during or after the crime.

The law is clear that the trial court should have granted the cautionary instruction requested by Williams concerning the testimony of his accessories. The trial court's refusal of that instruction was error.

Conclusion

For the above and foregoing reasons, this Court should reverse Kendrick Williams' convictions and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF MAILING AND SERVICE

I, Cynthia Ann Stewart, hereby certify that I have this day mailed by first-class mail, postage prepaid, the original and four copies of the foregoing Rebuttal Brief of Appellant to the Clerk of the Mississippi Court of Appeals (as well as a CD-ROM containing a PDF version of the brief) along with copies of the brief to the following:

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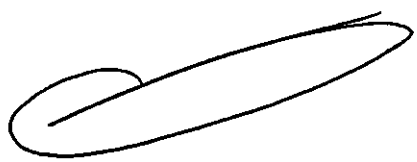
This, the 19th day of January, 2011.



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