

**IN THE COURT OF APPEALS 10/01/96**  
**OF THE**  
**STATE OF MISSISSIPPI**  
**NO. 93-KA-00927 COA**

**SAMMY JOE ROSS**

**APPELLANT**

**v.**

**STATE OF MISSISSIPPI**

**APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND  
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. BARRY W. FORD

COURT FROM WHICH APPEALED: ALCORN COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

DANNY L. LOWREY

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: DEWITT ALLRED, III

DISTRICT ATTORNEY: JOHN YOUNG

NATURE OF THE CASE: CRIMINAL: BURGLARY

TRIAL COURT DISPOSITION: SENTENCED TO 15 YEARS IN MDOC, 5 YEARS  
SUSPENDED. SENTENCE TO RUN CONSECUTIVE TO CURRENT SENTENCE.

CERTIORARI FILED: 12/21/98

MANDATE ISSUED: 4/12/99

BEFORE BRIDGES, P.J., DIAZ, AND SOUTHWICK, JJ.

DIAZ, J., FOR THE COURT:

Sammy Joe Ross (Ross) was convicted of burglary of a dwelling in the Alcorn County Circuit Court. He was sentenced to serve fifteen years in the custody of the Mississippi Department of Corrections with five years suspended. This sentence is to run consecutively to the sentence that he is now serving for another offense. Aggrieved, Ross appeals to this Court. We find no reversible error, and therefore, affirm the judgment of the lower court.

Although Ross raises at least sixteen issues on appeal, both parties have only briefed and argued twelve of the issues. Therefore, we have condensed the issues and address only the issues that were briefed.

#### FACTS

At the time of this incident, the victim, (K.A.) lived in a trailer home with her infant daughter. On February 4, 1986, K.A. was watching her daughter and babysitting another young child. Around three o'clock that afternoon, a man, identified by K.A. as Ross, knocked on her door and asked her if she knew where J.W. Rose lived to which she responded in the affirmative. Ross then asked K.A. to whom she used to be married. K.A. answered Ross' question. After this exchange, Ross pulled out a gun and pointed it at K.A. through the screen door. Ross then entered the trailer with the gun pointed at K.A.

Ross twice told K.A. to remove her clothes, and she refused. Instead, she told Ross that he could take anything he wanted from the house. The two struggled for a while. Ross eventually got K.A. onto a sofa in the living room, and pulled down her trousers and underwear. K.A. screamed the entire time. Her screams in turn, woke up the babies, who began crying. K.A. asked Ross if she could go check on the babies. Eventually, Ross let her get up, but he told her not to turn around when she came back from checking on the babies. When K.A. returned, Ross had left the trailer, and was pulling out of her driveway in his truck.

#### DISCUSSION

##### I. WHETHER THE TRIAL COURT ERRED IN DENYING

##### HIS MOTION TO DISMISS FOR WANT

##### OF A SPEEDY TRIAL?

##### a. Constitutional Right To Speedy Trial

Ross is currently serving a life sentence, and fifteen years for similar, but unrelated charges. Ross was originally arrested on September 16, 1987 for five of the unrelated charges which he faced at the time. On November 12, 1987, Investigator Pickens of the Mississippi Highway Patrol took a statement from K.A. On November 14, 1987, K.A. picked out Ross as her assailant from a lineup at the county jail. Ross was indicted for the present charge on October 3, 1988, and arraigned on October 10, 1988. Ross argues that he does not agree with settled case law, and asserts that the right to speedy trial should have attached at the time he was brought to the jail for the line up because that is when the criminal process began. For constitutional purposes, the right to speedy trial attaches at the time of the accused's arrest, indictment, or information. *Ross v. State*, 605 So. 2d 17, 21 (Miss. 1992). Therefore, for constitutional speedy trial purposes, time began running against Ross on October 3, 1988. Approximately four years and three months passed from the time Ross was indicted and arraigned until he was actually tried in this particular case. This obviously triggers a *Barker* analysis. See *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

Four factors must be balanced in determining whether the Defendant's claim that his right to a speedy trial has been violated. *Johnson v. State*, 666 So. 2d 784, 792 (Miss. 1995). These factors are: (1) length of delay, (2) reason for the delay, (3) whether the defendant has timely asserted the right to a speedy trial, and (4) whether the defendant has been prejudiced by the delay. *Johnson*, 666 So. 2d at 792 (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). No single factor is dispositive; however, we must consider the totality of the circumstances in addition to any relevant circumstances beyond the four factors, when making the determination. *Id.*

#### 1) Length of Delay

The state supreme court has held that a delay of eight months or more between arrest and trial is presumptively prejudicial. *Id.* (citations omitted). This factor in itself will not require reversal. However, it will require that we examine the remaining factors closely. *Id.* (citations omitted). The delay in Ross' case of over four years is presumptively prejudicial. Therefore, we closely examine the remaining factors.

#### 2) Reason for Delay

Simply stated, the rule governing reason for delay is two-pronged: 1) the State must prove either that the Defendant prompted the delay, or 2) that the State prompted the delay, but with good cause. *Ross*, 605 So. 2d at 23. Ross' original trial date for this case was set for January 24, 1989. Because we are concerned with the length of the overall delay in this case, we will go through the chronology of the events.

February 4, 1986- Commission of the crime.

September 16, 1987- Ross' initial arrest and incarceration on other charges.

November 14, 1987- Lineup and identification of Ross by victim of the offense.

October 3, 1988- Indictment filed.

October 10, 1988- Ross' indictment by waiver. Arrest on *capias*.

October 10, 1988- Continuance order on motion of Ross.

January 20, 1989- Continuance order on motion of Ross due to counsel's heavy case load.

May 8, 1989- Order granting Ross' attorney Langton's motion to withdraw due of conflict of interest. Attorney Windsor was appointed, and the case was continued until further order of the court. Attorney Windsor moved to withdraw due to conflict of interest.

June 20, 1989- Attorney Windsor's motion to withdraw was granted. Attorney Coleman was appointed.

July 17, 1989- Continuance order granted on motion ore tenus of Ross.

October 6, 1989- Continuance order to next term on motion of Ross because material witness unavailable to testify.

January 11, 1990- Continuance order to May term due to illness of Ross' attorney.

April 19, 1990- Continuance order to July term due to illness of Ross' attorney.

July 16, 1990- Continuance order to October term on motion of Ross because material witness unavailable to testify.

October 8, 1990- Continuance order to next term on motion ore tenus of Ross.

January 4, 1991- Continuance order until further order of the court on motion ore tenus of Ross.

May 13, 1991- Continuance order to next term on court's own motion due to pre-emption by trial of another case.

July 22, 1991- Continuance order on motion of Ross.

October 10, 1991- Continuance order to January term on motion of Ross.

January 22, 1992- Continuance order to next term on motion ore tenus of Ross.

May 14, 1992- Continuance order on motion ore tenus of Ross.

July 30, 1992- Continuance order to next term on motion ore tenus of Ross.

September 16, 1992- *Writ of habeas corpus ad prosequendum* for Ross' presence at October term. No continuance order was entered at October 1992 term.

December 19, 1992- *Writ of habeas corpus ad prosequendum* for Ross' presence at January term.

January 19, 1993- Entry of appearance by attorney Lowery for Ross.

January 22, 1993- Continuance order to May 3, 1993 on Ross' motion.

May 3, 1993- Trial.

Ross' case was continued eighteen times, and as a result, Ross was not tried until May 3, 1993. Of the eighteen continuances, fourteen were granted on motions made by Ross, three orders of continuances resulted from continuance orders on the court's own motion and one continuance occurred without an entry of an order.

"Any delays in prosecution attributable to a defendant under either the constitutional or statutory scheme tolls the running of time." *Handley v. State*, 574 So. 2d 671, 674 (Miss. 1990) (citations omitted). Furthermore, any continuances for "good cause" will also toll the running of time unless the "record is silent regarding the reason for delay," in which case "the clock ticks against the State because the State bears the risk of non-persuasion on the good cause issue." *Handley*, 574 So. 2d at 674. Accordingly, the fourteen continuances granted pursuant to Ross' motions cannot be charged against the State. Next, we look to the three continuances granted on the court's own motion.

The first continuance on the court's own motion was on May 8, 1989. On that day, the court appointed Ross' second attorney and accordingly ordered a continuance from the May term of the court until further notice. His second attorney, Ronald Windsor, immediately filed a motion to withdraw on the same day due to a conflict of interest. Ross's third attorney, David Coleman was appointed on June 20, 1989. This was a period of forty-four days. The next continuance on January 11, 1990 was granted apparently on the court's own motion due to attorney Coleman's continued illness. The trial was set for May 14, 1990. On April 19, 1990, the defense filed another motion to continue the case until the next term because Coleman was still recovering from his illness. The period between January 11, 1990 and April 19, 1990 consists of ninety-eight days. On May 13, 1991, the court ordered another continuance on its own motion due to a backlog of cases. At that point, there was no request for speedy trial. The case was continued until the next term. The period from May 13, 1991 to July 22, 1991 consists of sixty-five days bringing the total to 207 days of delay due to continuances from the court. On September 16, 1992, a *writ of habeas corpus ad prosequendum* was issued for Ross, but no continuance order was ever entered here. On December 19, 1989, another *writ of habeas corpus ad prosequendum* was issued for Ross. The prosecutor testified at the motion to quash the indictment hearing. He testified that Ross was anticipating the outcome of another case that was before the supreme court. Ross wanted to wait until the other case was resolved in order to decide whether he wanted to plea bargain with the State. His attorney informed the State that Ross would not plead in October, but he might plead in January depending on the outcome of the other case. Both sides agreed that he would not go to trial before the other case was resolved. No continuance order was entered here. The trial was set for January 23, 1993. Assuming that the October term began on the first of the month, this delay may be calculated to consist of 115 days bringing the total to 322 days.

Apparently, the first court continuance granted on the court's own motion was due to the fact that Ross' second attorney filed a motion to withdraw on the same day that he was appointed due to a conflict of interest. A delay caused by the withdrawal of the Defendant's attorney which entails allowing the new attorney a reasonable time to become familiar with the case and prepare for trial cannot be weighed against the State because it is beyond the State's control. *Johnson*, 666 So. 2d at 792 (citations omitted). Subtracting this from the total leaves 278 days. The second continuance was due to attorney Coleman's illness. The trial court has broad discretion in granting continuances, and

we do not think that it abused its discretion in so granting a continuance under these circumstances. *Atterberry v. State*, 667 So. 2d 622, 631 (Miss. 1995). Furthermore, Coleman testified that his law partner filed for a continuance on his behalf for the January 1990 term. Arguably, this was filed by the Defendant and cannot be charged against the State. Subtracting this from the total, the delay consists of 180 days. The next continuance from the court's own motion was due to a backlog of cases. Continuances due to docket congestion do not weigh as heavily against the State as would periods where no cause for the delay was seen. *Jasso v. State*, 655 So. 2d 30, 33 (Miss. 1995); *See, e.g., Hurns v. State*, 616 So. 2d 313, 318 (Miss. 1993) (overcrowded court dockets and trial schedules are neutral reasons in *Barker* analysis); *McGee v. State*, 608 So. 2d 1129, 1133 (Miss. 1992) (docket congestion can furnish good cause for delay). The continuance from the October 1992 term was by agreement between the parties pending the outcome of Ross's other case for plea negotiation purposes. Plea negotiations constitute good cause and should not be charged against the State. *See Taylor v. State*, 672 So. 2d 1246, 1259 (Miss. 1996). We do stress however, the importance of documentation in negotiations in order to substantiate claims of plea negotiations. *Taylor*, 672 So. 2d at 1259. The district attorney testified at the motion to quash the indictment as to the agreement reached between the parties regarding the continuance at the October 1992 term. We feel that this constitutes adequate documentation; however, even if we were to charge this time against the State, the total number of days delayed by the State totalled 180.

### 3) Assertion of Right

Although Ross was not required to demand a speedy trial, his assertion of such a right will weigh more heavily in his favor under this analysis. *Johnson v. State*, 666 So. 2d 784, 793 (Miss. 1995). Although we are unable to find a specific motion for a speedy trial, Ross did make a motion to quash the indictment because his right to a speedy trial was violated. Therefore, the fact that Ross made this motion may favor his argument. However, the fact that Ross moved for a continuance at the time of trial could be considered contrary to any concerns about a speedy trial. *See Atterberry*, 667 So. 2d at 627.

### 4) Prejudice

Ross alleges that he suffered prejudicial effects from the delay. The prejudice prong of this analysis seeks to prevent oppressive pre-trial detention, to minimize the anxiety and concern of the accused, and to limit the impairment of the defense. *Taylor v. State*, 672 So. 2d 1246, 1261 (Miss. 1996). The supreme court has stated that the State must actually show lack of prejudice in order to prevail on this factor. *Jasso v. State*, 655 So. 2d 30, 35 (Miss. 1995).

Ross was a previously convicted felon at the time of trial, and his incarceration at the time was not due to the present incident. Therefore, he cannot claim oppressive pre-trial detention. Ross wanted the trial continued until his other federal appeals were resolved in order to effectively plan his trial strategy. Anxiety may be presumed from the mere fact of delay even where the defendant does not claim that he has suffered anxiety. *Johnson v. State*, 666 So. 2d 784 793 (Miss. 1995). Impairment of the defense may occur as a result of witnesses dying. *See Johnson*, 666 So. 2d at 793. Although it is true that J.W. Rose passed away and therefore was not able to testify, the victim's father was allowed to testify about the conversation which he had with J.W. Rose. However, the statements were not admitted as substantive evidence.

After reviewing the reasons why Ross' trial was repeatedly continued, the continuances were either on motion of the defendant, or for good cause by the court. Although Ross did move for a speedy trial, the fact that he moved for a continuance up to the time of trial could be considered contrary to his interest in a speedy trial argument. Finally, although J.W. Rose was unable to testify at trial, considering the totality of the circumstances, the defense was not impaired, nor was it prejudiced. Ross has not been denied his constitutional right to a speedy trial.

#### b. Statutory Right To Speedy Trial

Section 99-17-1 of the Mississippi Code provides:

Unless good cause be shown, and a continuance duly granted by the court, all offenses for which indictments are presented to the court shall be tried no later than two hundred seventy (270) days after the accused has been arraigned.

Miss. Code Ann. § 99-17-1 (Rev. 1994). The statutory period allotted was exceeded in the present case.

We find that seventeen out of the eighteen continuances were for good cause. The one delay which was not covered by a continuance order was the delay from the October 1992 term to the January 1993 term. As stated above, this was by agreement by both sides because Ross wanted to wait until he knew the outcome of his other case on appeal at the time. This delay consisted of approximately 115 days. Adding this to the delay due to an overcrowded docket, (65 days), the total number of days attributable to the State is 180 days. The statute is satisfied.

## II. WHETHER THE TRIAL COURT ERRED IN ALLOWING

### J.W. ROSE'S STATEMENTS INTO EVIDENCE?

During the trial, J.L., the victim's father testified that K.A. called him and asked him to come over to her house after she was attacked. After she recounted the incident to him, he went over to J.W. Rose's house, and gave him a description of K.A.'s attacker. Rose told J.L. that the description fit that of his nephew, Sammy Ross, and proceeded to give J.L. Sammy Ross' address. From that information, J.L. proceeded to Ross' house in order to verify that the truck which K.A. had described her attacker as driving, would be there. After J.L. saw the truck in Ross' driveway, he left, but hired a private investigator a few days later in order to take pictures of the pickup and Ross. These pictures were later shown to K.A.

J.W. Rose committed suicide and therefore, was not available to testify at trial. The trial court allowed the victim's father to testify about the conversation that he had with Rose after the incident. Ross argues that the statements were hearsay because the statements were made outside of his presence.

It is elementary that hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." M.R.E. 801(c). If the significance of a statement is simply that it was made, and there is no issue about the

truth of the matter asserted, then it is not hearsay. *Gayten v. State*, 595 So. 2d 409, 414 (Miss. 1992). In general, words which accompany and give character to a transaction are not considered hearsay. *Gayten*, 595 So. 2d at 414 (citations omitted).

In *Gayten*, the court allowed a police officer to testify about a conversation he had overheard over a wiretap from a body microphone worn by an undercover agent. The court opined that the officer could testify to the conversation because the statements were not admitted to prove their veracity, but merely to show what it was to which the seller responded. Similarly, in this case, J.L. was allowed to testify about his conversation with J.W. Rose not to prove the truth of the statements made, but merely to show how J.L. responded after the incident with his daughter. We find that the statements were properly admitted.

Furthermore, the jury instruction D-7 was granted, which states:

The Court instructs the jury that the statement of J.W. Rose cannot be considered as evidence that Sammy Ross was at the dwelling of [K.A.] on February 6, 1986.

This instruction would have cured any confusion the jury may have had in considering the statements as substantive evidence.

### III. WHETHER THE TRIAL COURT ERRED IN DENYING ROSS' MOTION FOR MISTRIAL BASED ON A JUROR'S RESPONSE DURING VOIR DIRE

During voir dire, juror Sandia Michael indicated that she had worked with Ross' wife. When defense counsel asked if this would influence her in her decision of the case she replied, "No." After a few other questions, defense counsel asked her if she recalled hearing anything about the case to which she said, "The only thing I knew her husband was in prison; she was a Ross." Ross now argues that the lower court erred in not granting him a mistrial because the rest of the jury heard her prejudicial statement regarding Ross' incarceration. The trial judge denied a mistrial stating that he was of the opinion that a mistrial was inappropriate at that time.

The trial judge is allotted considerable discretion in determining whether a mistrial is warranted because the judge is in the best position to measure the prejudicial effect. *Holly v. State*, 671 So. 2d 32, 38 (Miss. 1996). "When the trial judge determines that the error does not reach the level of prejudice warranting a mistrial, the judge should admonish the jury to disregard the impropriety in order to cure its prejudicial effect." *Holly*, 671 So. 2d at 38 (citations omitted). The state supreme court has consistently held that such action is sufficient to remove any prejudice resulting from the improper remark. *Id.* The lower court granted the following jury instruction:

#### Instruction D-6

The court instructs the jury that statements of counsel, the court, and any member of the jury panel during the jury selection process is not evidence and the jury shall not consider any statement made during the selection process as evidence in this case.

In light of this instruction, we think that the jury was adequately admonished, and therefore, the trial judge did not abuse his discretion in refusing a mistrial at that time.

#### IV. WHETHER THE TRIAL COURT ERRED IN DENYING

##### ROSS' MOTION FOR CONTINUANCE

Ross cites no authority on which to base his argument that the trial court erred when it denied his motion for a continuance. Therefore, pursuant to the case of *Edlin v. State*, 523 So. 2d 42 (Miss. 1988), this Court need not consider this issue. In *Edlin*, the appellant argued that the verdict of guilty was not supported by the evidence. *Id.* at 49. He cited no authority on which he based his argument on that issue. *Id.* The supreme court disposed of that issue with the following quote:

Under this assignment of error Edlin seeks to attack the sufficiency of the evidence which underlies the verdict. This assignment of error is unsupported by any legal authority and need not be considered by this Court. *See Jones v. State*, 481 So. 2d 798, 804 (Miss. 1985); *Pate v. State*, 419 So. 2d 1324, 1326 (Miss. 1982); *Ramseur v. State*, 368 So. 2d 842, 844 (Miss. 1979).

*Id.* Nevertheless, we will consider this issue on its merits.

Ross made several motions regarding suppression of certain evidence, and his right to a speedy trial. The motions were heard on April 21 and 23, 1993, a week before the May 3, 1993 trial date. Defense counsel was notified of the judge's decision on May 1, 1993, and the court formally made its ruling on May 3, 1993 denying all of Ross' motions. At that point, Ross moved for a continuance in order to prepare his case accordingly. The trial court denied his motion for another continuance stating that in light of the fact that the motions were heard very close to the trial date, Ross should have prepared his case anticipating the fact that his motions may be denied. Furthermore, it is noted that the case was continued from the previous term on motion of the defense in order to prepare for trial.

"The decision to grant or deny a continuance is left to the sound discretion of the trial court." *Atterberry*, 667 So. 2d at 631 (citations omitted). "Unless manifest injustice appears to have resulted from the denial of the continuance, this Court should not reverse." *Id.*

Ross' trial attorney entered his appearance on January 19, 1993. Ross' trial began on May 3, 1993, giving counsel a little over three months to prepare for trial. Counsel had adequate opportunity to prepare for a trial in that amount of time. Surely counsel could have anticipated a possible unfavorable ruling on his motions and prepared strategy accordingly. We fail to find any manifest injustice that has resulted from the denial of the continuance especially in this instance.

#### V . DID THE TRIAL COURT ERR IN ITS RULING ON ADMISSIBILITY

##### OF THE VICTIM'S IN- COURT IDENTIFICATION AS WELL AS

##### PHOTOGRAPHS OF ROSS

#### a. Victim's In-Court Identification

Before trial, Ross filed a motion to suppress testimony regarding a lineup conducted on November 14, 1987. The lower court admitted the photographs of the lineup concluding that they were not suggestive or prejudicial to the defense. Furthermore, the court overruled the defense's motion to allow a "look alike" in the court room in place of the Defendant while the victim testified because Ross' appearance had apparently changed since the time of the incident. The court refused this motion. From the Appellant's brief on appeal, we infer that he now argues that the trial court erred in its rulings on these motions.

Ross argues that the victim's identification of him was unreliable because 1) the lineup was impermissibly suggestive, and 2) other than her father, the victim never described her assailant to anyone else until November 14, 1987, twenty-one months after the incident. Furthermore, he argues that the in-court identification was unreliable because the pre-trial identification was tainted.

"The standard of review for suppression hearing findings in a matter of pretrial identification cases is whether or not substantial credible evidence supports the trial court's findings that, considering the totality of the circumstances, in-court identification testimony was not impermissibly tainted." *Ellis v. State*, 667 So. 2d 599, 605 (Miss. 1995) (citations omitted). We will reverse the findings of the lower court only where there is an absence of substantial credible evidence supporting it. *Ellis*, 667 So. 2d at 605.

"A lineup or series of photographs in which the accused, when compared with the others, is conspicuously singled out in some manner from the others, either from appearance or statements by an officer, is impermissibly suggestive." *Arteigapiloto v. State*, 496 So. 2d 681, 682 (Miss. 1986). The trial judge stated that the photograph, "did not appear to be suggestive or did it appear to prejudice the defendant. There is nothing in the photograph to indicate that this defendant would be able to be singled out from those people in the photograph." Having examined photos of the lineup, this Court finds that Ross was in no way conspicuously singled out in the lineup. Therefore, we hold that the lineup was not unnecessarily suggestive. Because the pre-trial identification was not impermissibly suggestive, it follows that the in-court identification was not impermissibly tainted.

#### b. Photograph of Appellant

From the Appellant's brief, we can only ascertain that he insists that the court abused its discretion in admitting three photos of Ross into evidence. Going back to the record, we find that the original objection made at trial was that the photographs were not properly authenticated. The judge sustained the objection until the State laid a proper foundation for the photographs. Apparently, Ross had gained some weight from the time of the incident to the time of trial. The State introduced the pictures for identification purposes to show what Ross looked like at the time of the incident.

Rule 901(a) of the Mississippi Rules of Evidence requires sufficient evidence to support a finding that the matter in question is what the proponent claims. M.R.E. 901(a). Whether the evidence presented

satisfies Rule 901 is a matter that is left to the discretion of the trial court. *Stromas v. State*, 618 So. 2d 116, 119 (Miss. 1993). That decision will be upheld unless it can be shown that there was an abuse of discretion. *Stromas*, 618 So. 2d at 119.

On direct examination, K.A. positively identified the pictures of Ross and testified that the pictures accurately depicted Ross at the time of the incident. K.A. testified that she had ample time to observe her attacker and that the pictures of Ross were first presented to her by her father approximately one month after her attack. The trial court found that the pictures were properly authenticated and allowed them to be admitted into evidence. This was well within the discretion of the court. There is no merit to this issue.

## VI. DID THE TRIAL COURT ERR IN FAILING TO DISMISS CASE DUE TO PROSECUTORIAL MISCONDUCT?

Ross alleges that there were several instances of prosecutorial misconduct. Concisely stated, they are alleged to be: 1) the prosecutor spoke with Ross in October 1992 in an attempt to plea bargain with Ross, 2) the prosecutor made side remarks during his examination of Ross, and 3) statements made by the prosecutor during closing argument. Ross argues that due to any one of these instances, the trial court should have granted a mistrial. The test used to determine whether an improper argument by the prosecutor requires reversal is whether the natural and probable effect of the prosecuting attorney's improper argument created unjust prejudice against the accused resulting in a decision influenced by prejudice. *Taylor v. State*, 672 So. 2d 1246, 1270 (Miss. 1996). We find no such prejudicial impact in the case *sub judice*.

### a. Conversation with Ross

In October 1992, while Ross was awaiting trial, the district attorney had a conversation with Ross regarding a plea bargain. Although the accounts of the actual incident and conversation differ, we cannot find anywhere in the record where Ross made a contemporaneous objection to this issue before addressing it for the first time on appeal. Accordingly, this instance of alleged misconduct is waived, and this claim is procedurally barred. *Walker v. State*, 671 So. 2d 581, 614 (Miss. 1995) (citations omitted).

### b. Prosecutor's Side Remarks

Ross claims that remarks made by the prosecutor while examining witness were egregious enough to warrant a reversal of this case.

#### 1) Prosecutor's Remarks Concerning Writing On Back Of Photographs:

Several photographs were introduced during the victim's testimony. The prosecutor remarked that the dates on the back of each photograph indicated the dates of the preliminary hearings, and did not indicate the dates that the photographs were taken. The defense objected on the grounds that the prosecutor was testifying. The judge responded, "Excuse me, gentlemen. Sit." No ruling was ever made on the objection. Ross failed to seek a definitive ruling on the motion. When no definitive ruling is made and no corrective action is requested, the objection is waived. *Gayten*, 595 So. 2d at 413.

## 2) Cross-Examination Of Ross Regarding Medical Records:

On cross-examination, Ross was asked if he had medical records to substantiate when he received the scars on his face. Ross replied that he did not have them with him, but, "if it would please you, I am sure they could be got." To which the prosecutor said, "Mr. Ross, I wish you had got them." The defense objected, and the objection was sustained. The court admonished the prosecutor not to make any comments. Ross made no further requests regarding the statement. "Where an objection is sustained and admonishment is not requested, there is no error." *Marks v. State*, 532 So. 2d 976, 981 (Miss. 1988).

## 3) Prosecutor's Statements Regarding His Own Height:

The victim's identification of Ross involved estimating his height. On cross-examination, the prosecutor stated his own height. The court overruled the defense's objection. We find no prejudice was caused by this statement. *See Ormond v. State*, 599 So. 2d 951, 961 (Miss. 1992).

## 4) Prosecutor's Response In Reference To J.W. Rose's Statement:

On cross-examination, Ross was asked whether the directions that J.W. Rose gave to the victim's father were in fact to his house. At that point, defense counsel asked the court to re-instruct the jury as to the reason why J.W. Rose's statements were admitted into evidence. The court replied that it had already instructed the jury accordingly. Since we find no contemporaneous objection as to this point, this claim is waived and thus, procedurally barred. *Walker*, 671 So. 2d at 614. Even despite the bar, the court was acting within its discretion when it refused to re-instruct the jury as to J.W. Rose's statements when it already had done so previously.

## 5) Reference To J.W. Rose's Suicide:

The defense objected on the grounds of relevance when the prosecutor asked Ross whether J.W. Rose committed suicide. The court overruled the objection. "The relevancy and admissibility of evidence are largely within the discretion of the trial court and reversal may be had only where that discretion had been abused." *Johnson v. State*, 655 So. 2d 37, 42 (Miss. 1995). We find no abuse of discretion here.

### c. Closing Argument

Ross argues that the State made several improper remarks during closing argument. Some remarks were never objected to at trial level. We will only address the comments where an objection was made. *See Davis v. State*, 660 So. 2d 1228, 1255 (Miss. 1995). We begin by stating that counsel has always been given wide latitude in arguing a case on closing arguments. *Davis*, 660 So. 2d at 1245.

#### 1) Statement That K.A. Gave Written Statement To Her Father:

Defense counsel objected when he thought the prosecutor inferred that the victim gave a written statement to her father. The prosecutor responded by saying, " Your honor, if I indicated that, I certainly didn't mean to . . ." The objection was overruled. There was no prejudice here. The test used in determining whether an improper argument by the prosecutor to the jury requires reversal is whether "the natural and probable effect of the improper argument of the prosecuting attorney is to

create an unjust prejudice against the accused as to result in a decision influenced by the prejudice so created." *Ormond v. State*, 599 So. 2d 951, 961 (Miss. 1992). We find no such prejudice here.

2) Reference To Facial Scars During Closing Argument:

The prosecutor referred to the facial scars on Ross. The trial court sustained the defense's objection here; however, no further admonishment was requested. Again, as stated earlier, if an objection is sustained and no further admonishment is requested, there is no error. *Marks*, 532 So. 2d at 981.

3) Reference To Other Pictures During Closing Argument:

During closing argument, the prosecutor mentioned other pictures of Ross' truck that were introduced into evidence. The defense's objection was overruled. The function of trial counsel is to draw conclusions and inferences from evidence on behalf of his client in whatever he deems proper, so long as he does not become abusive and go outside the confines of the record. *Walker*, 671 So. 2d at 619. There is no error here.

4) Remarks That The Jails Are Full:

Finally, the prosecutor remarked that he wished the victim had come forward sooner, but due to the fact that jails are full, many people are released on bond. The court remarked that this was improper. The State continued, and the defense objected. The objection was overruled.

Although this remark may have been improper in the context of the whole record, we are unable to say that this one remark was of such substance as to have deprived Ross of a fair trial. It does not appear from the record that the judgment appealed from resulted in a miscarriage of justice. Trial courts are given wide latitude in determining whether or not the conduct of an attorney during trial is so prejudicial that an objection should be sustained or a new trial granted. *Edmond v. State*, 312 So. 2d 702, 705 (Miss. 1975). There is no merit to this claim.

VII. WHETHER THE TRIAL COURT ERRED IN ITS  
QUESTIONS DIRECTED AT JUROR MARY BUSH

After the State rested, Mary Bush, a member of the jury approached the court and indicated that she had not realized in voir dire, but that she may be acquainted with Ross' ex-wife. After lunch, the court made a few inquiries of Ms. Bush as to whether this fact would influence her decision in the case. She replied that it would not influence her decision. The defense attorney then asked if she had any knowledge of this case because of that relationship to which she answered in the negative. The court then asked if the attorneys were then ready to proceed, and no other objection was made at the time regarding Ms. Bush. Ross now claims that the trial court erred in making any mention that Ross had an ex-wife.

It is well settled that, for preservation of error for review on appeal, there must be a contemporaneous objection at the trial level. *King v. State*, 615 So. 2d 1202, 1205 (Miss. 1993) (citing *Smith v. State*, 530 So. 2d 155, 161-62 (Miss. 1988)). If a timely objection is not brought up at trial, an alleged error is waived. *King*, 615 So. 2d at 1205; *see also Holland v. State*, 587 So. 2d 848, 868 n.18 (Miss. 1991) (an error cannot be complained of if not presented to the trial judge for

decision at trial). Since the alleged error was not properly preserved, we need not address the merits on the issue of whether the trial court should have made any mention of Ross' ex-wife. We conclude that Ross has failed to preserve the point.

### VIII. WHETHER THE TRIAL COURT ERRED IN SENTENCING ROSS

The lower court sentenced Ross to serve fifteen years with five years suspended. The sentence was to run consecutively to any other sentence he was serving at the time. Ross now makes vague claims that his fundamental liberties have been destroyed, and that the trial court erred in imposing a sentence that was to run consecutive to any other sentence. He argues that the lower court should have entered a concurrent sentence.

Section 99-19-21 of the Mississippi Code states in part:

When a person is sentenced to imprisonment on two (2) or more convictions, the imprisonment on the second, or each subsequent conviction shall, in the discretion of the court, commence either at the termination of the imprisonment for the preceding conviction or run concurrently with the preceding conviction.

Miss. Code Ann. § 99-19-21 (Supp. 1995). According to this section, the trial court was acting well within its discretion when it ordered Ross' sentence to be served consecutively. *See Armstead v. State*, 503 So. 2d 281, 285 (Miss. 1987).

Ross claims that he should be given credit for the time he has already served in prison. It goes without saying that when one, by express order, is sentenced to serve consecutive terms, the second, or each subsequent conviction, shall commence at the completion of the term for the preceding conviction. *Milam v. State*, 578 So. 2d 272, 274 (Miss. 1991); *see* Miss. Code Ann. § 99-19-21 (Supp. 1995). This issue is without merit.

### IX. WHETHER THE TRIAL COURT ERRED IN DENYING ROSS'

#### MOTION FOR NEW TRIAL BASED ON

#### INEFFECTIVE ASSISTANCE OF COUNSEL

Ross complains that he received ineffective assistance of counsel from his first three attorneys. "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 (1984). It is a two-pronged test. The defendant must show that his counsel's performance was deficient, and that the deficiency prejudiced the defense of the case. *Strickland*, 466 U.S. at 687; *Washington v. State*, 620 So. 2d 966, 970 (Miss. 1993).

When evaluating counsel's performance, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; in other words, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." *Stringer v. State*, 454 So. 2d 468, 477 (Miss. 1984) (citations omitted). In other words, counsel is presumed to be competent. *Washington v. State*, 620

So. 2d 966, 970 (Miss. 1993). The standard used to determine the second prong of prejudice is " a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." *Foster v. State*, No. 95-DP-00750 SCT, 1996 WL 255476 at \*2 (Miss. May 15, 1996); *Mohr v. State*, 584 So. 2d 426, 430 (Miss. 1991). This indicates a "probability sufficient to undermine the confidence in the outcome." *Foster*, at \*3.

Ross bases his ineffective assistance of counsel claim on the allegations that his first attorney failed to file a motion for speedy trial, never told Ross that he had a conflict until the State disqualified him, and made no attempt to establish an alibi, or investigate the statement made by J.W. Rose. Ross alleges that his second attorney never communicated with him. As to his third attorney, Ross alleges that he failed to adequately investigate the case, filed continuances without Ross' consent, and attempted to plea bargain without Ross' consent. Ross alleges that all three attorneys failed to adequately communicate with him. Based on the record, we do not find that the attorneys' performances were deficient. There is no merit to this issue.

#### X. WHETHER THE TRIAL COURT ERRED ON ITS RULING ON ROSS' DISCOVERY OBJECTION

While cross-examining the victim's father at trial, it was revealed that he made a "statement" to Sammy Pickens, an investigator with the Mississippi Highway Patrol in addition to the statement which had been disclosed in discovery. Defense counsel immediately moved to strike all of the victim's father's testimony and also moved for a continuance stating that he needed time to "find out what's in this statement.". The trial court denied these motions, but allowed counsel to question Pickens outside of the presence of the jury. Pickens testified that nothing was reduced to writing at the meeting, and he did not take an oral statement from the victim's father at that time. It appears that the victim's father met with Pickens, and gave him a picture of Ross with a dog. This picture was introduced into evidence. When asked if he gave everything he had to the defense as he had given to the State, he replied that he did.

It is apparent from the transcript that no written or oral statement was given to Pickens by the victim's father at the time. Furthermore, the picture which was given to Pickens at that time was already introduced into evidence. We do not find any discovery violations and accordingly, find no merit to this issue. *See Watson v. State*, 521 So. 2d 1290, 1296 (Miss. 1988).

#### XI. WHETHER CUMULATIVE ERRORS REQUIRE REVERSAL OF JUDGMENT?

Once again, without citing any authority, Ross makes the argument that in the totality of the circumstances, his due process rights were violated, and thus this case should be reversed. Because we find no reversible error in the trial proceedings, we do not find any cumulative error. *See Walker v. State*, 671 So. 2d 581, 629 (Miss. 1995). This Court has stated many times that a defendant is not entitled to a perfect trial, only a fair trial. *Walker*, 671 So. 2d at 630 (citations omitted). Ross received a fair trial. Therefore, we affirm his conviction and his sentence.

**THE JUDGMENT OF THE ALCORN COUNTY CIRCUIT COURT OF CONVICTION OF BURGLARY OF AN OCCUPIED DWELLING AND SENTENCE OF FIFTEEN (15) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, FIVE (5) YEARS SUPSENDED IS AFFIRMED. THIS SENTENCE TO RUN CONSECUTIVELY TO ANY SENTENCE ROSS IS NOW SERVING. COSTS OF THIS APPEAL ARE TAXED TO ALCORN COUNTY.**

**FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.**