

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-00475 COA**

**MICHAEL HAMILTON A/K/A MICHAEL BROWN
A/K/A MICHAEL RAY HAMILTON A/K/A FUZZY
HAMILTON**

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

DATE OF JUDGMENT:	03/29/95
TRIAL JUDGE:	HON. JOHN H. WHITFIELD
COURT FROM WHICH APPEALED:	HARRISON COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	JAMES L. DAVIS III
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: JEFFREY KLINGFUSS
DISTRICT ATTORNEY:	CONO CARANNA
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	ROBBERY: SENTENCED TO 15 YRS, AS AN HABITUAL OFFENDER, IN THE CUSTODY OF MDOC, SAID SENTENCE WITHOUT PAROLE OR PROBATION; CONTEMPT OF COURT FOR FRIVOLOUS MOTIONS: SENTENCED TO 30 DAYS IN MDOC TO RUN CONSECUTIVELY WITH THE 15 YR SENTENCE WITHOUT HOPE OF PAROLE OR PROBATION
DISPOSITION:	AFFIRMED -11/18/97
MOTION FOR REHEARING FILED:	12/1/97
CERTIORARI FILED:	2/9/98
MANDATE ISSUED:	4/30/98

BEFORE BRIDGES, C.J., HINKEBEIN, AND KING, JJ.

KING, J., FOR THE COURT:

Michael Hamilton, a/k/a Michael Brown a/k/a Michael Ray Hamilton a/k/a Fuzzy Hamilton, was convicted of robbery in the Circuit Court of Harrison County and sentenced as an habitual offender to serve fifteen years, without the possibility of parole, in the custody of the Mississippi Department

of Corrections. In addition, the trial court found Hamilton in direct contempt of court as a result of his having filed a frivolous pleading and sentenced him to an additional thirty-days to run consecutively to the fifteen year sentence. Aggrieved, Hamilton appeals his conviction and sentence as an habitual offender. He raises the following errors:

A. WHETHER THE LOWER COURT ERRED IN ALLOWING INTO EVIDENCE THE IN-PERSON LINEUP OF THE DEFENDANT AT THE HARRISON COUNTY JAIL.

B. WHETHER THE IN-COURT IDENTIFICATION OF THE DEFENDANT BY THE VICTIM SHOULD HAVE BEEN ALLOWED.

C. WHETHER JURY INSTRUCTIONS D-2 AND D-3 SHOULD HAVE BEEN ALLOWED.

D. WHETHER THE DEFENDANT SHOULD HAVE BEEN SENTENCED AS AN HABITUAL OFFENDER.

E. WHETHER THE DEFENDANT'S TRIAL COUNSEL WAS INEFFECTIVE.

We affirm.

FACTS

On the night of April 13, 1993, as Virginia Shanteau of Gulfport opened her kitchen door, a man forced his way into her house. After shoving her into a bedroom closet, the intruder stole several items; included among those items were a watch, a 3 1/2 carat diamond ring, a glass container filled with loose coins, and money from her purse. Believing the intruder to have left her house, Shanteau came out of the closet and called the police. When the police arrived, Shanteau described the intruder as a tall, black male with a white towel or cloth tied about his head.

On April 15, 1993, Beverly Lewis attempted to pawn a 3 1/2 carat diamond ring. Suspicious of Lewis, the pawn broker contacted the police. Suspecting that the ring was the same one reported stolen in the Shanteau robbery, the police arrested Lewis. Lewis gave the police conflicting stories as to how the ring came into her possession. Ultimately, she told the police that Michael Hamilton had given her the ring to pawn. A warrant was issued for Hamilton's arrest on May 6. He was arrested and charged with robbery on May 8. Two days later, Hamilton went before the court for an initial appearance and requested that the court appoint him an attorney. The court appointed Jim Davis of Gulfport as his attorney. Hamilton remained in custody at the Harrison County Jail.

On May 10, 1993, Shanteau viewed a photo lineup, which included a photograph of Michael Hamilton. Shanteau was unable to identify Hamilton as the intruder.

On May 11, 1993, without notifying Hamilton's attorney, officers from the Gulfport Police Department asked Hamilton if he would participate in an in-person lineup before Shanteau. After initiating contact with Hamilton, the officers had him sign a Waiver of *Miranda* Rights Form to indicate that he consented to participate in the lineup. The form contained an addendum that read, "And I give my consent to an in-person lineup and I do not wish to have my attorney present at this

lineup." Shanteau identified Hamilton as the man who forced his way into her house and robbed her.

Hamilton went to trial in March of 1994. Shanteau's identification of Hamilton in the lineup was suppressed, and the court granted him two accomplice jury instructions. The trial ended with a hung jury. Hamilton was tried again in March of 1995. In this trial, the court denied Hamilton's motion to suppress the lineup identification and refused his accomplice instructions. At the end of the trial, the jury convicted Hamilton of robbery, and he was sentenced as an habitual offender, to fifteen years without the possibility of parole.

A.

WHETHER THE TRIAL COURT ERRED IN ALLOWING INTO EVIDENCE THE IN-PERSON LINEUP OF THE DEFENDANT AT THE HARRISON COUNTY JAIL.

B.

WHETHER THE IN-COURT IDENTIFICATION OF THE DEFENDANT BY THE VICTIM SHOULD HAVE BEEN ALLOWED.

An accused's right to counsel is guaranteed under the Sixth Amendment of the United States Constitution and Article 3, Section 26 of the Mississippi Constitution. In Mississippi, an accused's right to counsel attaches after adversarial proceedings have been initiated against him and subsequently conducted lineups must be conducted in the presence of the accused's attorney. *Scott v. State*, 602 So. 2d 830, 832 (Miss. 1992); *Wilson v. State*, 574 So. 2d 1324, 1326 (Miss. 1990); *Magee v. State*, 542 So. 2d 228, 233 (Miss. 1989); *Jimson v. State*, 532 So. 2d 985, 988-989 (Miss. 1988). The Mississippi Supreme Court has followed the United States Supreme Court and the Fifth Circuit Court of Appeals in holding that once an accused asserts his right to counsel at arraignment or a similar proceeding, the police may not initiate interrogation in the absence of his attorney. *Balfour v. State*, 598 So. 2d 731, 742 (Miss. 1992); see *Michigan v. Jackson*, 475 U.S. 625, 635 (1986); see also *Wilcher v. Hargett*, 978 F.2d 872, 876 (5th Cir. 1992). If the police initiate interrogation or contact with the accused where counsel's absence might impede the accused's right to a fair trial, any waiver by the accused for that contact is invalid. *Balfour*, 598 So. 2d at 741 (citing *Michigan v. Jackson*, 475 U.S. at 636). The accused's right to counsel during a pre-trial lineup receives no lesser protections than any other stage of the adversarial proceedings. Because a lineup is a "critical stage," the accused has a right to have counsel present due to the possibility of irreparable prejudice if counsel is not afforded. *Jimson v. State*, 532 So. 2d 985, 989 (Miss. 1988).

In the present case, Hamilton was arraigned on May 10, 1993 and asked the court to appoint counsel, thereby asserting his right to counsel under the Sixth Amendment and Article 3, Section 26 of the Mississippi Constitution. On May 11, Detectives Carvin and Towney of the Gulfport Police Department went to Hamilton's jail cell and asked Hamilton to participate in an in-person lineup. Hamilton did not request to speak with the detectives or to take part in the lineup. The detectives initiated the contact and the lineup in the absence of Hamilton's court appointed counsel, thus violating Hamilton's right to counsel during a critical stage in the adversarial proceeding.

The State contends that the police did not violate Hamilton's right to have counsel present at the

lineup because Hamilton waived this right by signing a waiver of *Miranda* rights prior to the lineup. According to the State and the trial court, Hamilton voluntarily waived his right to counsel and specifically consented to participate in the lineup. In support of this contention, the State points to the addendum on the waiver form: "And I give my consent to an in-person lineup and I do not wish to have my attorney present at this lineup." Because the police initiated communications with him for the purpose of requesting his participation in the post-arraignment lineup after he had already asserted his right to counsel, Hamilton's waiver of counsel was invalid. ***Balfour*, 598 So. 2d at 742.**

We, therefore, hold that Hamilton was denied his Sixth Amendment right to counsel at the lineup. However, the Mississippi Supreme Court has held that under certain circumstances, the violation of an individual's right to counsel at a pre-trial lineup can constitute harmless error. ***Magee v. State*, 542 So. 2d 228, 233 (Miss. 1989); *Jimpson*, 532 So. 2d at 989.** In *Magee*, the witness' identification of the defendant was not based upon the lineup. ***Magee*, 542 So. 2d at 233.** Similarly, in *Jimpson*, the witnesses' identifications of the defendant were based upon their observations at the scene of the crime. ***Jimpson*, 532 So. 2d at 989.** In both cases, the court held that even though the defendant's right to counsel was denied at the lineup, the error was harmless since the record did not indicate that the lineup was impermissibly tainted in the absence of counsel. ***Id.***

We apply the same standard in the present case. While Hamilton correctly contends that he was denied counsel at the lineup, he fails to point to anything in the record that would indicate that the lineup was impermissibly tainted. Therefore, the violation of Hamilton's right to counsel during his lineup was harmless constitutional error. ***Id.*** (citing *Chapman v. California*, 386 U.S. 18, 21 (1967)).

Hamilton's contention that the in-court identification was tainted because of the absence of counsel at the lineup is without merit. Hamilton refers this Court to nothing in the record which would allow us to determine that the subsequent in-court identification by Shanteau was impermissibly tainted by the absence of counsel.

C.

WHETHER JURY INSTRUCTIONS D-2 AND D-3 SHOULD HAVE BEEN ALLOWED.

Beverly Lewis was indicted as an accessory after the fact to the robbery committed by Hamilton. Lewis testified against Hamilton. Hamilton now contends that the trial court erred by not granting instructions D-2 and D-3, which instructed the jury to view Lewis' testimony with caution and suspicion. This state embraces the principle that the granting of a cautionary instruction regarding the testimony of an accomplice witness is within the discretion of the trial court and this Court will not disturb that determination absent an abuse of discretion. ***Wheeler v. State*, 560 So. 2d 171, 173 (Miss. 1990) (citing *Van Buren v. State*, 498 So. 2d 1224, 1229 (Miss. 1986)); *Derden v. State*, 522 So. 2d 752, 754 (Miss.1988); *Holmes v. State*, 481 So. 2d 319, 322 (Miss. 1985).** In *Derden v. State*, the Mississippi Supreme Court held that " the jury is to regard the testimony of co-conspirators with great caution and suspicion." ***Derden*, 522 So. 2d at 754 (citing *Winters v. State*, 449 So. 2d 766, 771 (Miss. 1984)); *Simpson v. State*, 366 So. 2d 1085, 1086 (Miss. 1979); *Thomas v. State*, 340 So.2d 1, 2 (Miss. 1976).** When the trial court denies the defendant a cautionary instruction, we look to whether the trial judge has abused his discretion by determining: (1) whether the witness was

an accomplice, and (2) whether his testimony was without corroboration. *Wheeler*, 560 So. 2d at 173. In the present case, the first element was met. Lewis was indicted as an accessory after the fact. However, the second element was not met. Lewis' testimony was corroborated by Shanteau and presented purely a question of fact to be determined by the jury as to whether or not Hamilton was guilty of the robbery. Shanteau identified Hamilton as the man who forced his way into her house and robbed her of various items including the 3 1/2 carat diamond ring. Lewis testified that she received the same 3 1/2 carat diamond ring from Hamilton. These facts were sufficient to allow the jury to find Hamilton was guilty of the robbery with or without cautionary instructions. We find no merit in this assignment of error.

D.

WHETHER THE DEFENDANT SHOULD HAVE BEEN SENTENCED AS AN HABITUAL OFFENDER.

Hamilton failed to bring this assignment of error to the attention of the trial court and failed to raise this issue in any of his post-trial motions before the trial court; therefore, we decline to address it for the first time on appeal. *Foster v. State*, 639 So. 2d 1263, 1270 (Miss. 1994).

E.

WHETHER THE DEFENDANT'S TRIAL COUNSEL WAS INEFFECTIVE.

Our review of the record indicates that this assignment of error is without merit and it warrants no discussion.

THE JUDGMENT OF THE CIRCUIT COURT OF HARRISON COUNTY OF CONVICTION OF ROBBERY AND SENTENCES OF FIFTEEN YEARS AS A HABITUAL OFFENDER AND A TERM OF THIRTY DAYS TO RUN CONSECUTIVELY FOR CONTEMPT OF COURT FOR FILING FRIVOLOUS MOTIONS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO HARRISON COUNTY.

BRIDGES, C.J., McMILLIN P.J., DIAZ, HERRING, HINKEBEIN, , JJ., CONCUR.

COLEMAN, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY SOUTHWICK, J. THOMAS, P.J., AND PAYNE, J., NOT PARTICIPATING

COLEMAN, J., DISSENTS.

With deference and respect to my colleagues of the majority I dissent because I cannot agree that the denial of Hamilton's Sixth Amendment right to counsel was harmless error beyond a reasonable doubt. The victim of the robbery, Virginia Shanteau, had not known Hamilton before she was robbed. Almost one month after the robbery, Ms. Shanteau was unable to identify Hamilton as her assailant from a photo lineup. The next day, Ms. Shanteau identified Hamilton from an in-person lineup, which the police conducted in the absence of Hamilton's attorney. At Hamilton's first trial, the trial judge suppressed the result of the in-person lineup, and the trial ended in a hung jury.

When the State retried Hamilton one year later, the trial judge reversed his earlier decision to suppress Ms. Shanteau's identification of Hamilton at the in-person lineup; and the jury found him guilty of the robbery of Ms. Shanteau. The majority opinion does not explain why the trial judge reversed his earlier suppression of Ms. Shanteau's identification of Hamilton at the in-person lineup. The second trial resulted in Hamilton's conviction of robbery. Given the hung jury from the first trial and the trial judge's unexplained reversal of his suppression of Ms. Shanteau's identification of Hamilton, I remain unpersuaded that the denial of Hamilton's Sixth Amendment right to counsel, which the majority concedes was error of constitutional proportions, was nevertheless harmless beyond a reasonable doubt.

Had Ms. Shanteau known Hamilton before he robbed her, or had she been able to identify him from the photo-lineup which the police showed her, then such subsequent error may arguably have been harmless. Moreover, I submit that the trial judge's reversal of his suppression of Ms. Shanteau's identification of Hamilton during the second trial, unexplained in the majority opinion, enhances reasonable doubt about whether this error was harmless. Even the trial judge first thought that the error was not harmless. I would reverse and remand for a new trial.

SOUTHWICK, J., JOINS THIS SEPARATE WRITTEN OPINION.