

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 94-KA-00400 COA**

DAVID CLAY

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:	03/21/94
TRIAL JUDGE:	HON. MARCUS D. GORDON
COURT FROM WHICH APPEALED:	NESHOBA COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	EDMUND J. PHILLIPS, JR.
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: PAT S. FLYNN
DISTRICT ATTORNEY:	KEN TURNER
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	MURDER: SENTENCED TO SERVE A TERM OF LIFE IMPRISONMENT IN THE MISSISSIPPI DEPARTMENT OF CORRECTIONS
DISPOSITION:	AFFIRMED - 12/16/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	2/4/98

BEFORE BRIDGES, C.J., COLEMAN, AND SOUTHWICK, JJ.

COLEMAN, J., FOR THE COURT:

A jury in the Neshoba County Circuit Court found David Clay guilty of the murder of Ellen Stewart, and by its judgment, the trial court sentenced him to serve a life sentence with the Mississippi Department of Corrections. In his appeal from this judgment Clay presents three issues for this Court's review and resolution. However, we affirm the trial court's judgment and sentence of Clay to serve a term of life imprisonment with the Mississippi Department of Corrections.

I. FACTS

On Friday night, April 23, 1993, Ellen Stewart, Jamie Horne, Tiffany Bradley, Jeffery Clemons, Melvin Montgomery, and Nicholas Kelly rode in Jamie Horne's 1988 blue Chevrolet Corsica automobile to The Slab, which was a dance club located east of Philadelphia on a county road just off Mississippi State Highway 16 in Neshoba County. That same night, David Clay rode to The Slab with Hosey Campbell and David Thames, whose nickname was "Bones." Although they never married, Clay was the father of Stewart's two young children. Around midnight, Stewart and Melvin Montgomery were talking with each other in the parking lot outside of The Slab when Clay approached Montgomery from behind. Clay and Montgomery began to fight, perhaps because Clay had seen Stewart dancing with Montgomery inside The Slab earlier that evening.

Other revelers at The Slab broke up the fight between Clay and Montgomery. After the fight ended, Jamie Horne took a pistol from Montgomery's possession and removed the clip from the pistol. Horne put the clip in his pocket and then placed the unloaded pistol under the front seat of the Corsica in which he, Stewart, and the others had arrived at The Slab. Horne and six other persons got into the Corsica and left The Slab. The order of seating in the car was the following: Jamie Horne was driving, and Tiffany Bradley was riding on the passenger's side of the front seat. Melvin Montgomery sat behind the driver next to the left rear door; Stewart sat in the middle of the back seat with Kim Viverette on her lap, and Jeffery Burkes sat on the back seat next to the right rear door with Kizzy Herrington on his lap.

The Slab was located on a county road off Highway 16. When Jamie Horne stopped at the stop sign located where the county road entered Highway 16, he and Tiffany Bradley swapped places. Bradley then drove the car west on Highway 16 toward Philadelphia. As Bradley drove toward Philadelphia, a burgundy-colored car approached them from behind at a high rate of speed with its bright lights on. It quickly entered the passing lane and sped past the Corsica.

Bradley continued to drive west on Highway 16 toward Philadelphia when this same burgundy-colored car with its headlights on bright quickly approached from the rear for the second time. This time when the car moved into the passing lane and along side the Corsica, someone hung out of the car window and shot several times at the Corsica. The first shot struck and blew out the left rear tire of the Corsica. Another shot struck the left rear side of the Corsica beneath its back window. At least one other shot shattered the left, rear side window of the Corsica. With the shattering of this window, Ellen Stewart, with Kim Viverette still seated in her lap, slumped over. Tiffany Bradley fought to maintain control of the Corsica after its left rear tire blew out, but eventually she brought the car to a stop on the north shoulder of Highway 16.

Immediately after the Corsica stopped, its driver and all of its passengers except Stewart quickly exited the car with understandable confusion and excitement. Only then did they know that Ellen Stewart had been mortally wounded on the left side of her head by one or more of the bullets which someone had fired from the burgundy-colored automobile as it sped past them. Melvin Montgomery drove Stewart in the Corsica, flat tire and all, to the hospital in Philadelphia, where she was pronounced dead.

Wyatt Waddell, a Philadelphia police officer on patrol in his cruiser, saw Montgomery driving at a high rate of speed, so Waddell followed Montgomery to the hospital emergency room entrance. After

Waddell had watched Montgomery pull Stewart from the back seat of the car, he called on his police radio for back-up to investigate the possibility of foul play. Another Philadelphia police officer, Thomas Thornton, responded to Waddell's summons for assistance, and during his inspection of the Corsica which Horne had driven to the hospital, Thornton found an unloaded .380 black handgun under the front seat of the car. Officer Thornton verified that there was no clip in the weapon and no bullet in its chamber. He smelled the gun when he had opened the chamber and concluded that it had not been fired.

II. TRIAL

The Neshoba County grand jury indicted Clay for "depraved heart" murder pursuant to Section 97-3-19(1)(b) of the Mississippi Code of 1972.⁽¹⁾

Prior to Clay's trial, his counsel, whom he apparently employed, filed a motion for additional discovery and other relief, in which he moved the Court "to order the production" of an extensive list of material.

As its witnesses, the State called Tiffany Bradley Horne, Jamie Horne, and Jeffery Burkes, who were three of the seven occupants of the Corsica in which Ellen Stewart left The Slab, several Philadelphia police officers who had participated in the investigation of Ellen Stewart's death, Dr. Steven T. Hayne, a pathologist who performed a post-mortem examination of Stewart's remains, and Steve Byrd, a forensic scientist who specialized in firearms examination, employed by the Mississippi Crime Laboratory. As his witnesses, Clay called Kim Viverette and Kizzy Herrington, both of whom had been riding in the back seat of the Corsica when Ellen Stewart was killed. Their testimony established the facts of Ms. Stewart's death as we have recited them.

Dr. Steven Hayne, a designated pathologist for the Mississippi State Medical Examiner's office, described the two entrance gunshot wounds located over Ms. Stewart's left temple. One entrance wound was in front of and slightly below the level of the left ear, and the second wound was immediately above the left ear. The wound in front of and slightly below the level of the left ear was caused by a copper jacket from a bullet which Dr. Hayne recovered from outside Ms. Stewart's skullcap. The wound immediately above the left ear was caused by the lead core of a bullet, which penetrated the left temple bone and traversed both the left and right cerebral hemispheres. Dr. Hayne removed the lead slug on the far side of the right part of the brain. Dr. Hayne opined that the wound caused by the lead slug caused Ms. Stewart's death.

Steve Byrd opined that he could not determine from what firearm the lead slug had been fired, but he had test-fired the .308 pistol which the police had recovered from the 1988 Corsica parked in the parking lot of the hospital at Philadelphia. He compared the projectiles fired from the .308 pistol with the copper casing recovered from Ms. Stewart's left temple and determined that the .308 pistol had not fired the copper casing. Without objection, Byrd opined that assuming that the copper casing had separated from the lead slug, the bullet would have been fired from either a .9 millimeter or some type of .38 caliber firearm.

During the course of the trial, the trial judge granted Clay's trial counsel's motion to suppress Clay's confession to members of the Philadelphia Police Department that he had intentionally fired twice into the Corsica from the other car and that as he was pulling his pistol into the car, it hit the door

and accidentally discharged a third time. Nonetheless, the jury found Clay guilty of murder, and the trial judge sentenced him to life imprisonment.

III. REVIEW, ANALYSIS, AND

In his brief, David Clay sets out three issues for this Court's review, analysis, and resolution. We quote them verbatim from his brief:

1. The [trial] [c]ourt erred in denying Counsel for the Appellant the right to cross examine a police witness for the State about another automobile shooting incident involving two of the same persons.

2. The pertinent part of Section 97-3-19(1)(b), Mississippi Code of 1972, "Evincing a depraved heart" is unconstitutionally vague and a denial of due process in violation of the fifth and fourteenth amendments of the United States Constitution.

3. The Appellant was denied effective assistance of counsel due to his counsel's failure to conduct sufficient discovery and failure to object to impermissibly elicited testimony, U.S. Constitution Amendments Six and Fourteen, Mississippi Constitution, Article III, Section XXVI.

A. Issue 1. The [trial] [c]ourt erred in denying Counsel for the Appellant the right to cross examine a police witness for the State about another automobile shooting incident involving two of the same persons.

One of Clay's counsel's trial strategies was to demonstrate that there were at least two other firearms in the Corsica beside the .308 pistol which Jamie Horne took from Melvin Montgomery and placed beneath the front seat on the passenger's side of the car after he had removed the clip from the weapon. He hoped to show that it was possible that Ms. Stewart had been shot with one of those pistols rather than with the pistol which the jury found that Clay had fired from the passing burgundy-colored car. However, he was unable to offer any evidence that there were other firearms inside the Corsica when Ms. Stewart was mortally wounded.

Undaunted by the absence of evidence of other firearms in the Corsica, Clay's counsel attempted to cross-examine Philadelphia Policeman Thomas Thornton about an earlier incident in which Melvin Montgomery and Jeffrey Burkes had purportedly shot at Officers Thornton and Fred Landrum from an automobile. Clay's counsel wanted to show the jury that after Montgomery and Burkes had allegedly shot at these officers, the officers found no firearms in Montgomery and Burkes' car when they searched it. Clay reasons that since Montgomery and Burkes had been able to hide or get rid of the weapons after they had purportedly fired at Officers Thornton and Landrum, Montgomery and Burkes would also have been able to get rid of any other weapons which were inside the Corsica when Ms. Stewart sustained her fatal wounds to the left temple.

After the State had objected to defense counsel's cross-examination of officer Thornton about the earlier incident which involved Montgomery and Landrum, the trial judge retired to his chambers outside the presence of the jury to consider the matter of whether the cross-examination of Officer

Thornton about the earlier shooting incident involving Montgomery and Burkes was admissible. During the State's and Clay's arguments on the propriety of this cross-examination, the trial judge inquired of Clay's counsel of what gun Horne and/or Burkes would have disposed after they realized Ms. Stewart had been seriously wounded. Clay's counsel responded to the trial judge's inquiry, "Okay. We will put him back on, Judge, because there will be other guns placed [in the Corsica] before it's over." When the trial judge reiterated his question about the relevancy of the earlier incident "to a shooting out there on the highway," Clay's counsel replied, "Okay. I'm agreeing with the Court. At this time, I'm premature." The State countered Clay's argument by asserting that "[e]ven if there were other guns, there is no proof any shots were fired from [within the Corsica]." Clay never adduced evidence that there were any guns in the Corsica other than the .308 caliber pistol, which officer Thornton opined had not been fired that night.

In his brief, Clay's appellate counsel explains his position on this issue by writing: "The [c]ourt, on objection by the State, refused to permit [c]ounsel for the [a]ppellant to cross-examine police officer Thomas Thornton about an *unrelated* incident in which two of the persons (Jeffery Burkes and Melvin Montgomery) in the car with the victim were involved in a separate shooting incident in which Melvin Montgomery and Jeffery Burkes 'purportedly shot at Mr. Thornton and other police officers, and after that incident, there were no cartridges, no weapon, or anything else' found in the car." (emphasis added). He continues, "Mississippi Rule of Evidence 611(b) and Mississippi practice in general permit wide-open cross examination subject to the limitations of Rule 611 (a) (MRE)."

Mississippi Rule of Evidence 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." **M.R.E. 401.** Evidence Rule 402 makes it clear that "[e]vidence which is not relevant is not admissible." **M.R.E. 402.** "The relevancy and admissibility of evidence are largely within the discretion of the trial court and reversal may be had only where that discretion has been abused." *Davis v. State*, **684 So. 2d 643, 661 (Miss. 1996)**. "The discretion of the trial judge must be exercised within the boundaries of the Mississippi Rules of Evidence." *Id.*

Rule 611(a) and (b) of the Mississippi Rules of Evidence, cited by Clay in defense of his argument, provides:

(a) Control by Court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of Cross-Examination. Cross-examination shall not be limited to the subject matter of the direct examination and matters affecting the credibility of the witness.

This Court accepts Clay's use of the adjective "unrelated" in his description of the other incident about which he sought to cross-examine Officer Thornton. Because the other incident was unrelated to the events which led to Ms. Stewart's death, and because the record contains no suggestion, much less evidence, that any shots were fired from inside the Corsica in which Ms. Stewart was riding in the middle of the backseat, the other shooting incident involving Montgomery and Burkes had no tendency to make the existence of the fact that there were other firearms inside the Corsica "more

probable or less probable than it would be without the evidence." Moreover, the total absence of any evidence that shots were fired from inside the Corsica rendered the incident involving Montgomery and Burkes irrelevant, or "unrelated," to the issue of whether Clay fired the shot that claimed Ms. Stewart's life.

Mississippi Rule of Evidence 611(a) requires that the court "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . make the interrogation and presentation effective for the ascertainment of truth" **M.R.E. 611(a)**. Clay's counsel's interrogation of Officer Thornton about an unrelated incident involving Montgomery and Burkes would have been ineffective for the ascertainment of the truth of whether there were other firearms inside the Corsica. Moreover, Clay's failure to establish that there were other firearms inside the Corsica, as he advised the trial judge that he anticipated being able to do, rendered the evidence of the other incident inadmissible pursuant to Rule 402 because it was simply irrelevant. Therefore, we conclude that the trial judge did not err pursuant to the Mississippi Rules of Evidence when he denied Clay's counsel the opportunity to cross-examine Officer Thornton about the earlier incident, and we accordingly resolve Clay's first issue against him and affirm the trial court's refusal to allow Clay's counsel to cross-examine Officer Thornton about an incident which even Clay elected to describe as "unrelated" to the events which culminated in Ms. Stewart's death.

B. Issue 2. The pertinent part of Section 97-3-19(1)(b), Mississippi Code of 1972, "Evincing a depraved heart" is unconstitutionally vague and a denial of due process in violation of the fifth and fourteenth amendments of the United States Constitution.

Clay asserts that it is too difficult to distinguish between "depraved heart" murder and manslaughter. He writes that the language "does not give notice to persons whom it attempts to describe that their conduct is murder rather than manslaughter, nor is it sufficiently precise for a jury to make a distinction. The vagueness of the statutory language deprives one accused of 'depraved heart' murder of due process of law; the statute subsection is void on its face."

Whatever merit Clay's second issue may have, the record reflects that Clay's trial counsel failed to present this issue to the trial judge for him to resolve it initially. "Constitutional arguments not asserted at trial are waived." *Fleming v. State*, 604 So. 2d 280, 292 (Miss. 1992). As the Mississippi Supreme Court opined in *Colburn v. State*, 431 So. 2d 1111, 1113-1114 (Miss. 1983):

The constitutionality of section [97-3-19(1)(b)] was never raised in the trial court. Appellant filed no demurrer, motion to quash, or objection, nor was mention made in his motion for a new trial as to the constitutionality of section [97-3-19(1)(b)]. This Court has continuously adhered to the rule that questions will not be decided upon appeal which were not presented to the trial court and that court given an opportunity to rule on them.

The Court continued, "Appellant, by failing to attack the constitutionality of section [97-3-19(1)(b)] by proper motion waived any error in this regard and cannot now seek reversal on this ground in this Court." *Id.* at 1114. Therefore, because Clay did not raise this issue at any time during trial or in any of his post-trial motions, he is procedurally barred from presenting this issue on appeal.

In his reply brief, Clay argues that this Court may consider plain error affecting the substantial rights

of a defendant even when there has been no contemporaneous objection or the issue was not raised at trial. He cites three cases in which the supreme court considered an issue on appeal when there had been no contemporaneous objection at trial because a substantial right of the defendant was affected. However, for the following reason, we cannot consider this issue as a matter of plain error. In *State v. Watkins*, 676 So. 2d 247, 248 (Miss. 1996), the chancellor *sua sponte* found that a portion of Section 41-21-77 of Mississippi Code (Rev. 1993), which provided that no person should be admitted to the State Hospital until the director determined that facilities and services were available, was unconstitutional. In reversing and rendering the chancery court judgment which declared that part of the statute was unconstitutional, the Mississippi Supreme Court explained:

"The rule we follow is that a statute is presumed to be constitutional." The party challenging the constitutionality of a statute must prove his case beyond all reasonable doubt before a court has authority to void a statute in whole or in part.

Id. at 249-50 (quoting *Jones v. Harris*, 460 So. 2d 120, 122). The presumption of the constitutionality of Section 97-3-19(1)(b) prohibits our treating this issue as a matter of plain error. Therefore, because Clay did not raise the issue of the constitutionality of Section 97-3-19(1)(b) before the trial judge for his initial determination, we hold that this issue is procedurally barred, and we resolve it against Clay.

C. Issue 3. The Appellant was denied effective assistance of counsel due to his counsel's failure to conduct sufficient discovery and failure to object to impermissibly elicited testimony, U.S. Constitution Amendments Six and Fourteen, Mississippi Constitution, Article III, Section XXVI.

1. The law in general

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." In *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963), the United States Supreme Court held that the previously quoted portion of the Sixth Amendment is made obligatory on the states by the Fourteenth Amendment and that an indigent defendant in a criminal prosecution in a state court has the right to have counsel appointed for him. In *McMann v. Richardson*, 397 U.S. 759, 771, n.14 (1970), the United States Supreme Court recognized that "the right to counsel is the right to the effective assistance of counsel."

It is appropriate to note that Clay's trial counsel and appellate counsel are different lawyers. From the record it appears that Clay both employed his trial counsel and initially appealed from the judgment of the trial court not as a pauper. For instance the clerk's papers contain receipts which the circuit clerk delivered to Clay's trial counsel for his payment in full of the costs of the appeal, and the clerk's papers contain neither an affidavit of poverty executed by Clay or an order allowing Clay to appeal *in forma pauperis*. For reasons not relevant to the understanding of the issues which Clay raises in this appeal, it became necessary for the trial court to appoint a lawyer other than his trial counsel to represent Clay in this appeal after Clay's trial counsel had perfected Clay's appeal.

2. Clay's allegations of ineffectual representation

Clay's appellate counsel charges trial counsel with ineffective assistance to his client for the following reasons: (1) trial counsel's failure to depose witnesses prior to trial required his trial counsel to use cross-examination of the State's witnesses for discovery purposes; (2) trial counsel's failure to object to Dr. Hayne's testimony about the copper casing which he removed from Ms. Stewart's left temple; and (3) trial counsel's always allowing the prosecutor to lead the State's witnesses without objection and without asking the trial court to admonish the prosecution not to lead the witnesses. However, in his brief for appellant, Clay's appellate counsel cites only generally the seminal case of *Strickland v. Washington*, 466 U.S. 668 (1984) and one Mississippi Supreme Court case, *Barnes v. State*, 577 So. 2d 840 (Miss. 1991), to support his position on this issue. He concludes his argument on his third issue as follows:

The effect of defense counsel's failure to object to the ballistics testimony of Dr. Haynes damaged the Appellant's case and the cumulative effect of his use of cross-examination to conduct discovery and of his constant failure to object to leading questions over the entire course of the trial was both deficient and prejudicial.

Clay does not suggest how these supposed deficiencies resulted in his conviction, nor does he show how the jury's verdict would likely have been different without them. Clay does complain in his reply brief that after his trial counsel agreed with the trial judge's refusal to allow him to cross-examine Officer Thornton about the "unrelated" shooting incident, which we discussed earlier, his trial counsel failed to attempt later to introduce this evidence as he had indicated to the trial judge that he would do. However, Clay does not suggest to this Court from what source his trial counsel could have produced the evidence that there were indeed other guns in the Corsica.

3. Standard of review

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court established the standard by which appointed counsel's representation of an indigent defendant amounted to effective assistance. The Supreme Court opined: "The benchmark for judging any claim of effectiveness 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." *Id.* at 686. The Supreme Court established a two-pronged test by which to determine whether this undermining of the proper functioning of the adversarial process had occurred. The Court defined these two prongs as follows:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687. However, the Supreme Court offered this caveat about the application of these two prongs:

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. 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. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

***Id.* at 689.**

In *Handley v. State*, 574 So. 2d 671, 683 (Miss. 1990), the Mississippi Supreme Court opined the following about its interpretation and application of these two prongs to an appellant's claim of ineffectual representation. With respect to claims of ineffective assistance of counsel, the Mississippi Supreme Court has stated:

Under the first prong, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." . . . In short, defense counsel is presumed competent.

Under the second prong, even if counsel's conduct is "professionally unreasonable," the judgment stands "if the error had no effect on the judgment." . . . Consequently, the movant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." . . . There is no constitutional right then to errorless counsel

(quoting *Cabello v. State*, 524 So. 2d 313, 315 (Miss. 1988)).

With the foregoing standards of review for Clay's third issue in mind, we again note that Clay has not demonstrated the effect of what he believes his counsel's unprofessional errors had on the outcome of this case, other than to allege that his counsel's conduct was both "deficient and prejudicial." In other words, but for Clay's trial counsel's deficiencies of which he now complains, the jury would most likely would have acquitted Clay. However, in earlier cases the Mississippi Supreme Court has addressed some of the deficiencies about which Clay complains.

4. Clay's specific complaints

a. Failure to conduct a pre-trial investigation

The Mississippi Supreme Court has explained that an allegation of failure to conduct pre-trial investigation may be insufficient to establish ineffective assistance of counsel. In *Cole v. State*, 666 So. 2d 767, 776 (Miss. 1995), the Court opined:

A defendant who alleges that trial counsel's failure to investigate constituted ineffectiveness must also state with particularity what the investigation would have revealed and specify how it would have altered the outcome of trial, or "how such additional investigation would have significantly aided his cause at trial."

This Court rejects Clay's claim that his trial counsel's failure to investigate compelled him to wait until the trial itself to conduct discovery by cross-examination of the State's witnesses. While Clay has included a verbatim quotation of the testimony of one witness from several pages of the record in an attempt to illustrate his claim, this Court finds the cross-examination to have been thorough and knowledgeable. Clay's trial counsel "grilled" the State's witness about her recollection of the details of the events which culminated in Ms. Stewart's death, and such grilling could hardly have occurred unless his trial counsel was already familiar with the evidence in this case. We have noted that long before trial, Clay's trial counsel filed a motion of discovery, which consisted of several pages. This Court holds that Clay's failure to allege "with particularity what the investigation would have revealed and [to] specify how it would have altered the outcome of trial" resolves this aspect of his third issue against him.

b. Failure to object to Dr. Hayne's testimony about the copper casing

During the State's direct examination of Dr. Steven Hayne, the pathologist who performed the post mortem examination of Ms. Stewart's remains, Dr. Hayne testified that he had removed the copper casing from one of the wounds to Ms. Stewart's left temple, which was then admitted into evidence as an exhibit for the State. Without objection from Clay's counsel and in response to the prosecutor's question, Dr. Hayne opined that the purpose of the copper casing was to provide stability and penetrating power. He further opined that because the two entry wounds were somewhat irregular, "there was considerable yaw and tumbling to the bullets as they struck the skin surface," which indicated that "they had gone through an intermediate target and lost stability before they struck [Ms. Stewart]."

More than one of the occupants of the Corsica testified that one of the bullets which was fired from the passing burgundy-colored car struck and shattered the left, rear passenger's window of the Corsica and that Ms. Stewart was riding in the middle of the back seat when the window shattered. Thus, this Court understands that Dr. Hayne's opinion that the bullet "had gone through an intermediate target," i.e., the left rear-passenger's window, contradicted one of Clay's trial strategies, which was to show that Ms. Stewart was killed by a bullet from a firearm which had been fired from inside the Corsica, rather than from the burgundy-colored car which passed the Corsica. Nevertheless, Clay has not informed this Court of the source of the evidence that Ms. Stewart was mortally wounded in her left temple by a projectile fired from a firearm inside the Corsica.

The Mississippi Supreme Court has declined to brand the representation of a criminal defendant ineffectual for the sole reason that he failed to object to evidence that was otherwise inadmissible. *See Knight v. State*, 577 So. 2d 392, 394 (Miss. 1991) (rejecting appellant's claim that his counsel was ineffectual because he failed to object to State's examination of certain witnesses); *Hutchinson v. State*, 391 So. 2d 637, 639 (Miss. 1981) (denying appellant's claim that his trial counsel was ineffectual because he failed to object to inadmissible evidence). This Court similarly declines to hold that Clay's trial counsel was ineffectual because he failed to object to Dr. Hayne's opinion that the

bullet which claim Ms. Stewart's life passed through "an intermediate target."

c. Allowing the prosecutor to lead the State's witnesses without objection

Clay does not suggest that had the State asked fewer leading questions, the outcome of his trial might have been different. Clay concedes that "[f]or reasons both tactical and practical, objections to leading questions are often foregone in the conduct of cases." In *Jones v. State*, 606 So. 2d 1051, 1059 (Miss. 1992), the Mississippi Supreme Court held: "A trial court, in its discretion, may allow leading questions, and unless there has been an abuse of discretion to the prejudice of a complaining party, it is not reversible error." In *Jackson v. State*, 614 So. 2d 965, 971 (Miss. 1993), the appellant charged that his trial counsel had rendered ineffective assistance because he had failed to object to leading questions which the prosecutor had asked. The supreme court rejected his argument on this issue by quoting the following from *Irving v. State*, 441 So. 2d 846, 856 (Miss. 1993):

As to the leading questions, the same testimony could have been elicited by simple rephrasing of the questions. Therefore, it cannot be said that Irving suffered any actual or substantial disadvantage because of the failure to object.

Because Clay has not suggested that the outcome of his trial would have been different had the State asked fewer leading questions or had his trial counsel objected more often to such leading questions, this Court finds that the quotation from *Irving* resolves this facet of Clay's third issue against him. In the absence of Clay's showing to the contrary, "the same testimony could have been elicited by simple rephrasing of the questions."

5. Summary of Clay's third issue that his trial counsel was ineffectual

In a general way, a defense counsel who succeeds in suppressing his client's confession that the client intentionally fired twice and accidentally fired once into the car in which his victim was riding can hardly be described as ineffectual. In related circumstances with which the Mississippi Supreme Court dealt in other cases, it held that defense counsel had not been ineffectual contrary to the appellants' assertions, to which cases we have referred in this opinion. Even if Clay's trial counsel's performance had been deficient, or ineffectual, as Clay maintains generally, Clay's failure to suggest the manner in which the deficiency affected the outcome of his trial adversely to him does not satisfy the second prong of the *Strickland* test. Therefore, this Court resolves Clay's third issue adversely to him.

IV. SUMMARY

The trial judge must determine the relevance of evidence to the issues of an accused's guilt of the crime for which he stands trial within the parameters of the Mississippi Rules of Evidence. Clay described the earlier shooting incident which involved Melvin Montgomery and Jeffery Burkes as "unrelated" to the incident in which Ms. Stewart was killed. Because that unrelated shooting incident had no bearing on the issue of Clay's guilt or innocence of the murder of Ellen Stewart, the trial judge did not err when he refused to allow Clay's trial counsel to cross-examine Officer Thomas Thornton about it. That this other incident was unrelated to the issue of Clay's guilt or innocence is re-enforced

by Clay's trial counsel's failure to offer any evidence that other firearms might have been in the Corsica that dreadful night.

We need not resolve the issue of whether the "depraved heart" portion of Section 97-3-19 offends the Fifth and Fourteenth Amendments to the United States Constitution as Clay urges us to do in his second issue because he did not first present the issue to the trial judge for his adjudication, and we dare not treat the issue as a matter of plain error because this statute is presumed to be constitutional. Clay's complaints about his trial counsel's ineffectual representation have been considered and rejected by the Mississippi Supreme Court in other cases, and because Clay has failed to explain why the outcome of his trial might have been different but for those supposed deficiencies, we hold that Clay has failed to overcome the presumption that his trial counsel's representation was competent and resolve Clay's third issue against him. The judgment of Clay's guilt of the murder of Ellen Stewart and its sentenced of Clay to life imprisonment with the Mississippi Department of Corrections is affirmed. Because we have determined from our review of the record that Clay did not appeal *in forma pauperis*, the costs of this appeal are assessed to him.

THE NESHOPA COUNTY CIRCUIT COURT'S JUDGMENT OF THE APPELLANT'S GUILT OF THE CRIME OF MURDER AND ITS SENTENCE TO SERVE A TERM OF LIFE WITH THE MISSISSIPPI DEPARTMENT OF CORRECTIONS ARE AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.

1. This section defines "depraved heart murder" as follows:

(1) The killing of a human being without the authority of law by any means or in any manner shall be murder in the following cases:

. . . .

(b) When done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual

Miss. Code Ann. 97-3-19(1)(b) (Rev. 1994).