IN THE COURT OF APPEALS
STATE OF GEORGIA

MOERISE WILLIAMS,	:	
Appellant,	:	Appeal No.: A15A1980
v.	:	
	:	
THE STATE OF GEORGIA,	:	
Appellee.	:	
_____	:	

APPELLANTS BREIF AND ENUMERATION OF ERRORS
PART ONE

Proceedings Below

Appellant Moerise Williams was indicted and charged in Fulton County with four felony counts. The first is the offense of aggravated assault with a deadly weapon, in violation of O.C.G.A. § 16-5-21 for the act of shooting Dantavious Walker in the forearm with a firearm. (TR. 10). The second count is aggravated assault, in violation of O.C.G.A. §16-5-21 for the act of shooting toward and in the direction of Gregory Hunt with a firearm. (TR. 11). The third count is aggravated assault, in violation of O.C.G.A. §16-5-21 for the act of shooting toward and in the direction of Willie Wilson with a firearm. (TR. 11). The fourth count is possession of a firearm during the commission of a felony in violation of O.C.G.A §16-11-106 for having on or within arms reach a firearm during the commission of a felony against and involving the person of another, to wit, aggravated assault against Dontavious Walker, Gregory Hunt, and Willie Wilson. (TR. 12).

Appellant's case was severed from a third co-defendant and he was ultimately tried together with Marco Moses in May 2011 in the Fulton County Superior. At trial he was convicted. Within the time prescribed by law, a motion for new trial was filed on June 28, 2011 (R-59). The trial court permitted counsel to file a supplemental motion for new trial on March 30, 2012 (R-63). On October 09, 2013 the trial court entered an order denying Appellant's motion for new trial and a timely Notice of appeal was filed on October 25, 2013.

Statement of the facts

The charges against Appellant arise from a shooting that occurred on September 26, 2007. The State's theory at trial was that three men, Prentice McNeil, Marco Moses, and Moerise Williams approached three persons in a van and shot at them. The three victims were Gregory Hunt, Dontavious Walker and Willie Wilson. Dontavious Walker was shot seven times, but survived. The two other victims were not struck. All three victims testified at trial. The State's case rested on the initial identification statements of the alleged victims that they later recanted at trial.

According the testimony of Detective Cooper, on September 26, 2007 Dontavious Walker while in the hospital seeking treatment for his gunshot wounds identified three individuals as the suspects responsible for shooting him as Prentice McNeil, Marco Moses, and Moerise Williams. (Tr. 1091-1095). At trial Dantavious Walker failed to identify the Appellant as one of the individuals responsible for

shooting him on September 26, 2007. (Tr. 444). Walker identified Prentice McNeil at trial as one of the shooters responsible for shooting him in the arm. (Tr. 614). At trial Gregory Hunt was unable to identify the individuals responsible for shooting at himself and Walker. (Tr. 641). At the time of the shooting he was concerned with seeking cover. (Tr. 641). At trial Willie Wilson testified that he was not inside the vehicle when shots were fired but he was outside the vehicle nearby talking to girls, once shots broke out, Wilson fled the scene. (Tr. 891- 895).

The state claimed that the cause of the recanted statements by witnesses was due to a cover up where the co-defendants tried to pay witnesses off and threatened them to prevent them from coming to court. (TR. 380). However at trial no witnesses, at anytime, testified that the appellant or any of the other co-defendants threated anybody or even discussed a payoff to any witnesses.

PART TWO

ENUMERATION OF ERRORS

I. IMPROPER QUESTIONING ABOUT SUPPOSED THREATS DIRECTED AT WITNESSES AND INEFFECTIVE ASSITANCE OF COUNSEL IN FAILING TO OBJECT TO THIS LINE OF QUESTIONS.

II. TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO THREAT EVIDENCE THAT IS THE SUBJECT OF ENUMERATION “1”.

III. THE THREAT EVIDENCE WAS COUPLED WITH VEILED ALLEGATIONS THAT THE LAWYERS ENGAGED IN A COVER UP.

IV. THE TRIAL COUNSEL'S FAILURE TO OBJECT TO THE IMPROPER STATEMENTS OF THE PROSECUTOR THAT SUGGESTED THAT DEFENSE ATTORNEYS WERE ENGAGED IN A COVER UP AMOUNTED TO INEFFECTIVE ASSISTANCE OF COUNSEL.

V. DURING THE EXAMINATION OF DETECTIVE COOPER, WHO INTERVIEWED DANTAVIOUS WALKER, THE STATE WAS PERMITTED TO ASK THE DETECTIVE A SERIES OF QUESTIONS ABOUT WHAT WALKER SAID, EVEN THOUGH THESE SPECIFIC QUESTIONS WERE NOT POSED TO WALKER AND THEREFORE, THIS WAS NOT PROPER IMPEACHMENT BY A PRIOR INCONSITENT STATEMENT AND VIOLATED DEFENDANTS CONFRONTATION CLAUSE RIGHTS.

VI. THE PROSECUTOR DELIVERED AN IMPROPER CLOSING ARGUMENT THAT AMOUNTED TO PLAIN ERROR;

VII. TRIAL COUNSELS FAILURE TO OBJECT TO THAT CLOSING ARGUMENT AMOUNTED TO INEFFECTIVE ASSITANCE OF COUNSEL.

VIII. THE TRIAL COURT SHOULD HAVE DIRECTED A VERDICT OF NOT GUILTY ON THE COUNT 3 INVOLVING WILLIE WILSON WHO WAS NOT IN THE CAR AND WHO WAS NOT SHOT AT.

IX. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE LENGTHY COLLOQUY BETWEEN CO-DEFENDANT'S COUNSEL AND THE LEAD DETECTIVE REGARDING APPELLANT'S POST-ARREST SILENCE

PART THREE

MEMORANDOUM OF LAW

I&II. TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO THREAT EVIDENCE THAT IS THE SUBJECT OF ENUMERATION "1".

Of course, competent trial counsel must object to inadmissible evidence. The failure to object to inadmissible evidence – particularly inadmissible evidence that is highly inflammatory and prejudicial – amounts to a denial of the defendant's Sixth Amendment right to effective assistance of counsel. *Owens v. State*, 371 Ga. App. 821, 733 S.E.2d 16 (2012); *Word v. State*, 308 Ga. App. 639, 708 S.E.2d 623 (2011). The failure to object to the threat evidence outlined in the preceding Enumeration of Error, was ineffective assistance of counsel. There was no strategic reason for failing to

object to this evidence at trial. The failure to object to this evidence resulted in the evidence being introduced without objection, thus relegating the standard of review on appeal to the plain error standard. Had a proper objection been made to the mountain of improper threat evidence, reversible error would have been the inevitable result. Having failed to object, trial counsel failed to provide competent representation.

III. THE THREAT EVIDENCE WAS COUPLED WITH VEILED ALLEGATIONS THAT THE LAWYERS ENGAED IN A COVER UP.

During opening statement, the state began its assault on the defense counsel. "There's one more thing that this case is about. Because, when their mission failed, a team of assassins the facts and evidence will show had to cover it up, and they did their best to cover it up in more than one way. One way was very sophisticated. And they hired lawyers, which they're entitled to do under our constitution." (Tr. 379).

The allegation that hiring lawyers was one "sophisticated way" to cover up their crime was a violation of the defendant's Sixth Amendment right to counsel. Hiring counsel is neither sophisticated, nor a "cover-up". The state abused its power in making this argument and trial counsel was ineffective in failing to object. The prosecution was belittling the rights secured by the constitution, equating, in effect, the invocation of that right as part of the cover-up. See *Miller v. State*, 228 Ga. App,

754, 492 S.E.2d 734 (1997); *Geoffrion v. State*, 224 Ga. App. 775, 482 S.E.2d 450 (1997).

IV. THE TRIAL COUNSELS FAILURE TO OBJECT TO THE IMPROPER STATEMENTS OF THE PROSECUTOR THAT SUGGESTED THAT DEFENSE ATTORNEYS WERE ENGAGED IN A COVER UP AMOUNTED TO INEFFECTIVE ASSISTANCE OF COUNSEL.

Trial counsel provide ineffective assistance of counsel by failing to object to the prosecutor's statements that the lawyers who represented the defendants were engaged in a cover-up. As argued above, the improper impugning of the defense counsel's role in the judicial process effectively deprives the defendant of his Sixth Amendment right to counsel. Trial counsel was obligated to object to improper argument by the prosecution, the failure to do so was ineffective assistance of counsel. See *Scott v. State*, 305 Ga. App. 710 (2010) (failure to object to improper argument amounts to ineffective assistance of counsel).

V. DURING THE EXAMINATION OF DETECTIVE COOPER, WHO INTERVIEWED DANTAVIOUS WALKER, THE STATE WAS PERMITTED TO ASK THE DETECTIVE A SERIES OF QUESTIONS ABOUT WHAT WALKER SAID, EVEN THOUGH THESE SPECIFIC QUESTIONS WERE NOT POSED TO WALKER AND THEREFORE,

THIS WAS NOT PROPER IMPEACHMENT BY A PRIOR INCONSITENT STATEMENT AND VIOLATED DEFENDANTS CONFRONTATION CLAUSE RIGHTS.

The law governing the admissibility of prior inconsistent statements is clear. In order to introduce such testimony from an extrinsic source (i.e., not simply through the cross-examination of the witness whose prior statement is being introduced), the state must *first* confront the witness with the specific prior statement and ask whether in fact he made that statement and give the witness an opportunity to explain any inconsistency. OCGA § 24-9-83 (the prior statement must either be shown to the witness, or read to the witness). *See also* Bischoffv. Payne, 239 Ga. App. 824, 522 S.E.2d 257 (1999) (witness who simply forgets prior statement may not be impeached with prior statement, but may have recollection refreshed with prior statement). This is not a vague requirement that simply requires a generalized reference to the prior statement during the questioning of the witness. Rather, it requires a line-by-line examination of the witness regarding any particular statement that was previously made that the party will later seek to introduce though an extrinsic source. *Hall v. Lewis*, 286 Ga. 767,692 S.E.2d 580, 591 (2010); *Daniely v. State*, 309 Ga. App. 123, 709 S.E.2d 274 (2011); *Gober v. State*, 300 Ga. App. 202, 684 S.E.2d 675 (2009).

In other words, if a witness on the stand testifies to Facts A, B and C, but previously the witness made a statement that the Facts were not-A, not-B, and not-C, before the party may introduce the previous statement, the witness must be confronted with all three of the prior statements (even if they are contained in one document or one interview) and given an opportunity to explain any inconsistency. Moreover, if the witness's prior statement contains Facts X, Y, and Z, those statements may not be introduced by some other witness who heard the statement. In short, there must be symmetry between what the witness is asked initially on the stand, what he is confronted with as the predicate for the impeachment, and what is later introduced. Any deviation from this protocol allows for the introduction of hearsay and also implicates the Confrontation Clause. If the party seeking to introduce the prior statement of the witness fails to confront the witness with the prior statement, and afford him an opportunity to explain, the prior statement may not be introduced either through the testimony of another witness, or in writing. *Smith v. State,* 171 Ga. App. 758, 321 S.E.2d 213 (1984).

This is precisely what occurred with Dantavious Walker. During his direct examination, he was asked certain questions about what happened the night of the shooting. He denied having seen any of his assailants other than Prentice McNeil (Tr. 444). He was confronted by the prosecutor with the fact that he had previously claimed that Appellant was in the car and when confronted with that

simple statement he acknowledged having previously made the statement and explained why *(Id.;* Tr. 537; 560 - 561). He also stated that he did not remember what he told the Detective about Appellant (Tr.445).

Then the state was permitted to question the police officer about what Walker told him and later was permitted to actually play a tape recording of Walker's prior statement that contained numerous facts that were not the subject of his direct examination, or the impeachment. The defense objected (Tr. 1191 – 1192; *see also* Tr. 1169; 1173, 1177 - 1187) and to that extent, the objection as to hearsay is properly preserved and requires a reversal of the conviction in this case. Indeed, this was not tangential evidence. The statement of Dantavious Walker was the key evidence on which the state relied in securing a conviction of Appellant.

The inadmissibility of this evidence, moreover, was not simply a hearsay problem. The statement that was played to the jury was a statement of Walker to the police, and thus qualified as "testimonial" under the *Crawford v. Washington* standard. Therefore, playing this taped statement to the jury was a quintessential violation of Moses' right to confront the witnesses against him, in violation of the Sixth Amendment to the Constitution and Georgia Constitution (Art. I, § 1, 'if XIV).

VI. THE PROSECUTOR DELIVERED AN IMPROPER CLOSING ARGUMENT THAT AMOUNTED TO PLAIN ERROR

Throughout the closing argument, the prosecutors violated various principles, including the prohibition on expressing their personal opinions (Tr. 1348: reference to the prosecutor's experience with gang cases and a reference that he is a "gang prosecutor" even though this was a prohibited topic at trial, pursuant to the Motion in Limine); (Tr. 1361: expressing his frustration that witnesses talked to him in the hall and then changed his testimony on the witness stand); and the prohibition on attacking the right to counsel guaranteed by the Sixth Amendment (Tr. 1344 – 1346).

Moreover, the prosecutors repeatedly urged the jury to return a verdict based on the illusory "threat evidence" that was not proven at trial to have emanated from the defendants on trial, and to assume that the witnesses changed their testimony based on a threat that was supposedly (but never proven) to have been authored by the defendants (Tr. 1338). Then, to aggravate the error, the prosecutors pointed out to the audience and stated unequivocally that the witnesses were scared to tell the truth because of people who were in the audience (Tr. 1347), though there was no evidence to support this allegation or any evidence that the defendants were responsible for the behavior of members of the audience.

Repeatedly, the prosecutor challenged the behavior of defense counsel, suggesting in no uncertain terms, that the lawyers were engaged in "sharp"

lawyering, as opposed to the prosecutors, whose motives were pure and designed only to achieve justice *(e.g.*, Tr. 1344). Finally, the prosecutors argued that the jurors themselves had "rolled their eyes" (Tr. 1337) and "laughed" at the testimony of witnesses (Tr. 1355), as if to suggest that this was further evidence of the lack of credibility of the witnesses.

All of these arguments were improper and served to deny the defendants their guarantee of a fair trial. Their Sixth Amendment right to counsel and their right to Due Process were violated by these arguments. *See generally* Walker v. State, 281 Ga. 521, 640 S.E.2d 274 (2007); *Kell v. State*, 280 Ga. 669, 631 S.E.2d 679 (2006) (improper argument relating to threat evidence that was not shown to have been prompted by the defendant required reversal of the conviction); *Booker v. State*, 242 Ga. App. 80, 528 S.E.2d 849 (2000); *B1yant v. State*, 164 Ga. App.543, 298 S.E.2d 272 (1982); *Byers v. State*, 276 Ga. App. 295, 623 S.E.2d 157 (2005); *Mathis v. State*, 276 Ga. App. 587, 623 S.E.2d 674 (2005); *Miller v. State*, 228 Ga. App. 754, 492 S.E.2d 734 (1997) (improper to make disparaging remarks about defense counsel); *Geoffrion v. State*, 224 Ga. App. 775, 482 s.E.2d 450 (1997) (improper to impugn character of defense counsel during closing argument, or to suggest that defense counsel's job is not to seek justice); *United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010) (improper argument to bolster prosecutor's stature by reference to his military service); *United States v. Clark*,

535 F.3d 571 (7th Cir. 2008) (improper denigration of right to counsel); *Hodge v. Hurly*, 426 F.3d 368 (6th Cir. 2005); *United States v. Holmes*, 413 F.3d 770 (8th Cir. 2005) (improper to argue that defense counsel were colluding with the defendants to deceive the jury); *Boyle v. Million*, 201 F.3d 711 (6th Cir. 2003) (improper to argue that defense lawyers acted improperly in nit-picking every issue).

VII. TRIAL COUNSELS FAILURE TO OBJECT TO THAT CLOSING ARGUMENT AMOUNTED TO INEFFECTIVE ASSITANCE OF COUNSEL

Defense counsel failed to object to any of these improper arguments, thus providing ineffective assistance of counsel in violation of the Sixth Amendment. See *Scott v. State*, 305 Ga. App. 710, 700 S.E.2d 694 (2010).

VIII. THE TRIAL COURT SHOULD HAVE DIRECTED A VERDICT OF NOT GUILTY AS TO COUNT III INVOLVING WILLIE WILSON WHO WAS NOT IN THE CAR AND WHO WAS NOT SHOT AT.

In Count III of the indictment the appellant was charged with aggravated assault in violation of O.C.G.A. §16-5-21 for the act of shooting toward and in the direction of Willie Wilson with a firearm. (Tr. 11). Count III alleges as follows:

> [and the grand jurors aforesaid, in the name and behalf of the citizens of Georgia, do charge and accuse Marco Burrell Moses and Moerise Williams with the offense of aggravated assault, in violation O.C.G.A. Section, 16-5-21, for the said accused, in the County of Fulton and State of Georgia on the 26th day of September, 2007, did unlawfully commit an assault upon a person of Willie Wilson by shooting at, towards and in the direction of

> Willie Wilson by shooting at, toward and in the direction of Willie Wilson with a firearm, the same being a deadly weapon] (Tr.11).

The alleged victim Willie Wilson testified at trial. (Tr. 876-1011). Wilson testified that he was standing outside of the vehicle talking to females at the time of the shooting. (Tr. 891). The State later asks Wilson where he was when the van in which the persons responsible for his shooting pulled up (Tr. 892). Wilson's response was "I wasn't that far. Like if somebody--- if it's two cars, one in front and one in--I wasn't that far." (Tr. 892). There was no testimony as to how far he was in distance. The State failed to establish the proximity of Willie Wilson to the car that was shot up. In order to support an essential element of Count III referring to the appellant shooting at or in the direction of Willie Wilson the State has to present evidence of the actual location of Wilson at the time the shooting took place. There was no claim that any person ever pointed a weapon at him or that he was the object of an assault. The fact that he fled (or that he was previously in the car) or that he was associated with other alleged targets is not sufficient to sustain a verdict of aggravated assault. Wilson never testified at trial that the appellant fired gun shots at or in his direction. In a criminal prosecution, the State has the burden of proving every essential element of the offenses charged. *Cooper v. State*, 20 Ga. App. 730, 59 S.E. 20 (1907).

At minimum, the State was obligated to prove that a gun was pointed at Wilson, that a shot was fired at him or that he was otherwise the object of the aggravated assault. Having presented no such evidence, the trial court erred in denying the appellants motion for a directed verdict on Count III of the Indictment. The State introduced no testimony and no other evidence, under oath, at trial in support of each and every element of aggravated assault as set forth in Count III of the Indictment.

IX. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE LENGTHY COLLOQUY BETWEEN CO-DEFENDANT'S COUNSEL AND THE LEAD DETECTIVE REGARDING APPELLANT'S POST-ARREST SILENCE

It is fundamental that "the fact that a defendant exercised the right to remain silent may not be used against the defendant at trial." (Citation omitted.) *Taylor v. State*, 272 Ga. 559, 561(2)(d) (2000). Therefore, Georgia law prohibits the State from commenting on a criminal defendant's pre-arrest or post-arrest silence or failure to come forward after a crime, even when the defendant takes the stand in his own defense. *Reynolds v. State*, 285 Ga. 70, 71, 673 S.E.2d 854 (2009); *Harrelson v. State*, 312 Ga. App. 710, 716(2), 719 S.E.2d 569 (2011); *Franks v. State*, 301 Ga. App. 590, 591 (2009). Evidence of the election to remain silent warrants reversal if it "point[s] directly at the substance of the defendant's defense or otherwise

substantially prejudice[s] the defendant in the eyes of the jury." (Citation and punctuation omitted.) *Whitaker v. State*, 283 Ga. 521, 524(3) (2008).

To establish a claim for ineffective assistance of counsel, Appellant must show both that counsel performed deficiently and that counsel's deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S 668 (1984). As to the deficient performance prong, Appellant must show that counsel's representation fell below an objective standard of reasonableness, which is examined from counsel's perspective at the time of trial and under the circumstances of the case. (Punctuation omitted.) *Greene v. State*, 295 Ga. App. 803, 805 (2009).

Here, there is no evidence in the Record that trial counsel's decision to not object and move for a mistrial based on the improper colloquy of the codefendant's attorney and the State's lead witness was strategic. Without such evidence, the Court "must conclude, therefore, that counsel's performance was deficient." *Johnson, v. State*, 293 Ga. App. 728, 730(2)(a) (2008) (finding trial counsel deficient for failing to object to State's questioning of defendant's mother that defendant failed to come forward to authorities, despite having knowledge that police wanted to speak with him regarding the alleged crimes); see also *Arellano v. State*, 304 Ga. App. 838, 841 (2010) (finding trial counsel's failure to object to questions regarding defendant's silence deficient where there was no evidence that such decision was strategic); *Hines v. State*, 277 Ga. App. 404, 407-408(2) (2006) (counsel's failure to object to

improper comment on defendant's decision to remain silent constituted deficient performance).

Having established the deficiency of trial counsel's performance, the remaining question is, therefore, whether such deficiency prejudiced the defendant. In the context of an ineffective assistance claim, "prejudice is shown by demonstrating that a reasonable probability exists that the outcome of the case would have been different but for the deficient performance of counsel." *Scott v. State*, 305 Ga. App. 710, 716, (2010), quoting *Gibbs*, *supra*, 287 Ga. App. 694, 696(1) (2007). Defendant's "burden is to show only a reasonable probability of a different outcome, not that a different outcome would have been certain or even more likely than not. "*Bass v. State*, 285 Ga. 89, 93 (2009); see also *Miller v. State*, 285 Ga. 285, 286 (2009) ("[t]he question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt") (punctuation omitted).

In the determination of whether the State's unchallenged comments or questions about a defendant's right to remain silent have prejudiced that defendant, the Court must consider a number of factors. See *Scott*, *supra*, 305 Ga. App. at 717. "These include whether the error was an isolated incident, or instead consisted of several question or comments, and whether the error was inadvertent, rather than a deliberate attempt by the State to use the defendant's silence against him." *Id.*, citing

Maynard v. State, 282 Ga. App. 598, 602(2), 639 S.E.2d 389 (2006) (finding defendant was prejudiced where "the prosecutor deliberately and repeatedly placed [his] silence before the jury"); *Gordon v. State* 250 Ga. App. 80, 83 (2001) (finding defendant was prejudiced where "[t]he prosecutor repeatedly stressed [the defendant's] failure to explain the events leading up to his arrest"); *Cf, Mayberry v. State*, 301 Ga. App. 503, 510-511(4)(d) (2009) (no prejudice where State's passing reference to defendant's silence during direct examination of a witness was "incidental at best").

This Court must analyze whether, in light of the evidence presented, there was a possibility that the State's improper comments contributed to the guilty verdict. *Scott, supra,* 305 Ga. App. at 717, citing to *Johnson, supra*, 293 Ga. App. at 731(2)(a). "In other words, we examine whether the evidence of the defendant's guilt was overwhelming or whether the evidence was conflicting." *Id.*, citing *Mayberry, supra,* 301 Ga. App. at 510(4)(d); *Reynolds, supra,* 300 Ga. App. at 354(2), 685 S.E.2d 346. Furthermore, the Court's consideration must maintain the baseline rule that the State is strictly prohibited from commenting upon a defendant's silence, because "in the situation of a criminal defendant, this failure to speak or act will most often be judged as evidence of the admission of criminal responsibility." *Reynolds, supra*, 285 Ga. at 71 (2009); See also *Grissom v. State*, 300 Ga. App. 593, 595 (2009) ("[i]t is fundamentally unfair to simultaneously afford a suspect a

constitutional right to silence ... and yet allow the implications of that silence to be used against him for either substantive or impeachment purposes") (punctuation omitted).

Applying these factors to the circumstances of the case at hand, it is clear that Appellant suffered prejudice as a result of trial counsel's error. The testimony in question was neither incidental nor inadvertent. Regardless of the intent of codefendant's attorney in questioning the lead detective about Appellant's post-arrest silence – the trial judge found that it was merely an "attempt to eviscerate the credibility of the detective" (R.__) (order denying motion for new trial October 9, 2013) – the fact remains that the lead detective was able to repeatedly testify that Appellant had invoked his right to remain silent. The codefendant's attorney's questioning—and the resulting testimony—was improper and objectionable. See *Scott*, *supra*, 305 Ga. App. at 718; *Johnson*, *supra*, at 730(2)(a); see also *Jackson v. State*, 282 Ga. 494, 497(2) (2007); *Mallory*, supra, 261 Ga. at 630(5), 409 S.E.2d 839.

Moreover, the evidence against Appellant was not overwhelming. There was no physical evidence linking him to the crimes, and the State's case rested entirely on the identification statements of the alleged victims, which were recanted at trial. "Although jurors ultimately chose to believe the [original eyewitness testimony], there is a reasonable probability that an improper inference of guilt, raised by

[Williams'] failure to come forward, influenced this decision." *Scott, supra,* 305 Ga. App. at 717, quoting, *Johnson, supra,* 293 Ga. App. at 731(2)(a); see also *Reynolds*, supra, 300 Ga. App. at 354(2) (given conflicting evidence, which *included* victim's eyewitness testimony, prosecutor's closing argument regarding defendant's failure to come forward and speak with police prejudiced him); *Maynard, supra,* 282 Ga. App. at 601-602(2) (comment on defendant's silence harmful, given evidence presented); *Gibbs*, supra, 287 Ga. App. at 698(1)(a)(ii) (comment on defendant's silence harmful because evidence, which included victim's identification testimony, was not overwhelming). Lastly, the Georgia Supreme Court, in *Mallory*, supra at 843, held "that in a criminal case, a comment upon a Defendant's silence or failure to come forward is far more prejudicial than probative". Therefore, prejudice is presumptive in Appellant's case.

CONCLUSION

For the foregoing reasons, Williams urges the court to reverse or remand his conviction on all counts. Further, this Court has decided most of the issues presented by this Appellant in the appeal of Marco Moses (A14A0140). However, said issues were raised again by this Appellant to preserve any future post-conviction challenges as not waived, if the same is necessary.

RESPECTFULLY SUBMITTED, this 25th day of August, 2015.

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CERTIFICATE OF SERVICE

This is to certify that I have served counsel for the opposing party with a copy of the foregoing document via United States Mail with adequate postage and addressed as follows:

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RESPECTFULLY SUBMITTED, this 25th day of August, 2015.

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