IN THE COURT OF APPEALS
STATE OF GEORGIA

MOERISE WILLIAMS,	)	
	)	
Appellant,	)	
	)	CASE NO.
v.	)	A15A1980
	)	
STATE OF GEORGIA,	)	
	)	
Appellee.	)	

STATE'S BRIEF OF APPELLEE

PAUL L. HOWARD, JR.
DISTRICT ATTORNEY
ATLANTA JUDICIAL CIRCUIT
GEORGIA STATE BAR NO. 371088

PAIGE REESE WHITAKER
DEPUTY DISTRICT ATTORNEY
ATLANTA JUDICIAL CIRCUIT
GEORGIA STATE BAR NO. 598190

JOSHUA DANIEL MORRISON
SENIOR ASST. DISTRICT ATTORNEY
ATLANTA JUDICIAL CIRCUIT
GEORGIA STATE BAR NO. 142593

Please serve:

JOSHUA D. MORRISON
Fulton County Courthouse, 4th Floor
136 Pryor Street SW
Atlanta, Georgia 30303
(404) 612-4959

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COMES NOW Appellee, the State of Georgia, through Fulton County District Attorney Paul L. Howard, Jr., and submits the State's Brief of Appellee.

I. STATEMENT OF THE CASE

Moerise "Mo'" Williams, hereafter "Appellant," was indicted by a Fulton County Grand Jury on June 9, 2009, for the offenses of aggravated assault (three counts) and possession of a firearm during commission of a felony. R., 3-13. After a jury trial held on May 9 to May 17, 2011, Appellant was convicted on all counts. T., 1506. He was sentenced to a total of twenty years to serve ten years in prison with the balance on probation. R., 2131-2134. On June 28, 2011, he filed a motion for new trial. R., 2181-2183. On March 30, 2012, he filed a supplemental motion for new trial. R., 2191-2207. The trial court denied the motion on October

9, 2013. R., 2217-2230. The record was transmitted to this Court on June 12, 2015. This appeal follows.

II. STATEMENT OF FACTS

The night of September 25, 2007, Appellant joined Prentice "Prent" McNeill and Marco "White Boy" Moses in an ambush in the Mechanicsville neighborhood. The three men ambushed Dontavious "Big Tay" Walker, Gregory "Big Greg" Hunt, and Willie "Boy" Wilson. The victims had gone to a convenience store located at 608 McDaniel Street. T., 1090. Mr. Walker and Mr. Hunt had gotten back in the car and were waiting for Mr. Wilson. At that moment, a green van pulled up, driven by Appellant. T., 1091. Mr. McNeill and Appellant exited the vehicle firing at the victims. Mr. McNeill had an assault rifle and Appellant had a handgun. Mr. Walker, sitting in the driver's seat, attempted to back up the car to get away from the shooters. T., 1091. Numerous weapons were used to fire on the three men; ballistics testing confirmed at least four guns were used. While backing up, Mr. Walker was struck by gunfire, and the car crashed. Mr. Walker and Mr. Hunt fled the car and sought cover. T., 1091. Mr. Hunt and Mr. Wilson were fortunately not physically injured. Mr. McNeill and Appellant got back into the van with Mr. Moses and they sped away. Mr. Walker was taken to Grady

Hospital. Detective Cooper of the Atlanta Police Department's Homicide Unit interviewed him the next morning. Mr. Walker told Detective Cooper that he personally knew the three men in the van; the three he saw were Appellant, Mr. McNeill, and Mr. Moses. Detective Cooper showed him a picture of Appellant, the man Mr. Walker knew as "Mo"; Mr. Walker identified him as Moerise Williams. T., 1164.

This assault occurred at the end of what law enforcement referred to as the "Bloody Summer" of 2007. T., 276. The escalating violence stemmed from a gang dispute between the International Robbing Crew and 30 Deep groups on one side and the Campbellton Road crew on the other. Six days prior to the assault, the Campbellton Road people put out a "hit" on Gregory Hunt and his brother Christopher "Noonie" Copeland while the two men were at the All One Social Club. T., 275. Mr. Hunt left the club and shortly thereafter, Mr. Copeland was killed[1] by a group of men that included Prentice McNeill.[2]

[1] Only Mr. McNeill and Matthew Mitchell were identified and arrested. The hit was put out because the International Robbing Crew had committed a home invasion against Matthew Mitchell and his girlfriend. The Georgia Supreme Court

Officers arrested Prentice McNeill at his residence on Glen Echo in Atlanta on September 27, 2007. T., 694. When they pulled up, several vehicles sped away from the home, including a silver SUV. T., 692. They obtained a search warrant for the home and inside they found a Ruger M14, a .223 gas-powered rifle, and an AK-47, all of which ballistics later matched to this shooting on McDaniel Street[3]. T., 750-759, 1048-1051.

(continued…)

affirmed Mitchell's conviction on April 29, 2013. *Mitchell v. State*, 293 Ga. 1 (2013). To this date, none of the other shooters have been arrested.

[2] Although the September 20, 2007 murder of Christopher Copeland and the September 27, 2007 assault against Gregory Hunt were indicted as one case, the trial court severed the charges and prohibited the State from mentioning the Copeland murder, the hit put out on Mr. Hunt, the "Bloody Summer" or mention of a gang dispute. T., 281-292.

[3] One of the firearms was used in both the Copeland murder and the McDaniel Street shooting, although the jury in Appellant's case was not informed about this. T., 279.

Prior to trial, Mr. Walker signed two different affidavits. The first was for Appellant's counsel and the second was for Mr. Moses' initial counsel. T., 475, 483. Both affidavits retracted his previous statement saying that Appellant and Mr. Moses were involved. These affidavits were signed after Mr. Walker ran into Appellant at a local club. T., 471. Mr. Walker and Mr. Wilson also had conversations with each other where Mr. Walker indicated that Mr. Moses was offering money in exchange for him not testifying against Mr. Moses. At trial, he indicated he was joking when he made this statement. T., 491-493.

Prior to trial, Prentice McNeill pled guilty. Appellant and Mr. Moses went to trial from May 10, 2011 to May 17, 2011. T., 1-1524. Both Appellant and Mr. Moses were found guilty on all counts. T., 1506-1508, 1522. This appeal follows.

III. ARGUMENT AND CITATION TO AUTHORITY

I. THERE WAS NO ERROR WHEN THE TRIAL COURT ALLOWED THE PROSECUTOR TO QUESTION WITNESSES ABOUT THREATS AS THIS WAS A PROPER LINE OF QUESTIONING.[4]

[4] Appellant combines Enumeration 1 and 2. The State's response to Enumeration 1 is derived from our response to Appellant's Supplemental Motion for New Trial.

Evidence that a witness is being threatened, even by someone other than a defendant, is admissible. The trial court did not err in allowing the State to present this evidence to the jury. Neither *Kell v. State*, 280 Ga. 669 (2006), nor *Scott v. State*, 305 Ga. App. 710 (2010), is applicable here. In *Kell*, the Georgia Supreme Court found that the introduction of evidence that the defendant's brother attacked his wife, a key witness, was inappropriate because there was no evidence the attack was to prevent her from testifying. In *Scott*, the Georgia Court of Appeals posited that evidence of threats made against the witnesses was inadmissible but because of the failure to object, that issue was waived. Threat evidence may be admitted, even if it is not tied to a defendant, if it explains a witness's conduct on the stand.

> "The trial court has discretion to admit evidence of a threat to a witness that is not connected to the defendant if the evidence is relevant to explain the witness's 'reluctant conduct on the witness stand.' *Coleman v. State*, 278 Ga. 486, 488 (604 SE2d 151) (2004). *See also United States v. Doddles*, 539 F3d 1291, 1296 (10th Cir. 2008) (holding that a witness's testimony that he feared retaliation from members of the defendant's gang was admissible to explain his inconsistent statements). *Compare Kell v. State*, 280 Ga. 669, 671-672

(631 SE2d 679) (2006) (holding such evidence inadmissible where the threat was not connected to the defendant or to any influence on the witness's testimony). Here, the evidence of Borrum's threatening gesture to Fitzgerald, which the prosecutor did not connect to Appellant during the questioning of Fitzgerald or Borrum, was admissible to explain Fitzgerald's inconsistent statements and reluctance on the witness stand, which occurred both before and after the threat by Borrum. *See Coleman*, 278 Ga. at 488. The evidence was also admissible to suggest Borrum's bias in favor of Appellant and thus to impeach the portions of Borrum's testimony that were favorable to Appellant. *See Manley v. State*, 287 Ga. 338, 340 (698 SE2d 301) (2010) (explaining that a witness's bias is always relevant for impeachment purposes)".

Williams v. State, 290 Ga. 533, 539 (2012).

Here, several witnesses were extremely reluctant to testify. The trial itself had to be continued for a day because Dontavious Walker disappeared because he was afraid to come to court. T., 313-341. The threat evidence was extremely probative toward Mr. Walker's reluctance to testify in the case. Gregory Hunt and

Willie Wilson were similarly situated. At the time, all three of these men lived in a part of town where being considered a "snitch" could get them killed. Mr. Hunt in fact, testified that he was nervous just to come in and testify. T., 670. Evidence of threats may also be introduced to explain a witness's conflicting testimony. All three victims were extremely evasive and clearly indicated they did not want to testify. Walker's testimony was completely inconsistent with what he earlier told the police. As such, the questioning was proper and the trial court did not abuse its discretion in allowing this line of questioning. *See Coleman*, at 488. The prosecutor had a good faith basis to ask these questions because the witnesses had told the prosecutor about their concerns of being harmed and confirmed as much as on the stand. Willie Wilson, as noted by Appellant, even stated he had people knocking on his door and called the prosecutor to complain about the position they were putting him in by forcing him to testify. T., 1008-1009.

Despite Appellant's assertions at the motion for new trial hearing, the State did not introduce evidence from the detective that Appellant was threatening anyone. Mr. Walker was warned that multiple people could be in danger. However, Appellant overlooks the fact that even his codefendant Marco Moses was warned that his life could be in danger. Mr. Moses testified to that fact at the

original motion to suppress hearing, as did his mother. MT., 34, 41. The detective's statements to Mr. Walker were neither inadmissible hearsay nor were they inadmissible threat evidence. They were not hearsay because they were not offered for the truth of the matter asserted but instead to explain the detective's course of conduct in the investigation. This was relevant because it showed how Det. Cooper was able to identify the people mentioned by Mr. Walker even though Mr. Walker was only able to provide a "street name." Second, they were admissible threat evidence because they also provided an explanation for Mr. Walker's evasive behavior on the stand.

For these reasons, this enumeration is without merit.

II. APPELLANT'S TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE QUESTIONS ABOUT THREATS TO WITNESSES AS THIS LINE OF QUESTIONING WAS PROPER.

Appellant contends that trial counsel was ineffective for failing to object to questioning about threats made to the witnesses.

> "To prevail on a claim of ineffective assistance of counsel, a criminal defendant must show that counsel's performance was deficient and that the deficiency so prejudiced defendant that there is a reasonable likelihood that, but for counsel's errors, the outcome of the trial would

> have been different. The criminal defendant must overcome the strong presumption that trial counsel's conduct falls within the broad range of reasonable professional conduct. The trial court's findings with respect to effective assistance of counsel will be affirmed unless clearly erroneous."

Patel v. State, 279 Ga. 750, 751 (2005) (citations and punctuation omitted) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). A defendant is only entitled to a fair trial, not "a perfect one." *Sutton v. State*, 238 Ga. 336, 338 (1977).

As noted above, threat evidence is admissible to explain a witness's evasive answers and conduct on the stand and to explain why a witness may change his or her story. *See, e.g. Williams* at 538-539; *Coleman* at 487-488. As noted in *Coleman*, this evidence is "a relevant area of inquiry at trial." *Coleman*, at 488. As such, trial counsel had no sound legal principle upon which to make an objection because the evidence was clearly admissible. The "[f]ailure to make a meritless objection cannot be evidence of ineffective assistance." *Moore v. State*, 278 Ga. 397, 401 (2004).

Strickland's standard requires an appellant to satisfy a two-pronged test. Both prongs must be proven in order for an appellant to prevail on a claim of

ineffective assistance of counsel. 466 U.S. at 687. First, an appellant must show that counsel's performance was deficient. This requires a showing "that counsel made errors so serious that he was not functioning as counsel guaranteed by the Sixth Amendment." *Id.* This standard requires an appellant to identify the acts or omissions of counsel which he alleges are unreasonable, while this Court determines, "whether, in light of all the circumstances, the challenged action was outside the range of professional, competent counsel." *Id*. at 690.

As to the second requirement, an appellant must demonstrate that trial counsel's deficient performance also prejudiced his defense. This requires showing that "counsel's errors were so serious so as to deprive the defendant of a fair trial[.]" *Id*. at 687. As to this prejudice prong, an appellant must show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id*. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. *See also Miller v. State*, 285 Ga. 285, 287 (2009).

Unless an appellant can make *both* showings, "it cannot be said that the conviction…resulted from a breakdown in the adversary process that renders the result unreasonable." 466 U.S. at 687. Further, there is a strong presumption that

counsel rendered effective assistance and made "all significant decisions in the exercise of reasonable professional judgment." *Id*. An appellant has the burden to overcome the strong presumption that counsel's conduct falls within the range of reasonable professional conduct and *affirmatively* show that the purported deficiencies in counsel's performance were indicative of ineffectiveness and not examples of a conscious, deliberate trial strategy. *Morgan v. State*, 275 Ga. 222, 227 (2002).

"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." *Strickland*, 466 U.S. at 689. Appellant has failed to demonstrate that his trial counsel provided ineffective assistance in connection with these alleged errors for the reasons previously set forth.

Here, there is no evidence that trial counsel erred. Moreover, Appellant has not shown that objecting to this line of questioning would have had a reasonable probability in changing the jury's verdict. As such, Appellant was not prejudiced. As Appellant has not met either prong of the *Strickland* standard, this enumeration is without merit.

III. THE STATE DID NOT GIVE AN IMPROPER OPENING STATEMENT.

Appellant claims that the prosecution violated his right to counsel in opening statement. However, when taken in context, the statement at issue is clearly not criticizing Appellant for obtaining defense counsel or suggesting that hiring counsel was part of a cover up but instead putting in context the affidavits the jury would see and preparing the jury to view the affidavits in the context of the perpetrators' attempts to escape justice. The argument does not denigrate or accuse the lawyers. The affidavits were a product of the earlier approaches of the victims by the coconspirators. Specifically, the prosecutor states,

> "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 CONSTITUTIONS, BUT THEY APPROACHED THE VERY VICTIMS THAT THEY

> TRIED TO KILL, AND THROUGH THEIR LAWYERS THEY HAD ONE OF THE VICTIMS SIGN AFFIDAVITS SAYING, YOU KNOW WHAT, IT WASN'T THEM WHEN THAT VICTIM HAD ALREADY MADE A STATEMENT TO LAW ENFORCEMENT OFFICIALS IDENTIFYING THIS MARCO MOSES AND THE DEFENDANT MOERISE WILLIAMS AS TWO OF THE ASSASSINS WHO SHOT AT HIM ON SEPTEMBER 22ND -- SEPTEMBER 26 OF 2007. THEY -- HE CAME IN TO THEIR OFFICES MONTHS LATER AND SIGNED AFFIDAVITS SAYING I RECANT MY STATEMENT. THAT'S PART OF THE COVER-UP THAT THEY TRIED TO DO."

T., 379. The "sophisticated way" that Appellant was trying to cover up his crime was not hiring an attorney, it was brazenly leaning on the victims to come in and sign affidavits saying something different from what was originally told the police about what happened. Taken in context, the prosecutor was not in any way belittling the constitutional right to counsel. As such, this enumeration is without merit.

IV. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE PROSECUTOR'S STATEMENT ABOUT DEFENSE COUNSEL BECAUSE THE STATEMENT, WHEN TAKEN IN CONTEXT, WAS NOT IMPROPER.

Appellant claims that the prosecution impugned the character of defense counsel by suggesting in opening statement that the defense attorneys were engaged in a cover-up. As noted in the response to Enumeration III, taken in context the statement does not impugn defense counsel. It does point to the lengths that Appellant and his co-conspirators would go in an attempt to get the victims to change their testimony, and thus escape justice.

Scott v. State, 305 Ga. App. 710 (2010), cited by Appellant, is distinguished because in that case the prosecutor did make an improper comment on Appellant's right to remain silent in closing argument. Here, the prosecutor was not making a comment on the defense attorneys or on the right to counsel. Failure to make a non-meritorious objection does not render counsel ineffective. *Moore*, at 401. Moreover, it unlikely this fleeting comment prejudiced Appellant to the point it substantially affected the jury's verdict. *Patel*, *supra*, 279 at 751. As a result, this enumeration is without merit.

V. THE PRIOR INCONSISTENT STATEMENTS OF DONTAVIOUS WALKER WERE PROPERLY INTRODUCED INTO EVIDENCE DURING DETECTIVE COOPER'S TESTIMONY.

Detective Cooper was properly allowed to testify about what Dontavious Walker had previously told him because Mr. Walker's statements fell under the prior inconsistent statement exception in the hearsay statute[5]. O.C.G.A. §24-9-83. Appellant asserts that the State failed to lay the proper foundation for the introduction of those prior statements, specifically by failing to ask Mr. Walker with sufficient specificity and a line by line comparison of his previous statement compared to his current.

"The prior inconsistent statement of a witness who is present and available for cross-examination may be admitted … if 'the time, place, person, and circumstances attending the former statement are called to his mind with as much certainty as possible.'" *Edmond v. State*, 283 Ga. 507, 510 (2008) (quoting O.C.G.A. § 24-8-83). Additionally, "the prior statement must contradict or be inconsistent with the witness's in-court testimony [and] must be relevant to the

[5] In the new evidence code that came into effect January 1, 2013, prior inconsistent statements are now found at O.C.G.A. §24-6-613(b).

case …" *Duckworth v. State*, 268 Ga. 566, 567 (1997). Even where, as here, a witness exhibits memory loss or is reluctant to testify, the statement may still be admitted. *Spann v. State*, 248 Ga. App. 419, 421 (2001)[6]. Where a witness gives a response to at least some questions, the prior statement may be introduced. *Robinson v. State*, 271 Ga. App. 584, 586 (2005).

As even Appellant points out, Mr. Walker responded to the questions posed by the prosecutor. He indicated that he had changed his story by initially identifying who had shot him but then saying he did not know the people who shot him. T., 437. He began by saying he did not remember what he told Det. Cooper about Moerise Williams. He then said he did not really remember anything about the incident. T., 445. However, he then said he did remember providing a

[6] "In the 'instant' case … , each of the three witnesses who suffered memory loss took the stand and testified. It is obvious from the transcript that these three witnesses, as well as the other three who equivocated regarding their statements, were reluctant to testify against defendants. Under such circumstances it was proper to allow the State to introduce prior inconsistent statements as substantive evidence." *Spann*, *supra* at 421.

statement to Det. Cooper. He specifically said he remembered telling Detective Cooper that he had seen Mr. Williams, Appellant and Prentice McNeil. "Oh, I told him I had saw White Boy and Mo and Prent." T., 444. He also said he remembered Prentice McNeill jumping out of the vehicle with a gun. T., 445-446. He then changed his statement from saying he did not really remember anything to saying he did not remember everything about the incident. T., 446. He also stated he did not want to be in court and did not care whether the people who shot him were prosecuted or not. T., 446-447. He then reiterated that he remembered what he told Det. Cooper about Prentice McNeil but did not remember what was said about Appellant or Williams. T., 448. Mr. Walker was then questioned about the shooting and answered questions regarding the convenience store, the bullet holes to his vehicle, and how he drove backwards to try to avoid the gunfire. T., 455-461. He denied speaking to anyone at the scene. T., 461. He then denied, on the record, identifying Appellant from a photographic lineup or Williams from a single photograph. T., 465-466. He later identified the statement he signed at the defense attorney's office but stated he had no recollection of it. T., 486-487.

Several things are clear from Mr. Walker's testimony. First, he did not claim that he remembered nothing. He remembered and discussed many facts

about the circumstances surrounding the shooting, both on direct and cross-examination. Thus, Walker "did not remain silent when called to the stand or merely claim loss of memory as to *everything*. [He] did answer several important questions, and some of the answers to those questions was inconsistent with previous statements made to the police." *Robinson v. State*, 271 Ga. App. 584, 586 (2005) (emphasis added); *see also Meschino v. State*, 259 Ga. 611, 615 (1989) (proper foundation laid for use of prior inconsistent statements where witness acknowledged she could "vaguely remember" having made "some kind of statement" to law enforcement). It was therefore proper to impeach Walker via his prior inconsistent statements.

Second, Mr. Walker was adequately confronted with his prior statements. He was asked repeatedly whether he remembered having spoken with the police or with anyone else at the hospital. His answers varied but he clearly indicated he did remember speaking to Det. Cooper. Mr. Walker was asked about the relevant content of the statements he made to Det. Cooper, including identifying Appellant and Mr. Williams as two of the men who assaulted him. His answers alternated between contradicting his prior statements, denying them, or claiming he did not remember. On the stand he said he told Det. Cooper, "Somebody pulled up

shooting at us." T., 444. However, his actual statement to Det. Cooper was that Appellant, Mr. Williams and Mr. McNeill were shooting. Moreover, Mr. Walker was cross-examined by counsel for Appellant and counsel for Mr. Williams. This confrontation was sufficient to make admissible the prior inconsistent statements. *See James v. State*, 316 Ga. App. 406, 412 (2012) (holding it was not error for prosecutor to rely on notes taken from having listened to witness's prior statement, rather than confronting witness with the actual content of that statement, because the witness had been sufficiently oriented to the "time, place … and circumstances attending the former statements."); *Griffin v. State*, 262 Ga. App. 87, 88 (2003) (it was not error to admit prior inconsistent statements when record showed that witness was made aware of the time, place, and circumstances attending his statements and State gave witness opportunity "to admit, explain, or deny the prior contradictory statement."). As such, the trial court did not err in admitting these statements and this enumeration is without merit.

VI. THE PROSECUTOR DID NOT DELIVER AN IMPROPER CLOSING ARGUMENT.

Prosecutors are accorded wide leeway in making closing argument. *See Appling v. State*, 281 Ga. 590 (2007) (Prosecutor's argument that Appling's

defense was a fraud was not error). "[There is] wide leeway given to argue all reasonable inferences that may be drawn from the evidence during closing argument … and urging that, on that basis, the defendant lied." *Id*. at 592-593. (Citations omitted). Moreover, even if a remark were improper, trial counsel has discretion in determining whether an objection is warranted or not, even in closing argument. *Braithwaite v. State*, 275 Ga. 884, 885-886 (2002) (Trial counsel was not ineffective for failing to object to prosecutor's "golden rule" argument in closing).

In this enumeration, Appellant's first claim is that the prosecutor improperly mentioned that he was a gang prosecutor in closing. Specifically, the prosecutor stated, "Now, could Mr. Banks and I, you know – you know, as Mr. Scheib brought out several times during one of his crosses, we're gang prosecutors, you know. Witnesses recant all the time, okay? That's just – that's part of the struggle. That's part of what we do." T., 1347-1348. Specifically, the prosecutor was referencing the cross-examination of Willie Wilson. Mr. Scheib thoroughly cross-examined Mr. Wilson about pending gang activity charges. He introduced into evidence a copy of the indictment against Mr. Wilson and the nature of those charges. T., 932-937. Mr. Scheib then accused Mr. Wilson of having tattoos that

signify membership in a gang. T., 937. He then pointed out that the prosecution indicted Mr. Wilson for gang activity and later on mentioned that the prosecutors allowed Mr. Wilson a bond on those gang charges in exchange for Mr. Wilson's cooperation. T., 938, 954. More importantly, Appellant's own attorney brought up the fact that the prosecutors were members of the gang unit. "So you had a case that sat for a year on for gang related activity, and you know they were the gang and gun unit; right? They kind of run that situation; right?" T., 991. Appellant cannot open the door by telling the jury that Mr. Banks and Mr. Cross were gang prosecutors and then complain about a brief mention of that fact by Mr. Cross in closing.

Appellant also argues that the prosecution expressed frustration that witnesses would say one thing in the hallway and then change their testimony on the stand. T., 1361. The complained of statements were not improper, nor does Appellant cite any caselaw to support such a proposition. Contextually, the argument was what is said, an expression of frustration that the evidence before the jury was not "cleaner" and to explain the evasive and shifting testimony of these witnesses; witnesses, who, as the prosecution pointed out, came from neighborhoods where cooperation with law enforcement could result in dangerous

consequences for the witness and their family members. T., 1360-1362.

Third, Appellant complains that the prosecutor disparaged defense counsel in closing. T., 1344-1346. However, a review of the transcript shows that the prosecutor was attacking the argument of counsel, which is clearly proper fodder for closing argument. It was not improper for the prosecution to point out that the defense attorneys were comfortable with the ballistics tests that linked Prentice McNeill to shooting but then attacked the accuracy of the ballistics tests involving their own clients. T., 1344. The prosecutor also properly attacked the credibility of the conflicting affidavits. T., 1346.

The prosecutor also properly argued about the threat evidence against the witnesses. T., 1338, 1347. This information was presented into evidence. Dontavious Walker testified that he was nervous because people in the gallery were "mean-mugging" him. T., 595, 597. There was also evidence presented that Appellant had paid money to both Dontavious Walker and Willie Wilson. T., 501-502, 536-537, 904-909, 912-915, 924-927. Threat evidence, even when not connected to a defendant, is admissible if it explains a witness's "reluctant conduct on the witness stand." *Williams*, at 539 (citing *Coleman*, at 488).

The jury was also properly instructed that evidence does not include the

closing arguments made by the attorneys. T., 1476. "Qualified jurors under oath are presumed to follow the instructions of the trial court." *Daniel v. State*, 296 Ga. App. 513, 516 (2009) (citing *Holmes v. State*, 273 Ga. 644, 649 (2001)). As such, even if any of the arguments made by the prosecutor were improper, they were harmless as it is unlikely they contributed to the verdict. The jury was instructed not to consider the arguments of counsel as evidence and there was significant evidence of Appellant's guilt presented at trial. This enumeration is without merit.

VII. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE PROSECUTOR'S CLOSING ARGUMENT BECAUSE THE PROSECUTOR'S CLOSING ARGUMENT WAS NOT IMPROPER.

Appellant claims that trial counsel was ineffective for failing to object to the prosecutor's closing argument based on the issues raised in Enumeration XI. As noted above, the prosecutor's argument was not improper. Failure to make a non-meritorious objection does not render counsel ineffective. *Moore*, at 401.

Even if the prosecutor's argument was improper, it unlikely the argument is what contributed to the jury's verdict. This is distinguished from *Scott v. State*, 305 Ga. App. 710 (2010), cited by Appellant, because the prosecutor in *Scott* made several improper comments on the defendant's silence and the evidence in that

case was sufficiently close to warrant a new trial. Here, there was significant evidence of Appellant's guilt. Thus, there was no prejudice to Appellant even if his trial counsel should have made an objection. *Patel*, at 751. As the prosecutor's closing argument was not improper, and even if it were, it was not likely to have contributed to the jury's verdict, this enumeration is without merit.

VIII. TRIAL COUNSEL PROPERLY DENIED THE DIRECTED VERDICT OF ACQUITTAL TO COUNT III INVOLVING THE AGGRAVATED ASSAULT AGAINST WILLIE WILSON.

The evidence presented at trial was that all three men were ambushed and targeted. The fact that Appellant and his co-conspirators were firing shots at all three men was sufficient for the trial court to deny the motion for a directed verdict. A person commits the offense of assault when he or she "attempts to commit a violent injury to the person of another." O.C.G.A. § 16-5-21. A person commits an aggravated assault by committing an assault with "a deadly weapon, an object … which when used offensively is likely to … result in serious bodily injury." O.C.G.A. § 16-5-20. Willie Wilson was in a position where he could have received serious bodily injury through the actions of Appellant. The State introduced enough evidence for the trial court to deny the motion. This enumeration is without merit.

IX. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE PROSECUTOR'S CLOSING ARGUMENT BECAUSE THE PROSECUTOR'S CLOSING ARGUMENT WAS NOT IMPROPER.

Appellant claims that trial counsel was ineffective for failing to object to the colloquy between his co-defendant's attorney and the lead detective about Appellant's post-arrest silence when the co-defendant's attorney was attacking the lead detective's credibility. First, the cases cited by Appellant are only applicable when the State improperly comments upon a defendant's exercise of his right to remain silent. In the instant case, the State did not question the detective about Appellant's silence. Second, matters of sound trial strategy fall clearly as proper attorney conduct under the *Strickland* standard. Here, counsel for the codefendant was attacking the credibility of a key witness for the State. It was sound trial strategy not to object to this line of questioning. *See Phillips v. State*, 284 Ga. App. 224 (2007) (whether to make certain objections falls within the realm of reasonable trial strategy). Thus, there was no deficient performance and the first prong of the *Strickland* test was not met. This enumeration is without merit.

IV. CONCLUSION

WHEREFORE, the trial court did not err in denying Appellant's motion for new trial, the trial court's order and the jury's verdict should be affirmed.

Respectfully Submitted,

This 14th day of Sep., 2014

Paul L. Howard, Jr.
District Attorney
Georgia State Bar No. 371088

Paige Reese Whitaker
Deputy District Attorney
Georgia State Bar No. 598190

s:\Joshua D. Morrison
Joshua Daniel Morrison
Sr. Assistant District Attorney
Georgia State Bar No. 142593

Fulton County Courthouse, 4th Floor
136 Pryor Street SW
Atlanta, Georgia 30303
TEL: (404) 612-4959

CERTIFICATE OF SERVICE

This is to certify that I have served the within and foregoing Brief to counsel of record for Appellant by **mailing** a copy of same, postage prepaid, to:

Dwight Thomas, Esq.
2296 Henderson Mill Rd
STE 407
Atlanta, GA 30345

By: s:\ Joshua D. Morrison
Senior Assistant District Attorney
Georgia State Bar No. 142593

Fulton County Courthouse, 4th Floor
136 Pryor Street SW
Atlanta, Georgia 30303
(404) 612-4959