KENIVEL SMITH APPELLANT

V.

FILED

DEC 28 2007

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COURT OF APPEALS

STATE OF MISSISSIPPI APPELLEE

APPELLANT'S REPLY BRIEF

Oral Argument Requested

MISSISSIPPI OFFICE OF INDIGENT APPEALS
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Counsel for Appellant

STATUTES

none

OTHER AUTHORITIES

because this case involves the probable contravention of fundamental rights of due process, cross-examination and fair trial standards in the admission and exclusion of evidence which resulted in the conviction of the appellant on pure hearsay.

REPLY ARGUMENT

The assertion by the state that the appellant threatened the victim in this case is not supported by the record. The prosecutor made the assertion that the state witness had been threatened and that he was scared. [T. 69]. There is nothing in the record which indicates, suggests or implies that the appellant made any threats to the victim. In fact, according to the victim, it was not the appellant who threatened him, but the police. [T. 95].

Therefore, the state's argument that the appellant waived his right to cross-examine his accusers is based on a vacuous factual assertion, hence, *Davis v. Washington,* 126 S. Ct. 2266, 2280 (2006) does not apply for the reasons suggested by the state.

To the contrary, *Davis v. Washington* stands for the proposition that the state cannot threaten a witness and then claim that the witness is unavailable for purposes of Miss. R. Evid. 803 (24) and 804(a)(3) and (b)(5). So, the state provides yet another reason the trial court erred reversibly as suggested in the appellant's initial brief.

The state next argues that the appellant waived his hearsay objection by conducting cross-examination of the victim citing *Gatlin v. State*, 724 So. 2d 359 (Miss. 1998).

admitted into evidence over hearsay objection. What is different from the present case is that in *Gatlin*, it was Gatlin who was identified as the declarant and the content of the conversation was not offered to prove the truth of the matter asserted. Hence, there was no Sixth Amendment violation, even if the Gatlin telephone calls were hearsay. *Id.* Contrarily, in the present case, the hearsay contained the state's only evidence against Smith, it was clearly incompetent. The constitutional problem, which the state does not address in its arguments, is that here Smith did not get to cross-examine the victim's nephews who made the accusation which became the basis of the identification of Smith as the shooter.

The *Gatlin* court relied on *Dycus v. State*, 440 So. 2d 246, 255 (Miss. 1983) and *Fielder v. State,* 108 So. 2d 590 (1959). The legal viability of *Dycus* and *Fielder* is doubtful at best and both appear to be overruled on this point.

As stated in *Merritt v. State,* 517 So.2d 517, 519-20 (Miss.1987), "[o]nce an objection is overruled, the party making the objection may try the remainder of the case on the assumption that the ruling will stand." The *Merritt* court then directly states that the holding in *Fielder* is not the law any longer. *Id.*

In *Stringer v. State*, 500 So.2d 928, 946 (Miss. 1986), the Court said,

> [w]hen the trial judge makes a ruling adverse to a litigant, and where the litigant's lawyer has properly noted his objection, that litigant and his

> which does nothing more than show the lawyer's obligatory respect for the trial judge while at the same time continuing as best can be done the advancement of his client's cause.

See also *McGee v. State*, 569 So.2d 1191, 1194 (Miss. 1990).

Finally on the point of waiver, to follow the state's suggestion in the context of this case also runs headlong into established constitutional law, such as quoted in *U. S. v. Newell* 315 F.3d 510 C.A.5 (Miss.),2002:

> Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences", citing *Brady v. United States*, 397 U.S. 742, 748, 90 S. Ct. 1463, 25 L. Ed.2d 747 (1970).

Next the state offers *Carter v. State* 965 So. 2d 705, 711 (Miss. App. 2007). Carter is distinguishable on the requirement of trustworthiness. The *Carter* Court noted that "[t]o date, no evidence has been produced by Carter to indicate that the victims were lying or had any reason to lie . . . " . In *Carter* there were indications of reliability. In the present case, there is indication of just the opposite.

In the present case, the victim's statements and testimony are saturated with malodorous untrustworthiness. The witness said that he obtained the information that Smith shot him from "his nephews". [T. 74-75, 93]. Moreover, there was testimony that the victim never saw Smith the night of the shooting. [T. 92]. The victim said that the police had threatened him. [T. 95]. The testimony was all over the proverbial radar

Arguably, if the evidence was sufficient, which it was not, the admission of the incompetent hearsay remains erroneous, and reversible, because, the admission of the improper evidence allowed the state to unfairly bolster its case with hearsay. In reversing an aggravated assault conviction in *Anderson v. State*, 156 So. 645, 646-47 (Miss. 1934) based on the admission of a witness' hearsay statement wrongfully admitted, it was pointed out that:

> [t]his court has consistently condemned the practice of undertaking to bolster up the testimony of a witness on the stand, and to strengthen his credibility by proof of his declarations to the same effect as sworn to by him out of court. [cites omitted]

In *Anderson*, after the victim had identified the defendant at trial, investigating officers were allowed to testify that they took the defendant to the victim who was in bed recouping from being shot and that the victim identified the defendant. The *Anderson* court reversed the conviction stating "[t]he testimony of [the officers] under the circumstances should not have been admitted." *Id.* If bolstering hearsay testimony was inadmissible and reversible error in *Anderson*, it is inadmissible and reversible error here.

In *Walker v. State*, 878 So. 2d 913, 915-16 (Miss. 2004) the Court reversed because of the admission of unauthenticated evidence which tended to corroborate the sexual assault victim's testimony, the court found that the admission of a towel with served only to bolster the testimony of the prosecution's witnesses. See also, *Scott v. State* 446 So.2d 580 (Miss. 1984).

Otherwise, Appellant stands with his original authorities and arguments.

Respectfully submitted,

KENIVEL SMITH

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CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 28th day of December, 2007, mailed a true and correct copy of the above and foregoing Reply Brief to Brief Of Appellant to Hon. Albert B. Smith, III, Circuit Judge, P. O. Box 478, Cleveland MS 38732, and to Hon. Larry G. Baker, Dist. Atty. , 115 First St., Ste. 200, Clarksdale MS 38614, and to Hon. W. Glenn Watts, Assistant Attorney General, P. O. Box 220, Jackson MS 39205 all by U. S. Mail, first class postage prepaid. all by U. S. Mail, first class postage prepaid.

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