IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JOHNNY RAY DAVIS — APPELLANT

VS. — NO. 2007-KA-0504

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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VERSUS **NO. 2007-KA-0504-COA**

STATE OF MISSISSIPPI **APPELLEE**

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STATEMENT OF THE CASE

Procedural History

Johnny Ray Davis was convicted in the Circuit Court of the Second Judicial District of Jones County on a charge of fondling and was sentenced to a term of 15 years in the custody of the Mississippi Department of Corrections with five years suspended. (C.P.86-87) Aggrieved by the judgment rendered against him, Davis has perfected an appeal to this Court.

Substantive Facts[1]

J.T., the victim in this case, testified that she was 12 years old at the time of trial and nine years old in 2003. She was an honor roll student at West Jones Elementary School. J.T. identified the defendant, Johnny Ray Davis, as her mother's stepfather, whom she called "Pawpaw." (T.196-98)

On one occasion between Halloween and Christmas of 2003, J.T. was sitting on Davis's lap at his computer. A pornographic video[2] popped onto the screen, and J.T. "asked him what it was." Davis replied, "I don't know; I think somebody sent it to me." Davis and J.T. then "started playing tic tac toe." Later, during this same occasion, the video popped onto the screen again. At this time, Davis "had his hand going into" J.T.'s pants. According to her, "And then he started to rub my vagina. ... He just rubbed basically on the outer parts." He stopped when a visitor walked into the room. (T.200-01)

Another occurrence took place in December 2003, when J.T.'s mother, T.T., went shopping and left J.T. and her twin brother in the care of Davis. The brother went fishing while J.T. and Davis played a video game. After she "got bored of it," she "went to go watch cartoons." Davis approached her. (T.202-03) In J.T.'s words,

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[1]Davis does not challenge the sufficiency or weight of the evidence undergirding the verdict. Thus, the state presents a condensed statement of facts.

[2]J.T. testified that this video depicted "a little girl and an old man." The little girl "was stripping ... [a]nd then she would go and suck his penis." (T.201)

> He started to put his hand to go into my underwear again. And I squeezed my legs because the day before or even earlier ... he hurt me whenever he did that. So I squeezed my legs so he couldn't get in there. And he said, all right, I'll stop.
>
> (T.203)

At the time in question, J.T. shared a bedroom with her older sister, A.T. One night in late December 2003 or early January 2004, J.T. and A.T. entered the bedroom of their mother, and A.T., who was "frantic," told T.T. that J.T. "had something to tell" her. The three of them went into the living room, where J.T. told her mother that "her pawpaw ... [h]ad been touching her in her tee tee, and she just wanted him to stop."[3] J.T. identified her vaginal area as her "tee tee" which Davis had fondled. (T.181-82)

On January 6, 2004, T.T. reported these incidents to Investigator Brad Grunig of the Jones County Sheriff's Department. Later, Investigator Grunig conducted a videotaped interview of Davis. (T.160-63) On cross-examination of Investigator Grunig, defense counsel offered these tapes into evidence. They were admitted without objection. (T.165-66)

Dr. Patricia Tibbs was accepted by the court as an expert in the field of pediatrics. Dr. Tibbs testified that on January 13, 2004, she examined J.T. upon a report of "[a]lleged sexual abuse." (T.207) When asked to recount the substance of what J.T. told her during the interview, Dr. Tibbs testified as follows:

> She stated, when I sit on Grandpa's lap sometimes he rubs my tummy then begins to rub lower and lower and ends

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[3]When T.T. asked J.T. "how long had this been going on," J.T. "said since as long as she could remember." (T.182)

> up deep in my tee tee, and it hurts sometimes. She describes her sitting on his lap with her back to him. And she continued that sometimes he puts sticky gooey stuff on his hands and rubs me into my back and into my butt hole. It hurts sometimes. Mostly all the time. I have never seen blood. One time when he rubbed me in my tee tee it stung every time I tee teed. And when I told him he rubbed lotion on it, but he it [sic] still hurt for about four days. Many times after he rubbed me ever since I was little it would sting when I went to tee tee. One time when I was asleep or I was trying to stay awake he pulled me close to him and rubbed my behind with something else that felt gooey and sticky. It went into my butt hole. I think it was not his hands. It felt like his private, his tee tee.
>
> (T.209)

Sharon McMahan, a licensed profession counselor, was accepted by the court as an expert in her field. (T.217-19) Ms. McMahan testified that she interviewed J.T. on January 14, 2004. During this interview, J.T. told Ms. McMahan "that her grandfather had been doing some really bad things to her for as long as she could remember." When Ms. McMahan asked her "what had he exactly been doing," J.T. said that "he had been rubbing her private spot." She also stated that he had "put white lotion on her." According to Ms. McMahan, "[S] said that she thought he got his ideas from the computer. She went on to describe one I'm [sic] image where a little girl was in bed with an old man and she started sucking his private." (T.219-22)

The defense rested without presenting evidence. (T.244)

SUMMARY OF THE ARGUMENT

Davis's challenges to the state's closing argument are procedurally barred by his failure to interpose a contemporaneous objection. Solely in the alternative, the state submits these challenges are also devoid of substantive merit.

PROPOSITION:

THE DEFENDANT'S CHALLENGES TO THE STATE'S CLOSING ARGUMENT ARE PROCEDURALLY BARRED AND SUBSTANTIVELY WITHOUT MERIT

Although it is presented under two propositions, Davis's argument on appeal is essentially a challenge to certain arguments made by the assistant district attorney in closing. Specifically, he contends the prosecutor impermissibly commented on his right not to testify (T.278); that he improperly vilified the defendant (T.278); that he expressed his personal opinion of the defendant's guilt (T.279); that he misstated certain evidence (T.279); and that he made an improper "send a message" argument. (T.283)

The initial flaw in Davis's argument is that it is unpreserved for review. The defense failed to interpose a contemporaneous objection to any of these remarks. This failure bars consideration of these issues on appeal. *Rubenstein v. State*, 941 So.2d 735, 779 (Miss.2006); *Moore v. State*, 938 So.2d 1254, 1265 (Miss.2006), citing *Thorson v. State*, 895 So.2d 85, 112 (Miss.2004); *Rushing v. State*, 711 So.2d 450, 455 (Miss.1998).

In *Knight v. State*, 751 So.2d 1144 (Miss. App. 1999), the appellant presented an argument quite similar to Davis's in terms of content and procedural posture. This Court rejected that argument with an analysis set out in pertinent part below:

> Jeffery Knight asserts as an eighth assignment of error that prosecutorial comments made during closing argument requires reversal. Knight further elaborates by stating "[p]rosecutors are not given full reins to gain victory and are limited by the zeal than [sic] can use as evidenced by (the) following: that a prosecutor 'while he may strike hard blows, is not at liberty to strike foul ones,' it [is] left to the lower courts to discern what sort of misconduct rises to the level of reversible error." *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L.Ed. 1314 (1935)(overruled on other grounds). Knight contends that in the case at bar, he was deprived a fair trial because the prosecutor "injected remarks intended to inflame

and gave his opinion as to guilt." Additionally, Knight asserts that the prosecution misstated evidence during his closing argument.

The problem with the argument presented by Knight is that he failed to contemporaneously object to any of the prosecutor's remarks. We require a contemporaneous objection to the allegedly prejudicial remarks. *May v. State*, 569 So.2d 1188, 1190 (Miss.1990); *Dunaway v. State*, 551 So.2d 162, 164 (Miss.1989); *Marks v. State*, 532 So.2d 976, 984 (Miss.1988).

> **It is now well settled that when anything transpires during the trial that would tend to prejudice the rights of defendant, he cannot wait and take his chances with the jury on a favorable verdict and then obtain a reversal of the cause in this Court because of such error, but he must ask the trial court for a mistrial upon the happening of such occurrence when the same is of such nature as would entitle him to a mistrial.**
>
> *Box v. State*, 610 So.2d 1148, 1154 (Miss.1992) (quoting *Blackwell v. State*, 44 So.2d 409, 410 (Miss.1950)).
>
> [I]t is the duty of a trial counsel, if he deems opposing counsel overstepping the wide range of authorized argument, to promptly make objections and insist upon a ruling by the trial court. The trial judge first determines if the objection should be sustained or overruled. If the argument is improper, and the objection is sustained, it is the further duty of trial counsel to move for a mistrial. **The circuit judge is in the best position to weigh the consequences of the objectionable argument, and unless serious and irreparable damage has been done, admonish the jury then and there to disregard the improper comment.**
>
> Johnson v. State, 477 So.2d 196, 209-10 (Miss. 1985).

> In this case, the lower court instructed the jury that any arguments, statements, or remarks by counsel were not evidence and if any statement were made that had no basis in the evidence, then the jury should disregard the remark. Clearly, any error that occurred was not so extensive or prejudicial as to constitute fundamental error. The Court is mindful that Jeffery Knight made an objection and moved for a mistrial relative to statements made by the prosecutor during closing argument. This motion was brought after the jury had been excused from the courtroom to deliberate on a verdict and this was simply too late. In Herrington v. State, 690 So.2d 1132, 1139 (Miss.1997), the supreme court acknowledged that a trial judge can only render a determination of prejudice if the party makes a timely objection and motion for a mistrial. The court further proclaimed that "timeliness means the objection and motion must be made contemporaneously with the allegedly improper utterance. This is well-known as the 'contemporaneous objection rule'. Contemporaneousness is critical because it allows the judge to avert a mistrial, if possible, by admonishing the jury to disregard the utterance." Id. This Court determines that Jeffery Knight waived this issue in the court below and forfeited any error on appeal to this Court.
>
> (emphasis added) 751 So.2d at1153-54.

Maintaining that Davis's arguments are procedurally barred, the state alternatively addresses the merits of those arguments. First, Davis submits the following comments improperly referred to his failure to testify:

> And he [defense counsel] says, oh, I let you hear from Johnny Ray Davis through the videotape. Well, that's fine. I didn't mind him playing the tape. And you can listen to all that two or

> three hours of bull again if you want to ... You know, he's talking about everything in the world... except about this little girl.
>
> (T.278)[4]

The state counters that it strains credulity to suggest that this was a direct, or even inferential, comment on the defendant's exercise of his constitutional right not to testify against himself. Rather, the prosecutor was commenting on the content of a videotape introduced into evidence. "In general, parties may comment upon any facts introduced into evidence, **and may draw whatever deductions and inferences that seem proper from the facts.**" (emphasis added) *Ross v. State*, 954 So.2d 968, 1002 (Miss.2007). By making these deductions and inferences, the assistant district attorney was doing what he was charged with doing, and what he was entitled to do. He did not overstep any boundaries here.

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[4]The state reiterates that the challenge to these comments is procedurally barred. *Wright v. State*, 958 So.2d 158, 166 (Miss.2007); *Walters v. State*, 720 So.2d 856, 864 (Miss. App. 1998).

Next, Davis claims the assistant district attorney vilified him by calling him a "pervert."[5] (T.278) Taking issue with this characterization, he submits the following argument and definitions:

> The word "pervert" is used in today's society to describe the worst of sexual activity. Merriam-Webster dictionary defines "Pervert" as "one given to some form of sexual perversion." *Merriam-Webster Online Dictionary*. 2007.http://www.merriam-webster-com (5 Jul 2007). The dictionary then continues to define "perversion" as "an aberrant sexual practice or interest especially when habitual." *Id.*
>
> (Brief for Appellant 10)

The state accepts this definition of the word "pervert" and submits the prosecutor's use of this word was supported by the evidence and was, therefore, fair argument. The proof showed that the defendant, an adult male, habitually touched the minor victim, his wife's own granddaughter, on her private parts.[6] Such conduct is abhorred in civilized society. No rational person would assert that such activity is anything other than

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[5]An identical argument was held to be procedurally barred in *Earley v. State*, 595 So.2d 430, 433 (Miss.1992). In that case, the defendant was on trial for sexually battering her nine-year-old son. The Supreme Court held that in the absence of a contemporaneous objection, the defense was procedurally barred from challenging prosecutor's reference to the defendant as a "pervert" during closing argument. See also *Piercy v. State*, 850 So.2d 219, 221 (Miss. App. 2003).

[6]He also exposed her to lewd, pornographic computer images depicting young girls performing fellatio on older men.

"aberrant." Accordingly, calling the defendant a "pervert" was not improper.[7] See *Divine v. State*, 947 So.2d 1017, 1022 (Miss. App. 2007) (prosecutor's referring to defendant, accused of sexually penetrating his nephew, as a sexual predator and a child molester were fair argument based on the evidence).

Davis claims additionally that the prosecutor transgressed in expressing his personal opinion of guilt: "He can sit over there, Mr. Davis, he's guilty. I'm telling you. That's my opinion. But it's up to you to decide the final analysis." [8] (T.279)

Of course, "a prosecutor may not use his personal beliefs and the prestige attendant to his office to bolster his argument or the witnesses or evidence which he deems most damaging to a defendant." *Caston v. State*, 823 So.2d 473, 495 (Miss.2002), citing *Young*, 470 U.S. at 5. However, he is "entitled to argue his case drawing all rational inferences which come from the evidence in the courtroom." *Id.*, at 495-96.

The remark at issue must be analyzed in its context. It was made on the heels of an exposition of the evidence presented and deductions and inferences therefrom. "Such

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[7]Although no further discussion should be required, the state submits for the sake of argument that the assistant district attorney was attempting to refute defense counsel's suggestion that the defendant's alleged impotence rendered him incapable of committing this offense. (T.272)

[8]This particular issue has been held to be procedurally barred by the failure to interpose a contemporaneous objection. *Rubenstein*, 941 So.2d at 779. Moreover, in *United States v. Young,* 470 U.S. 1, 20 (1985), "the United States Supreme Court stated that bolstering statements made by the prosecution do not amount to plain error as to require reversal." *Id.*

deductions are to be distinguished from personal opinions which are not drawn from the evidence at trial." *Caston*, 823 So.2d at 496. The state contends the comment in question, considered in this context, was not a bare expression of unsupported personal belief.[9] It certainly was not "so egregious as to rise to the level of a fundamental denial of a constitutionally-mandated fair trial." *Bell v. State*, 725 So.2d 836, 851 (Miss.1998).

Davis asserts additionally that the prosecutor "misstated evidence to the jury" when he argued that defense counsel agreed with the state's expert witnesses. (Brief for Appellant 12) The state counters this was a fair response to the defense counsel's closing argument, during which he repeatedly attempted to utilize the testimony of the state's expert witnesses for the defendant's benefit. (T.272-75) Moreover, with respect to these witnesses, defense counsel explicitly said, "I agree with them." (T.275)

Finally, Davis takes issue with the conclusion of the prosecutor's argument: "When the guilty go free the innocent are punished. I did all I could. It's up to you now." (T.283) He asserts that this was a "send a message" argument, which has been prohibited. The state responds that even if the comments in question could be construed as such improper argument, the defendants would not be heard to challenge them for the first time on appeal. *Randolph v. State*, __ So.2d __ (Miss. App.) (Decided August 7, 2007) (2007 WL 2246055); *Langston v. State*, 791 So.2d 273, 280 (Miss. App. 2001) (declining to address merits of unpreserved challenge to alleged "send a message" argument); *Hayes v. State*, 723 So.2d 1182, 1188 (Miss. App. 1998).

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[9]As shown by the foregoing excerpt, the prosecutor went on to tell the jurors that the determination of the factual issues ultimately was their prerogative.

In the alternative, the state submits the prosecutor did not tell the jurors that they should "send a message" by their verdict, or that the verdict would be reflective of the conscience of the community; rather, they essentially asked the jury to do justice for the victim.[10] This was not improper. *Crawford v. State*, 515 So.2d 936, 939 (Miss.1987).[11] See also *Carter v. State*, 956 So.2d 951, 960 (Miss. App. 2006), and *Lee v. State*, 858 So.2d 124, 128-29 (Miss.2003).

Even if this argument could be characterized as an exhortation to "send a message," by no stretch of the imagination was it "so egregious as to prevent the jurors from reaching an appropriate verdict."[12] *Gardner v. State*, 792 So.2d 1000, 1006 (Miss. App. 2001). This would not be one of those "few" cases in which such an argument has been held to require reversal. *Id.*, citing *Forbes v. State*, 771 So.2d 942, 951 (Miss. App. 2000).

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[10]On this basis, *Alexander v. State*, 736 So.2d 1058, 1064 (Miss. App. 1999), is distinguishable. In that case, the prosecutor went much farther than stating, "There is nothing further we can do." He went on to tell the jurors to "send a message" and to imply that they were responsible for keeping illegal drugs out of the county. This argument embodies not only the prohibited "send a message" motif but a "link in the chain" argument and a "community conscience" exhortation. *Evans v. State*, 725 So.2d 613, 675 (Miss.1997). Nothing of the sort occurred here.

[11]By no stretch of the imagination was this argument "so egregious as to prevent the jurors from reaching an appropriate verdict." *Gardner v. State*, ___ So.2d ___ (Miss. App. 1999-KA-1759, decided February 20, 2001).

[12]The most rational conclusion is that Davis was convicted because the state presented compelling, credible and uncontradicted evidence of his guilt.

In conclusion, the state points at that the court instructed the jury as follows, in pertinent part:

> Arguments, statements and remarks of counsel are intended to help you understand the evidence and apply the law, but they are not evidence. If any arguments, statements or remarks have no basis in the evidence then you should disregard the argument, statement or remark.
>
> (C.P.17)

This Court has held that reversal is not required when such instruction is given. E.g., *Burns v. State*, 729 So.2d 203, 229 (Miss.1998). Accord, *Ormond v. State*, 599 So.2d 951, 961 (Miss.1998).

The state reiterates that Davis's challenges to the state's closing argument are procedurally barred. In the alternative, the state contends they are substantively without merit as well.

CONCLUSION

The state respectfully submits the propositions made by Davis have no merit. Accordingly, the judgment entered below should be affirmed.

Respectfully submitted,

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BY: DEIRDRE McCRORY
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CERTIFICATE OF SERVICE

I, Deirdre McCrory, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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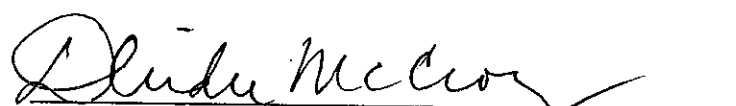
This the 11th day of October, 2007.



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