IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JOHNNY RAY DAVIS — APPELLANT

VS. — NO. 2007-KA-O504

STATE OF MISSISSIPPI — APPELLEE

REPLY BRIEF OF APPELLANT

APPELLANT RESPECTFULLY REQUEST ORAL ARGUMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

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STATEMENT OF THE CASE

A. Disposition of Case

The Appellant, Mr. Davis was convicted of fondling in violation of § 97-5-23(1) of the Mississippi Code on February 16, 2007 in the Circuit Court of Jones County. On the 26th of March, 2007 Mr. Davis was sentenced to 15 years in the state penitentiary with five years suspended. This case now comes to the Mississippi Court of Appeals.

STATEMENT OF FACTS

The statement of facts are detailed in Appellant's initial brief. As not to be redundant nor to lengthen the time the Court must spend on this brief, the Appellant does not repeat the statement of facts in this reply brief.

SUMMARY OF ARGUMENT

Johnny Ray Davis was unconstitutionally denied his fundamental right to a fair trial by the prosecuting attorney's improper remarks during the State's closing argument. The challenges raised on appeal are not procedurally barred by failure to interpose a contemporaneous objection. Therefore, the decision of the trial court should be reversed or at least remanded.

ARGUMENT

The assistant district attorney in closing made several impermissible comments that give rise to the challenges in this appeal. The assistant district attorney improperly commented on Mr. Davis not testifying (R.E. 24, 25.); vilified the defendant with the intention of arousing the passion of the jury and creating prejudice (R.E. 25.); expressed his personal opinion that the Mr. Davis was guilty to the jury (R.E. 26.); misstated evidence to the jury (R.E. 28.); and used the "send a message" argument (R.E. 29.). The assistant district attorney in general deserted his post as administer of justice and became a representative of a party involved with the controversy.

The State asserts that the issues raised in the appeal are unpreserved for review. (Brief for the Appellee at p.4) However, this argument fails on two points. The first point is the Defense did object at the opening of the closing statement and the trial judge quieted the objection by saying "the jury can determine what is going on." (R.E. 24.) The prosecuting attorney continued to make improper comments throughout the State's closing argument. The Defense, at the time, decided that a continuous string of objections would weigh heavy on its creditability and determined that it would be more harmful to continuously object. The second point that causes the State's asserts to fail is that these comments directly violated the Defendant's Constitutional rights, thus are not waived due to failure to object. The Mississippi Supreme Court has recognized that when "such a fundamental right, even the failure to timely object to the prosecution's comment at trial will not waive the right on appeal." *Whigham v. State*, 611 So.2d 988, 995 (Miss. 1992). The Court acknowledged this as well when it held "Constitutional rights in serious criminal cases rise above mere rules of procedure." *Brooks v. State*, 46

So.2d 94, 97 (Miss. 1950), citing *Fisher v. State*, 110 So. 361 (Miss. 1926). Constitutional rights are so important that the Court made them the exceptions to the rule of contemporaneous objections. "Errors affecting fundamental rights are exceptions to the rule that questions not raised in the trial court cannot be raised for the first time on appeal." *Id.* What is at issue here is the Defendant's Constitutional rights, Mr. Davis's fundamental rights not to be deprived of his liberty except by due process of law, a fair trial and "where fundamental and constitutional rights are ignored, due process does not exist, and a fair trial in contemplation of law cannot be had." *Id.* Therefore, under one or both of these points, the claims put forth in the appeal are not barred.

The State claims that the prosecutor was commenting on the content of the videotape introduced into evidence and not commenting on the Defendant's failure to testify. (Brief for the Appellee at p.8) This claim is irrational at best. The Defense was trying to counter the ever present harmful effect of a defendant not testifying by playing the videotape for the jury. The prosecutor pointed this out by saying:

> 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. Any 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.
>
> (R.E. 24,25.)

This statement is clearly pointing out to the jury that the Defendant did not testify. The assistant district attorney began by pointing out that the Defendant was only "hear[d]" from through the videotape and he did not talk about the case at hand. In any light, the words "[y]ou know, he's talking about everything in the world...except about this little

girl," speaking of the content of the videotape or not is a comment on the Defendant exercising his Fifth Amendment right to not testify. (R.E. 25.)

The next issue the State addresses is the assistant district attorney's vilification of the Defendant as a "pervert," when the prosecutor was using the word only to inflame and arouse the passions of the jury. The State claims the use of the word is a fair argument based on "proof showed." (Brief for the Appellee at p.9) However, the "proof" that the State rests on are the facts in question. If the Defendant was guilty then there would be proof that he was a pervert, as long as the facts are in dispute the word was just used to inflame the passions of the jury. Nevertheless, in footnote 7 of the Appellee's brief they argue that the use of the word was an attempt to refute defense counsel's suggestion that the defendant's alleged impotence rendered him incapable of committing this offense. (Brief for the Appellee at p.10) If this was the case, justice would be better served by introducing evidence to the contrary or making a thoughtful closing instead of name calling that was intended to arouse the passions of the jury. The State relies on *Divine v. State* as case law to support their position on this claim. *Divine v. State*, 947 So.2d 1017 (Miss. App. 2007). In that case this Court allowed the prosecution to call the Defendant a child molester; however this Court also noted that the prosecution was referencing a statement by the Defendant immediately before using the same words. In the case at hand the assistant district attorney may have been referring to the defense's impotence comment, however it did not invite a response that reached such an inflammatory level.

The State moves next to the issue of the prosecutor expressing his personal opinion of guilt. In their brief the State admits that a prosecutor can not use his personal

beliefs and the prestige attached to his office to bolster his argument. (Brief for the Appellee at p.10) However, the State begins by claiming that the prosecutor did not offer his opinion when he said: "Mr. Davis, he's guilty. I'm telling you. That's my opinion." (Brief for the Appellee at p.11) The State asserts that the assistant district attorney was arguing his case drawing on inferences which come from evidence. (Brief for the Appellee at p.11) That this comment must be analyzed in context and that it was made on the heels of an exposition of the evidence. (Brief for the Appellee at p.11) However, when looked at in context, there was no exposition of evidence before the comment was made. This was a pure expression of personal belief that carried more weight than it should because of the office from which it came. Nevertheless, there was another comment made by the assistant district attorney that expressed his personal believe, that could not be based on any evidence. The prosecutor offered his opinion on the guilt of the Defendant by saying "I would cut off my arm before I would knowingly prosecute an innocent man." (R.E. 27.) The State did not address this comment in its brief. However, this is a clear statement that the prosecutor saw the Defendant as guilty and that he was only prosecuting the Defendant because he was guilty. Being in the position of assistant district attorney this statement carries an enormous amount of weight. This is just one of the reasons that the prosecutor is not allowed to do what he did, offer his opinion on guilt or innocence of the Defendant, twice.

The State insists that the prosecutor did not misstate evidence to the jury when he argued that the defense counsel agreed with the state's expert witnesses. (Brief for the Appellee at p.11) However, what the defense counsel agreed with, was the fact that both were experts and not with their testimony. Defense counsel repeatedly called into

question the validity of their findings. (R.E. 33, 17, 22, 34-37, 20, 38, 39.) Specifically, to illustrate that the experts interviews with the alleged victim showed that the alleged victim's statements were uncorroborated and contradictory. (R.E. 40.)

The State's argument that the assistant district attorney did not use a "send a message" argument is specious. (Brief for the Appellee at p.12) This Court has ruled that the phrase "[t]here is nothing further we can do. It's up to you" **is a "send a message" argument**. *Alexander v. State*, 736 So.2d 1058, 1064 (¶16) (Miss.App. 1999). The assistant district attorney used almost the same exact words when he said "I did all I could. It's up to you now." (R.E. 29) Furthermore, the Mississippi Supreme Court has held that this error on its own could constitute a reversible error. *Payton v. State*, 785 So.2d 267, 270 (¶10) (Miss. 1999).

CONCLUSION

The Defendant respectfully requests that the Court reverse or remand the trial court's ruling because the Defendant did not receive a fair trial due to the misconduct of the prosecution. This misconduct resulted in numerous errors which combined undoubtedly created a prejudice that could not be overcome at that time. However, any one of these errors could be reversible by itself. These errors and misconduct deprived the Defendant of a fair trial. These challenges are not procedurally barred based on case law holding that when a fair trial was denied then the Defendant was stripped of his fundamental and constitutional rights and due process was lacking. Nevertheless, defense counsel did object at the beginning of the closing argument and did not want a string of constant objections in front of the jury. Fearing this would cause

more harm than good, defense counsel held his objections as the assistant district attorney broke case law, ignored the Supreme Court of Mississippi and robbed the Defendant of his constitutional rights. The Defendant seeking a reversal or a new trial is only in search of a fair trial which was denied to him by the prosecution.

RESPECTFULLY SUBMITTED, this the 25th day of October, 2007.

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CERTIFICATE OF SERVICE

I, Eric Tiebauer, the undersigned attorney, have this date forwarded, via United States mail, postage pre-paid, a copy of the above foregoing document to the following:

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THIS, the 25th day of October, 2007.

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