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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

GREGORY VINCENT BAKER

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APPELLANT

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COURT OF APPEALS**

VS.

NO. 2007-KA-1583

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

- I. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO SUPPRESS.
- II. THE STATE'S COMMENTS DURING ITS FINAL CLOSING ARGUMENT DO NOT CONSTITUTE PLAIN ERROR.

STATEMENT OF THE FACTS

On the evening of July 24, 2005, Kenny Sims, the telecommunications dispatcher for the Coahoma County Sheriff's Department received a call from an anonymous female stating that she had just left the Defendant, Gregory Vincent Baker's house and that several people were there "cooking drugs." (Transcript p. 6). Mr. Sims then called Deputy Neal Mitchell on his cell phone and advised him of the call. (Transcript p. 6). Deputy Mitchell asked Deputy Chris Doss to assist him on the call. (Transcript p. 6). Deputy Mitchell acknowledged that he knew the location of Baker's house as he had been then numerous times for both domestic calls and drug-related calls. (Transcript p. 13-14).

When the deputies arrived in the neighborhood, they saw Baker's mother and spoke with her

about the call. (Transcript p. 15). Baker's mother first gave the deputies permission to search her son's trailer, but as they walked toward the trailer, she changed her mind stating that she did not want her son to get into any trouble. (Transcript p. 15). The deputies were about to leave when Baker's little sister ran to the trailer and began knocking on the door. (Transcript p. 171). The deputies then heard a loud "commotion" that sounded like people running through the trailer and then a door slamming. (Transcript p. 16). The deputies saw several people run out the back door of the trailer. (Transcript p. 16). The deputies pursued the four individuals, Carl Burleson, Otis Glenn Poole, Cindy Long, and Danna Haney, seen running from the house and apprehended each of them. (Transcript p. 170 - 171). The deputies called for back up and secured the scene. (Transcript p. 172). They noticed smoke coming from the trailer and called the fire department. (Transcript p. 172-173).

Agent James Jones of the Mississippi Bureau of Narcotics obtained a search warrant for the trailer. (Transcript p. 272). The Mississippi Bureau of Narcotics officers involved in the search testified that given the substances found inside the trailer, a person could manufacture methamphetamine. (Transcript p. 221 and 241). Baker was found later that evening wearing muddy boots and hiding in a closet in his mother's house. (Transcript p. 174). He was removed and arrested. (Transcript p. 174).

Prior to his trial, Baker filed a Motion to Suppress All Evidence Seized. (Record p. 9). A hearing was held on the motion during which Deputy Mitchell and Doss testified regarding the events that transpired on the evening in question. Baker argued that the deputies should not have been on the property at all based on the anonymous tip stating that an anonymous tip has to have evidence of reliability. (Transcript p. 27 - 28). The State countered that the deputies were merely investigating a call and that no search and seizure took place as a result of the anonymous call noting

that Deputy Doss testified that the search warrant was later obtained based on not only what was stated by the anonymous caller but also on what he and Deputy Mitchell saw on the evening in question. (Transcript p. 23-24). Specifically the State argued that:

No search or seizure or arrest, rather, took place based solely on this anonymous tip. Your Honor, they went out there. They asked [Baker's mother] a few questions. They got initial consent to search. And when that consent was taken away, they went to leave. At that point, other circumstances arise, the subjects fleeing, which gave cause in the State's argument to probable cause for arrest, which led to statements, all of which combined together as probable cause basis for the search warrant, which led to the seizure of the evidence in the trailer. The [anonymous] tip itself is just the tip of the iceberg. It didn't give rise to any significant search or seizure on the part of the police. Any search at all, and only a minor seizure on the part of questioning of Ms. Baker, presuming the officer's have a duty to investigate a call.

(Transcript p. 30 - 31). Baker responded stating that "the whole issue here is whether or not the officers had enough information to even go out there. And our position is, Your Honor, that they did not." (Transcript p. 31 - 32). The trial judge agreed with the State noting that:

We have a caller, an anonymous caller call. These officers were instructed to go. They did right. That's what they are supposed to do. In this circuit, as long as I'm judge, that's - - that's good.

(Transcript p. 33). The trial judge then denied the motion. Baker later filed a Motion to Reconsider Suppression of Evidence and a hearing was held. This motion was denied also.

During Baker's trial, his accomplice Carl Burleson, testified that he, Cindy Long, and Danna Haney traveled to Baker's trailer with red devil lye, pills, and lithium batteries with plans to manufacture methamphetamine. (Transcript p. 289 - 290). When they first arrived at the trailer, Baker, Glenn Poole and a few other people were inside; however, all except Baker and Poole left as soon as they arrived. (Transcript p. 290 and 298). The group began using methamphetamine that Baker had cooked earlier that day. (Transcript p. 297). They were inside the trailer approximately 15 minutes when the deputies arrived. (Transcript p. 291). Burleson, Long, Haney, and Poole

panicked and ran out of the house. (Transcript p. 292). Burleson testified that he did not see Baker run out of the house. (Transcript p. 298).

Baker was convicted of manufacturing methamphetamine, possession of precursors, and conspiracy to manufacture methamphetamine. He was sentenced to serve ten years for the manufacture of methamphetamine charge, ten years for the possession of precursors charge, and three years for the conspiracy charge with each running concurrently.

SUMMARY OF THE ARGUMENT

The trial court did not abuse its discretion in denying Baker's Motion to Suppress as there was no illegal search conducted. Also, the trial court did not commit plain error in allowing the State's closing arguments as they were simply comments on Baker's failure to provide a credible defense and were in response to his closing argument.

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO SUPPRESS.

The standard of review for a trial judge's ruling on a motion to suppress evidence is as follows:

This Court must decide whether there was substantial, credible evidence to support the trial judge's ruling. *Culp v. State*, 933 So.2d 264, 274(¶ 26) (Miss.2005). This ruling must not be disturbed by our Court unless such substantial, credible evidence is absent. *Ray v. State*, 503 So.2d 222, 223-24 (Miss.1986). Further, admission of evidence is within the discretion of the trial court, and can only be reversed upon abuse of its discretion. *Crawford v. State*, 754 So.2d 1211, 1215(¶ 7) (Miss.2000).

Qualls v. State, 947 So.2d 365, 372 (Miss. Ct. App. 2007). In this case, the trial judge acted within his discretion in denying the motion to suppress as there was no illegal search.

On appeal, Baker "urges" this Court to consider the officers' entry onto Baker's property a search. (Appellant's Brief p. 10). However, the State asserts that the officers' initial entrance onto

the property was not a search. "Constitutionally speaking, a search occurs when governmental action invades an area in which the person invoking the Fourth Amendment has an actual expectation of privacy which society would consider to be reasonable." *Baker v. State*, 802 So.2d 77, 79 (Miss. 2001) (citing *Katz v. United States*, 389 U.S. 347, 361, 88 S.Ct. 507, 516-17, 19 L.Ed.2d 576 (1967)). As set forth above, the officers went to the scene because they received an anonymous call from a female specifically stating that she had just witnessed drugs being cooked at Baker's trailer. (Transcript p. 13). Officer Mitchell testified that:

It is our job to respond. And if we didn't respond, then we could be held liable because the information was given to us and we did not act on it. So, that was the main reason for us to go out there to act on it, to investigate, to look at, to look into the complaint that was given to us.

(Transcript p. 15). When the officers arrived, they spoke with Baker's mother explaining the call they received and she initially gave them permission to search the trailer, but later changed her mind. (Transcript p. 15). When asked what they did when Baker's mother refused consent, Officer Mitchell stated:

We stopped. We stopped going toward the trailer. You know, once we was fixing to leave, then all of the sudden we heard a lot of commotion that sounded like somebody was running through the residence. And I heard the back door slam and happened to look up. We saw people running out of the door, running around the trailer. They had came out the back door.

(Transcript p. 15 - 16). Up to this point, there had absolutely been no search. The police were merely responding to a call and came only as far onto the property as was necessary to speak with Baker's mother about the call. They began walking toward the trailer only after she gave them consent to search and immediately stopped going toward the trailer when she changed her mind. As the Mississippi Supreme Court has previously held, "[t]he local policeman ... is also in a very real sense a guardian of the public peace and he has a duty in the course of his work to be alert for

suspicious circumstances, and, provided that he acts within constitutional limits, to investigate whenever such circumstances indicate to him that he should do so.” *Walker v. State*, 881 So.2d 820, 826 (Miss. 2004) (quoting *Singletary v. State*, 318 So.2d 873, 876 (Miss.1975)). *See also Hill v. State*, 865 So.2d 371, 377 (Miss. Ct. App. 2003) (holding that “neither warrant nor probable cause is required for an investigatory inquiry”). Thus, the officers were simply fulfilling their duty to investigate a call and clearly stayed within their constitutional limitations.

Only after hearing “a lot of commotion,” hearing the back door of the trailer slam, and seeing four people run out of the back door, did police enter the area near the trailer. (Transcript p. 16 and 171). Even then, officers did not enter the trailer itself until after a warrant was issued. After hearing the commotion and seeing the four individuals run out of the house, the officers chased those individuals and took them into custody. The Mississippi Supreme Court has also stated that “[p]olice officers have a duty not only to search out those who commit reported crimes but also to investigate unreported activity whenever circumstances indicate that they should.” *Dies v. State*, 926 So.2d 910, 919 (Miss. 2006) “The Fourth Amendment does not require police who lack the information necessary for probable cause to simply shrug their shoulders and allow a crime or a criminal escape to occur.” *Id.*

The only thing seized at this point was the purse of one of the women who was detained. (Transcript p. 172). After taking these people into custody, the officers secured the scene and called for back up. (Transcript p. 172). While they were waiting on back up, they noticed smoke coming from trailer and called the fire department. (Transcript p. 172 - 173). After the fire department determined that the trailer was not on fire, a search warrant was obtained. (Transcript p. 173). None of the officers on the scene conducted a search until after the warrant was obtained. Thus, the officers did not conduct an illegal search and seizure. Accordingly, the trial judge properly denied

Baker's Motion to Suppress.

II. THE STATE'S COMMENTS DURING ITS FINAL CLOSING ARGUMENT DO NOT CONSTITUTE PLAIN ERROR.

Baker argues that the State "made direct allusions to Baker's exercising his constitutional rights to have a trial and to not testify." (Appellant's Brief p. 12). However, Baker is procedurally barred from raising the issue on appeal as he did not make a contemporaneous objection nor did he raise the issue in his Motion for New Trial. Baker, however, now relies on the plain error doctrine. (Appellant's Brief p. 12). This Court has previously held the following in that regard:

The law is well settled that if no contemporaneous objection is made, the error, if any, is waived. Procedural bar notwithstanding, an appellate court may review the merits of the underlying claim knowing that any subsequent review will stand on the bar alone. A defendant who fails to make a contemporaneous objection must rely on plain error to raise the assignment on appeal. The right of an appellate court to notice plain error is addressed in M.R.E. 103(d). The Mississippi Supreme Court applies the plain error rule only when a defendant's substantive rights are affected. "The plain error doctrine has been construed to include anything that 'seriously affects the fairness, integrity or public reputation of judicial proceedings.' " The plain error doctrine requires that there be an error and that the error must have resulted in a manifest miscarriage of justice.

Stubbs v. State, 811 So.2d 384, 387 (Miss. Ct. App. 2001)(quoting *Dobbins v. State*, 766 So.2d 29, 31 (Miss. Ct. App. 2000)). Accordingly, an analysis of the issue "necessarily includes a determination of whether there is, in fact, "error," that is, some deviation from a legal rule; that error "plain" or "clear" or "obvious;" and it is prejudicial in its effect upon the outcome of the trial court proceedings." *Porter v. State*, 749 So.2d 250, 261 (Miss. Ct. App. 1999) (quoting *United States v. Olano*, 507 U.S. 725, 732-735, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993)). "The standard of review that appellate courts must apply to lawyer misconduct during opening statements or closing arguments is whether the natural and probable effect of the improper argument is to create unjust prejudice against the accused so as to result in a decision influenced by the prejudice so created."

Hampton v. State, 815 So.2d 429, 433 (Miss. Ct. App. 2002) (quoting *Sheppard v. State*, 777 So.2d 659, 661 (Miss. 2001)). In the case at hand, there was no plain error as there was no error. Further, even if there were error in allowing the State to make the complained of arguments, it is not reversible as it did not create unjust prejudice against the accused or result in prejudicial effect upon the outcome of the trial.

A careful look at the complained of statements during the State's final closing argument confirms that the State was NOT commenting on Baker's failure to testify or his exercising his right to a jury trial. The statements were merely comments on Baker's defense. During Baker's closing arguments, he basically argued that the State's witness, Carl Burleson, and the other accomplices were to blame for the methamphetamine lab in Baker's house. (See p. 424 - 428). He further questioned the veracity of Mr. Burleson's testimony. (See p. 424 - 428). The State is allowed to rebut the closing arguments of the defense. See *Bailey v. State*, 956 So.2d 1016, 1034-35 (Miss. Ct. App. 2007) (holding that there is "[n]o reversible error results where a prosecutor's remarks are in response to defense counsel's previous argument" and that "[i]t is well settled that parties have latitude to argue in rebuttal to arguments raised by other parties"). In response to Baker's arguments, the State in pertinent part responded as follows:

Defense counsel would love to have you believe that Carl Burleson is to blame for everything. That's because Carl Burleson is here. He's an easy target. He's in those striped pants and that white shirt with MDOC on his back. The truth is, ladies and gentlemen, that Carl Burleson stood up. When he got caught, he stood up, and he told the truth to the police, and he told the truth to you here today. He told the truth everywhere along the line. He took responsibility for what he did, and he asked for help with his addiction. The defendant, Vincent Baker, has never done that. He doesn't have the fortitude to stand up and take responsibility for what he did, like Carl Burleson took responsibility. Instead he hid. He hid in that trailer until he could sneak out. He hid in the house until he got pulled out by police officers. He is now hiding behind his family in hopes that you will believe that his family wouldn't lie for him.

(Transcript p. 430).

In these statements, the State is merely countering Baker's arguments that Mr. Burleson should not be believed by stating that he told the truth and took responsibility for his actions from the beginning. The State then goes on to argue to the jury that while Mr. Burleson and the other accomplices were running out of the trailer, Baker was *hiding* inside and while Mr. Burleson and the other accomplices were taken into custody, Baker was *hiding* in a closet in his parents' house. Finally, the State argued that Baker's defense was basically to "*hide* behind his family." The State's closing, like that in *Scarborough v. State*, "did not penalize the defendant for exerting his constitutional privilege but rather were comments on the defendant's lack of defense." 893 So.2d 265, 271 (Miss. Ct. App. 2004). "This Court has repeatedly held that attorneys on both sides are allowed wide latitude in their closing arguments and that there is an obvious difference between a comment on the defendant's failure to testify and a comment on defendant's failure to put on a credible defense." *Wright v. State*, 958 So.2d 158, 164 (Miss. 2007) (citing *Underwood v. State*, 919 So.2d 931, 939-940 (Miss. 2005)) (*Emphasis added*). Furthermore, "the State is entitled to comment on the lack of any defense, and such comment will not be construed as a reference to a defendant's failure to testify 'by innuendo and insinuation.'" *Shook v. State*, 552 So.2d 841, 851 (Miss. 1989). Clearly, the State's arguments were simply comments on Baker's lack of a credible defense.

Baker cites to the dissenting opinion in *Hampton v. State*, 815 So.2d 429, (Miss. Ct. App. 2002) in support of his argument that the State's final closing argument was a comment on his exercising his right to trial and therefore plain error. However, in *Hampton*, the prosecutor directly commented on the defendant's exercising his right to trial by stating as follows:

This is a typical case. In America, we've got a Constitutional Right to a trial. People have fought and died. We're celebrating our holiday next week because of people fighting and dying for the rights that we have as American citizens. He's got that right

to sit here and shoot craps if he wants to when the evidence is crystal clear. That's what he's doing. He's wanting to gamble on one juror being weak and hanging up the jury. . . . He wants to shoot craps, put us through a day of work, and I submit to you it shouldn't take you very long to go back there and find that man guilty of robbery because that's he is.

Id. at 432. The *Hampton* majority noted that the prosecutor's comments were not "per se improper" and cautioned prosecutors about this type of comment; however, the Court ultimately held that the error was harmless as they could not "find that the district attorney's comments resulted in any unjust prejudice." *Id.* In Baker's case, the prosecutor did not make any direct statements about his exercising his right to trial. As set forth above, the crux of the State's argument was that its witness, Mr. Burleson, had been truthful from the beginning and that Baker had not put on a credible defense. Thus, there can be no error. Furthermore, even if the comments were considered error, they, like the comments at issue in *Hampton*, did not result in any unjust prejudice. It was already before the jury that Baker's accomplice, Mr. Burleson, pleaded guilty to the charges while Baker went to trial. Moreover, the evidence of Baker's guilt was overwhelming in that the methamphetamine lab was found in his house, there was testimony regarding his involvement, and there were numerous pieces of evidence in the house including, but not limited to the sign referring to his trailer as a "dope house" and the "How To Guide" regarding methamphetamine.

Accordingly, Baker's second issue is without merit as the State's arguments were proper rebuttal of the defense's closing arguments and were simply a comment on Baker's failure to provide a credible defense. Further, the arguments in question created no unjust prejudice.

CERTIFICATE OF SERVICE

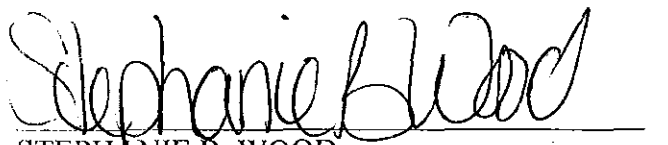
I, Stephanie B. Wood, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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