IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

ERIC TATE — APPELLANT

VS. — NO. 2008-KA-1318-SCT

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF ISSUES

I. THE STATE DID NOT COMMENT UPON TATE'S CONSTITUTIONAL RIGHT TO NOT TESTIFY.

II. NEITHER AN UNSOLICITED STATEMENT BY DEPUTY VALLELY NOR IMPEACHMENT EVIDENCE USED AGAINST THE DEFENDANT'S WIFE WARRANTED A MISTRIAL.

III. THE JURY WAS NOT EXPOSED TO PREJUDICIAL INFORMATION.

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V. THE JURY'S VERDICT IS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

STATEMENT OF FACTS

One afternoon, Rosie Holloway, ten-year-old Q.H.'s maternal grandmother with whom Q.H. lived since birth, overheard a telephone conversation between Q.H. and Eric Tate, Q.H.'s stepfather, in which Q.H. informed Tate that "she wouldn't wear those kind of clothes anymore." T. 200. The content of the conversation alarmed Rosie, who had already been suspicious of Tate's constant telephone calls to Q.H. T. 198. Rosie took the phone from Q.H., who ran to the bathroom. T. 200. Rosie followed Q.H. to the bathroom where Q.H. revealed that Tate had been molesting her since

she was seven or eight years old. T. 200. Rosie thereafter informed her daughter (Q.H.'s mom), Curtileniea Tate, of the allegations. Rosie accompanied Curtileniea and Q.H. to the Amite County Sheriff's Department to file a complaint. T. 202. After taking the complaint from Curtileniea, Sheriff's Deputy Bill Vallely contacted the Department of Human Services, which sent two case workers to interview Q.H. After the DHS interview, Curtileniea signed a criminal affidavit against her husband. T. 173-74. Tate was subsequently indicted for two counts of fondling and one count of sexual battery.

Q.H. testified at trial that Tate had been molesting her since she was seven or eight years old. T. 95. She testified that Tate had repeatedly fondled her breasts and vaginal area. T. 95-97, 102. Q.H. also testified that on multiple occasions Tate inserted a green vibrating object in her vagina and asked her if it felt good.[1] T. 98-99, 102. The vibrating device was later found in Tate's bedroom by Rosie and Curtileniea. T. 207. On one occasion, Tate attempted to penetrate Q.H.'s vagina with his penis, but failed only because "it wouldn't fit." T. 102. Q.H. testified that the abuse was more frequent after she turned ten years old. T. 103. She further testified that she did not tell her mother about the abuse because she was scared of Tate and did not think that her mother would believe her. T. 123, 128, 142. Q.H. also stated that when she did tell her mom, her mom confronted Tate who said he would not do it again. T. 138.

Dr. Leigh Gray, the State's expert gynecologist, testified that she performed a physical examination of Q.H. and discovered tears in her hymen consistent with vaginal penetration. T. 148-49. On cross-examination, Dr. Gray clarified that she could not state what penetrated Q.H.'s vagina,

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[1]The testimony at trial revealed that the intended use of the "little green wiggle thing" was a toy pen made of plastic which vibrated when turned on. T. 98. However, the pen had been removed from the "toy." T. 114.

but that she was certain that the injuries she observed could not happen from falling off of a bike or from a vaginal infection. T. 151. Dr. Gray also stated that Q.H. was not using tampons at the time of the exam, and further, she would not expect to see that level of trauma from tampon usage. T. 162.

Rosie testified at trial that although she had a very good relationship with Tate and considered him to be a generally good person, she had been suspicious due to his constant phone calls to Q.H.,even calling her from his work offshore. T. 199. Rosie also testified about Q.H.'s initial reporting of the abuse, and how Q.H. has changed since the allegations emerged.

Curtileniea testified on behalf of Tate. The sum of her testimony was that she never believed her daughter's allegations, but that she did initially cooperate with authorities just to have the allegations investigated. Curtileniea ultimately sided with her husband and decided that her ten-year-old daughter was lying about the fondling and sexual battery.

After three hours of deliberations, the jury found Tate guilty on all three counts. Taking into account that Tate had been previously convicted of rape, the trial court sentenced Tate to thirty years on the sexual battery charge, and ten years on each fondling charge, with all sentences to run consecutively.

SUMMARY OF ARGUMENT

The State did not impermissibly comment on Tate's right to not testify. The comment in question was nothing more than a response to defense counsel's statements during closing argument which called the child-victim's veracity into question.

Deputy Vallely's off-the-cuff statement which included the word "suicide" was not so prejudicial as to warrant a mistrial. The trial court admonished the jury to disregard the statement. The court's curative instruction removed any potential prejudice. Curtileniea's testimony regarding

a conversation between she and Tate was admissible impeachment evidence against Curtileniea, and admissible as a statement against a party opponent. Tate's statements in the conversation do not amount to a suicide threat. To the extent that this Court finds that the statement was a suicide threat, this Court should adopt the majority view from other jurisdictions which allow evidence of suicide attempts and suicide threats to show consciousness of guilt.

A comment by a venire person that she had heard of another case involving Tate was not so prejudicial as to warrant a mistrial. The statement provided absolutely no details about another charge. The trial court instructed the jury to disregard the statement, and advised the jury that there was no other charge against Tate. The court's curative statement removed any potential prejudice which could have resulted from the statement.

The jury's verdict is supported by legally sufficient evidence, and the verdict is not against the overwhelming weight of the evidence.

ARGUMENT

I. THE STATE DID NOT COMMENT UPON TATE'S CONSTITUTIONAL RIGHT TO NOT TESTIFY.

Tate claims that he was entitled to a mistrial when the State allegedly commented on his failure to testify. The entirety of the defense closing argument involved portraying the child victim as a liar and "problem child." T. 295. In response to that argument, during the State's rebuttal closing argument, the prosecutor noted that the obvious difficulty in prosecuting a sexual assault case was that by the very nature of the crime, it is one that happens in private, and comes down to the victim's word against the perpetrator's word. The trial court apparently overruled defense counsel's

objection to this characterization.[2] The prosecutor resumed his argument, and after stating, "It's her word against his . . .," defense counsel's second objection was sustained. The trial court then instructed the jury to disregard the prosecutor's comment. T. 309.

The decision to grant or deny a mistrial lies within the sound discretion of the trial court. *Edwards v. State*, 856 So.2d 587, 593 (¶19) (Miss. Ct. App. 2003). Although direct comments on a defendant's constitutionally protected choice to not testify are strictly prohibited, all other comments are reviewed on a case by case basis to determine whether the prosecutor's statements can be construed as commenting on the defendant's failure to testify. *Wright v. State*, 958 So.2d 158, 161 (¶7) (Miss. 2007). Attorneys are given wide latitude during closing arguments, and this Court has repeatedly explained the difference between a comment on the defendant's failure to testify and a comment on the defendant's failure to put on a successful defense. *Id.* at 161,164 (¶¶7,14). As stated by this Court in *Wright*, "What is prohibited is any reference to the defendant's failure to testify implying that such failure is improper, or that it indicates the defendant's guilt." *Id.* at 161 (¶8). The prosecutor's comments in the case *sub judice* in no way implied that Tate's failure to testify was improper or indicative of guilt. Rather, the statements fairly summed up the evidence and was responsive to defense counsel's closing argument.

Tate claims that the comment was a direct comment on Tate's failure to testify, "because there were no other words to which he could be referring." Appellant's brief at 8. However, Tate's defense was that the child victim fabricated the allegations. As such, the prosecutor's comment that the case was the victim's word against the defendant's referred simply to Tate's defense. Again, this

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[2]The trial court never explicitly stated its ruling. After defense counsel's objection, an off the record bench conference was held. After the conference, the trial court simply stated, "Let's go ahead and proceed." Contextually, it would appear that the objection was overruled.

Court has noted the distinction between comments on the defendant's failure to testify and comments on the defendant's failure to present a successful defense. Furthermore, "other words" to which the prosecutor could be referring included Curtileniea's testimony that Tate denied Q.H.'s allegations. T. 242-43.

Although the prosecutor's comment was not improper, the trial court sustained Tate's objection and instructed the jury to disregard the prosecutor's comment. There is a presumption that a jury follows the directives of the trial court. *Walker v. State*, 671 So.2d 581, 621 -622 (Miss. 1995) Additionally, "it is the well established rule in Mississippi that where a trial judge sustains an objection to testimony interposed by the defense in a criminal case and instructs the jury to disregard it, the remedial acts of the court are usually deemed sufficient to remove any prejudicial effect from the minds of the jurors." *Id.* Accordingly, even if the prosecutor's statement had been improper, the trial court's instruction to the jury to disregard the comment cured any possible error.

II. NEITHER AN UNSOLICITED STATEMENT BY DEPUTY VALLELY NOR IMPEACHMENT EVIDENCE USED AGAINST THE DEFENDANT'S WIFE WARRANTED A MISTRIAL.

During Deputy Vallely's direct examination, the prosecutor questioned him about the course of his investigation. During this testimony, Deputy Vallely made the following unsolicited statement, "I notified New Iberia to be on the lookout for [Tate] and for his vehicle because of possible suicide." T. 178. The trial court sustained defense counsel's objection to the statement, and instructed the jury to disregard the statement. T. 178. Then during Curtileniea's cross-examination, she testified about a statement made to authorities describing a phone call between she and Tate in which Tate told her to take care of their boys and not bring them to his funeral. T. 272. Tate claims that Vallely's and Curtileniea's testimony was more prejudicial than probative, and that the trial court should have granted a mistrial based on the admission of said testimony.

As previously stated, it is presumed that a jury a follows the trial court's instruction to disregard testimony which brought on a sustained objection. *Walker*, 671 So.2d at 621-22. Vallely's off-the-cuff statement regarding "possible suicide" cannot be the basis of reversible error, where the trial court's instruction to disregard the testimony removed any potential prejudicial effect of such a statement from the minds of the jurors.

Tate claims that Curtileniea's testimony about a conversation she had with her husband just days after Q.H.'s revelation was not relevant and was also more prejudicial than probative. On direct, Curtileniea testified that when her mother told her about Q.H.'s revelation, she did not believe her mother, and only went with her mother and her daughter to report the abuse because her mother insisted that she "sign whatever they say sign, and do whatever they tell you to do." T. 242. Curtileniea also brought her daughter's character for truthfulness into question by testifying about an incident involving missing money that occurred two years prior to the molestation allegations. T. 245-46. The remainder of Curtileniea's testimony on direct centered on the reasons she did not believe her husband molested her daughter.

On cross-examination, Curtileniea was questioned about her conversation with Tate, which she documented and turned over to Vallely.

> Q. Mrs. Tate, I now hand you -- show you what's been marked as State's Exhibit A for identification and ask you again, is that, in fact, the statement that you prepared and carried down there and gave to Mr. Vallely?
>
> A. Yes, sir.
>
> Q. And it says, "To whom it may concern. This is a statement about the conversation that I had with Eric Tate. My son had the phone, and I grabbed it from him. I said hello twice, and Eric said, 'Hey, it's me,' and how was I and the boys. I said how the F you think we're doing. He said he was sorry." He told you that. He told you that he was sorry, didn't he?
>
> A. Right.

Q. Okay. "I said what did you do to Quan, and he said all the things she said I did, I did not do. I told him just doing anything was wrong. I told him charges has been filed. Tell -- he said tell his boys he loved them. Told me to continue to take care of his boys and don't bring them to his funeral, and then he hung up the phone." You took that statement to Mr. Vallely? Is that right?

A. Right.

T. 272. The testimony in question was absolutely relevant for impeachment purposes. The entirety of Curtileniea's testimony on direct was that she never believed the allegations from the time they were made. The statement in question showed that she did initially believe her daughter's report of abuse. As such, the State was permitted to impeach Curtileniea's contradictory account.

To the extent that this Court may find that only Curtileniea's portion of the recorded conversation was relevant to impeach her credibility, the remainder of the statement, Tate's end of the conversation, was admissible as an admission by a party opponent. A statement is admissible and not hearsay if the statement is offered against a party and is his own statement. MRE 801(d)(2)(A). Regarding an admission by a party opponent, this Court has held, "It is irrelevant that the defendant did not intend it to be a statement against interest and that it was self-serving when made." *Conley v. State*, 790 So.2d 773, 787 (¶43) (Miss. 2001). In other words, to be admissible under MRE 801(d)(2)(A), the statement need not be against the party's interest when made. *Thornhill v. State*, 561 So.2d 1025, 1029 (Miss. 1989).

Tate claims that even if the statements made in the recorded telephone conversation were relevant, they were more prejudicial than probative. Tate asserts that the portion of the statement in which he advised his wife not to bring their children to his funeral was a suicide threat. A more reasonable interpretation of Tate's statement would be an acknowledgment that he would likely spend the rest of his life in prison for fondling and committing a sexual battery upon his step-

daughter. Evidence of a suicide threat in Tate's statement is tenuous at best. However, to the extent that this Court construes Tate's statement as a suicide threat, the State offers the following argument. Tate is correct in his assertion that this Court has never addressed the issue of whether a defendant's suicide attempt or threat of suicide is admissible to show consciousness of guilt. A survey of persuasive authority reveals that reviewing courts in at least twenty-four states have held that evidence of a defendant's attempted suicide is admissible to show consciousness of guilt.[3] Several states even allow jury instructions which state that the jury may consider a defendant's attempt to commit suicide as consciousness of guilt.[4] Few cases, however, have dealt with a defendant's threat, rather than actual attempt, to commit suicide. It appears that only five reviewing courts have discussed the issue, and four of the five courts determined that threats of suicide are also admissible to show consciousness of guilt. See *Duncan v. State*, 602 S.E. 2d 908, 910 (Ga. App. 2004); *Commonwealth v. Sanchez*, 610 A.2d 1020, 1028 (Pa. 1992); *State v. Steffens*, 1992 WL 75831

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[3]These states are Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Iowa, Kentucky, Massachusetts, Minnesota, Missouri , Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Oklahoma, Pennsylvania, Tennessee, Texas, and Vermont. See *Strong v. State*, 277 S.W. 3d 159 (Ark. 2008); *People v. Butler*, 90 Cal. Rptr. 497 (Cal. App. 1970); *People v. Summit*, 104 P.3d 232 (Colo. App. 2004); *McKinney v. State*, 466 A.2d 356 (Del. 1983); *Walker v. State*, 483 So. 2d 791 (Fl. Dist. Ct. App. 1986); *Aldrgidge v. State*, 494 S.E. 2d 368 (Ga. App. 1997); *State v. Hargraves*, 107 P.2d 854 (Idaho. 1940); *People v. Campbell*, 467 N.E. 2d 1112 (Ill. Ct. App. 1984); *State v. Mitchell*, 450 N.W. 2d 828 (Iowa 1990); *Rine v. Commonwealth*, 2005 WL 1185205 (Ky.); *Commonwealth v. Sheriff*, 680 N.E. 2d 75 (Mass. 1997); *State v. Ackerman*, 380 N.W. 2d 922 (Minn. App. 1986); *State v. Painter*, 445 S.W. 2d 79 (Mo. 1931); *State v. Campbell*, 405 P.2d 978 (Mont. 1965); *State v. Plunkett*, 149 P.2d 101 (Nev. 1944); *State v. Brown*, 517 A.2d 831 (N.H. 1986); *State v. Mann*, 625 A.2d 1102 (N.J. 1993); *State v. Blancett*, 174 P. 207 (N.M. 1918); *State v. Hunt*, 287 S.E. 2d 818 (N.C. 1982); *Dodd v.* State, 100 P. 3d 1017 (Okla. Crim. App. 2004); *Commonwealth v. Sanchez*, 610 A.2d 1020 (Penn. 1992); *State v. White*, 649 S.W. 2d 598 (Tenn. Crim. App. 1982); *Harper v. State*, 930 S.W. 2d 625 (Tex. App. 1996); *State v. Onorato*, 762 A.2d 858 (Vt. 2000).

[4]See *Dodd v.* State, 100 P. 3d 1017 (Okla. Crim. App. 2004); *Commonwealth v. Sheriff*, 680 N.E. 2d 75 (Mass. 1997); *Walker v. State*, 483 So. 2d 791 (Fla. Dist. Ct. App. 1st Dist. 1986); *State v. Brown*, 128 N.H. 606 (1986); *State v. Campbell*, 146 Mont. 251 (1965).

(Tenn. Crim. App. 1992); *People v. O'Neil*, 165 N.E. 2d 319, 465 (Ill. 1960). The common analogy drawn by the courts which allow evidence of a defendant's suicide attempt or threat is to flight as evidence of consciousness of guilt.

Tate cites to *Penalver v. State*, 926 So.2d 1118, 1133 (Fla. 2006), to support his assertion that "suicidal thoughts or threats alone are not a measure of guilt unless there are attenuating circumstances that would reasonably convince the trier of fact that the only reason for such thoughts or threats was to avoid prosecution." Appellant's brief at 13. The *Penalver* court, found that the defendant's statements to the effect of "I might as well be dead," and "I want to kill myself," were not unequivocal suicide threat. *Id.* at 1134. More importantly, the court found that at the time the statements were made, Penalver was not under arrest and had not been threatened with prosecution. *Id.* As such, the court found that the statement in question did not evince a desire to evade prosecution, which would be admissible. *Id.* If Penlaver's statements were not threats of suicide, then certainly, Tate's statement was not a suicide threat. To the extent that Tate's statement can be construed as a suicide threat, the statement was made after a criminal affidavit against him had been filed, and could be construed as a desire to evade prosecution. Additionally, the present case is more akin to *Duncan* and *Steffens*, where both defendants were charged with sex crimes against children and subsequently threatened to commit suicide, and reviewing courts found that the threats were evidence of consciousness of guilt. 602 S.E. 2d at 910; 1992 WL 75831 at 4.

In summary, Curtileniea's portion of the recorded statement was admissible for impeachment purposes. Tate's portion of the recorded statement was admissible as statement against a party opponent. Tate's statement advising Curtileniea to not bring their boys to his funeral, was more an admission of guilt than a threat to commit suicide. To the extent that this Court finds that the statement could be a threat to commit suicide, the State asks the Court to adopt the majority view

that such a statement is admissible as evidence of consciousness of guilt.

III. THE JURY WAS NOT EXPOSED TO PREJUDICIAL INFORMATION.

During voir dire, a venireperson indicated that she was familiar with the case, stating, "I've heard of it before now, and I heard of another case that involved Mr. Tate also." T. 62. Defense counsel then concluded his examination of the panel, and asked to approach the bench. T. 62. The panel was excused and both attorneys met in chambers with the trial judge. T. 63. Defense counsel moved for a mistrial based on the venireperson's statement. T. 64. The State responded that the venireperson revealed no details about the other case. T. 64. Defense counsel then alleged that after the venireperson's statement, another venireperson on the back row smiled. T. 65. The court overruled the motion for mistrial, finding that jury pool had not been tainted by the statement. T. 66. The court also stated that jurors are presumed to follow the law, and the jury would be properly instructed. T. 66. Finally, the court stated that the venireperson who made the statement would be removed for cause, as well as the juror in the back row who smiled. T. 66. After a short recess, both parties appeared before the trial judge in chambers, where Curtileniea claimed that she was outside the courthouse when she heard four or five jurors saying they wondered "what other case he had against him." T. 70. Defense counsel then expressed his concern that Tate would be unable to receive a fair trial. T. 72. The trial court denied defense counsel's renewed motion for mistrial, and noted that defense counsel had not asked for a curative instruction, but the court would grant one if requested. T. 73. The court further stated that if the verirepersons identified by Curtlileniea ended up in the jury pool, the court would allow defense counsel additional challenges as to those jurors. T. 73. The trial court then overruled defense counsel's motion to re-open voir dire. T. 74. The court then asked if defense counsel desire a curative instruction be given to the jury. T. 75. After the jurors were seated, the court stated, "Now, also I am going to instruct you at this time that you are

to completely and totally disregard any comment that may have been made on voir dire about any other case against this defendant because there is no other case. Does everybody understand that?" T. 80. The jurors responded in the affirmative." T. 80. Nevertheless, Tate claims on appeal that the trial court erred in failing to grant a mistrial.

Our reviewing courts have stated the following regarding motions for mistrial based on alleged prejudicial remarks.

> Case law unequivocally holds that the trial judge is in the best position for determining the prejudicial effect of an objectionable remark. The judge is provided considerable discretion to determine whether the remark is so prejudicial that a mistrial should be declared. Where serious and irreparable damage has not resulted, the judge should admonish the jury then and there to disregard the impropriety.

Edwards v. State, 856 So.2d 587, 593-94 (¶19) (Miss. Ct. App. 2003) (quoting *Coho Resources, Inc. v. McCarthy*, 829 So.2d 1, 18 (¶ 50) (Miss. 2002)). A trial court's determination that a seated jury is fair and impartial will not be disturbed unless it is shown that the finding is clearly erroneous. *McDougle v. State*, 781 So.2d 909, 910-11 (¶5) (Miss. Ct. App. 2000).

In *Clayton v. State*, 893 So.2d 246, 248 (¶5)(Miss. Ct. App. 2004), the trial court's denial of a motion for mistrial was upheld where a juror indicated that he was involved in the defendant's arrest. In *Shelton v. State*, 853 So.2d 1171, 1184 (¶42) (Miss. 2003), the trial court's denial of a motion for mistrial was upheld where a juror stated during voir dire that this was the defendant's second trial. In *Nelson v. State*, 839 So.2d 584, 587 (¶7) (Miss. Ct. App. 2003) the trial court's denial of a motion for mistrial was upheld where a juror stated that the defendant, "was a client of ours on probation at Justice Network." In *McDougle v. State*, 781 So.2d 909, 910 -911 (¶4) (Miss. Ct. App. 2000), the trial court's denial of a motion for mistrial was upheld where a juror stated that he had been informed that the defendant had previously committed an armed robbery. In *Edwards v. State*, 856 So.2d 587, 593-94 (¶21) (Miss. Ct. App. 2003) the trial court's denial of a motion for

mistrial was upheld where a juror stated that he was aware of the defendant's incarceration prior to trial. These are but a few of the cases in which our reviewing courts have found that the trial court's curative instruction ensured that the jury was in fact fair and impartial. Additionally, the *Clayton* and *Edwards* courts specifically found that no prejudice resulted from jurors' comments about the defendant's incarceration because the jurors did not reveal any information about the defendants' charges. 893 So.2d at 248; 856 So. 2d at 594.

Tate characterizes the curative instruction as "limited," but the State suggests that the trial court went above and beyond in protecting Tate's right to a fair and impartial jury. The trial court's instruction could have been construed by jurors to mean that there was no other pending case against Tate at the time of trial, or that there had *never* been another case against him, which the record reveals is untrue. In any event, Tate has failed to show that the trial court's determination that the jury was fair and impartial was clearly erroneous. Tate suffered no serious and irreparable damage from the venireperson's remark, and a mistrial was not warranted.

IV. THE JURY'S VERDICT IS SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE.

Although Tate frames his fourth assignment of error as one of legal sufficiency, the entirety of his argument concerns the weight of the evidence, as he does nothing more than attack the child-victim's credibility. The State will address that aspect of the appellant's argument in the following issue.

Tate wholly fails to even articulate which element of which charge the State did not prove beyond a reasonable doubt. Tate was charged with and found guilty of fondling and sexual battery. The victim's testimony of the defendant's vile, reprehensible acts need not be repeated here. There can be no question that Q.H.'s testimony established that Tate both indulged his depraved licentious sexual desires by touching his ten-year-old step-daughter's breasts and vaginal area, and that he

engaged in sexual penetration with the child. It matters not that Tate did not successfully penetrate the victim with his penis, as the definition of sexual battery includes penetration of the victim's genitals by the insertion of "any object," which clearly includes the green vibrator Q.H. testified that Tate used. Miss. Code Ann. §97-3-95.

This Court has repeatedly held that even a single witness's uncorroborated testimony is legally sufficient to support a conviction. *Miller v. State*, 996 So.2d 752, 756 (¶12) (Miss. 2008) (quoting *Cousar v. State*, 855 So.2d 993, 998-99 (¶16) (Miss 2003)). In the present case, however, Q.H.'s testimony was not uncorroborated. Dr. Gray testified that the tears in Q.H.'s hymen were consistent with penetration. T. 149. The tears were so severe that Dr. Gray opined that they could not be the result of falling off a bike, using tampons, or a vaginal infection. T. 151,162. Additionally, Rosie and Curtileniea found that green vibrator in Tate's room that Q.H. testified he used in the sexual battery.

The State proved each element of each crime charged beyond a reasonable doubt. Tate's legal sufficiency claim must fail.

V. THE JURY'S VERDICT IS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

A conviction will only be overturned based on an argument that the conviction is against the weight of the evidence if the reviewing court finds that the verdict is so contrary to the evidence that allowing the verdict to stand would "sanction an unconscionable injustice." *Bush v. State*, 895 So.2d 836, 844 (¶18) (Miss. 2005). The entirety of Tate's weight of the evidence argument consists of pointing out alleged inconsistencies and omissions in Q.H.'s testimony. The task of weighing a witness's credibility and resolving factual disputes lies within the sole province of the jury. *Wilson v. State*, 990 So.2d 798, 803 (¶22) (Miss. Ct. App. 2008). The jury was faced with Q.H.'s account

of the crime and Tate's denial of the crime. When this honorable Court weighs the evidence in the light most favorable to the verdict, it cannot find that allowing Tate's conviction to stand would sanction an unconscionable injustice.

CONCLUSION

For the foregoing reasons, the State asks this honorable Court to affirm Tate's conviction and sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, La Donna C. Holland, 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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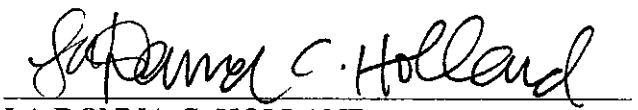
This the 12th day of May, 2009.



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