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BEFORE THE SUPREME COURT OF MISSISSIPPI

ERIC TATE — APPELLANT

V. — CIVIL ACTION NO. 2008-KA-01318-SCT

STATE OF MISSISSIPPI — APPELLEE

BEFORE THE COURT is Appellant and his reply to the State's Brief wherein, the State argues that he, Eric Tate, is not entitled a judgment of acquittal or a new trial. Because the State's position falls short, particularly, with respect to the improper closing arguments of the prosecutor, this Court should, at a minimum, grant Appellant a new trial.

REPLY ARGUMENT

A. COMMENT ON RIGHT NOT TO TESTIFY

The State's position as to why the prosecutor's closing argument was proper contains at least three (3) points. First, it was said that the prosecutor's statement, "her word against his word," "fairly summed up the evidence and was responsive to defense counsel's closing argument." Appellee's Brief, p. 5. Here, the State appears to concede that its statement was, at least, an indirect comment on Tate's failure to testify. The statement reviewed in its proper context should result in a

finding that the improper comment could not be excused. Recall that the prosecutor's comments were made just after he had just finished a litany on how he despised sex crimes as follows:

> "...I hate these cases.
> I hate them. I've been doing this for twenty years, and I hate these cases worse than anything else I do, and I'm going to tell you why, ladies and gentlemen. Because when people do this kind of stuff to children, they don't do it in front of anybody. They don't do it in front of other people. So what I end up with when it really gets down to it is **her word against his**. Think about it..."
>
> T. 308.

After reviewing this, it is difficult to understand how the State now argues that this was a summary of the evidence. It was not.

Furthermore, the comments were not a rebuttal to defense counsel's analysis of the testimony of the witnesses as was, for instance, in Whitlock v. State, 941 So.Ld 843 (Miss. App. 2006). The Court there observed that statements of the prosecutor where the accused failed to give his statement under oath as the other witnesses did, were actually responsive to the argument of defense counsel who had just earlier made a comparison of the State witnesses' statements to attack their credibility. To the extent the State *sub judice*, by inference, is relying upon Whitlock, that reliance must fail for lack of adequate comparison.

Next, the State then argued that it's comment simply referred to Tate's defense: that the minor victim lied concerning being molested by Tate. Appellee's Brief, p.5. But the actual intent of the prosecutor was and is not relevant. Cite omitted. Curiously, the State made an additional point that the comment did not concern Tate's failure to testify, but his failure to present a successful defense. Appellee's Brief, pp. 8-9. It appears that the State's positions travel in opposite directions which actually highlights the tenuous nature of its argument. True, Tate did make the argument of fabrication by the minor, but he put forth proof of such that was not substantially contradicted. Therefore, a substantial defense, not the lack thereof, was presented. Moreover, the State never suggested before now that there was a lack of defense. Thus, this argument must fail for lack any basis whatsoever.

As a last effort, the State argued that its comment could have referred to Tate wife's testimony that Tate denied the allegations of Q.H. In other words, the State now concedes, in essence, that its previous argument that the comment *fairly summed up the evidence, was responsive to defense counsel's argument, referred to Tate's defense, and to Tate's lack of defense*, could have been wrong. Of course, Appellant has already addressed this last point in Appellant's Brief; that the prosecutor argued that the testimony of Tate's wife supported an **admission**

not a denial of the allegations. See Appellant's Brief, p.4-5. To say that the comment **could have** referred to this or that lends more credence to Appellant's point that it was just as likely the comment *could have* referred to Tate's lack of testimony at trial.

While direct comments on a defendant's right not to testify constitute reversible error, Davis v. State, 767. So. 2d 986 (Miss. 2000), comments by innuendo and insinuation concerning this same right must be judged on a case-by-case basis. Id. The words of the prosecutor to the jury were essentially this:

> "Members of the jury, because Tate and the minor were the only two present, this case comes down to the minor's testimony of what occurred versus Tate's testimony and because Tate did not testify, Tate must be guilty."

The comments of the State were directly related to Tate's lack of testimony. No different conclusion was reached by the Florida District Court of Appeal in Fussell v. State, 436 So.2d 434 (Fla. App. 3rd District 1983) as cited in Appellant's Brief. The same court held that the following opening argument was, too, improper: "that the basic issue is whether the jury is going to believe the State's witness or the defendant," Roberts v. State, 443 So.2d 192 (Fla. App. 3rd District 1983). In the case *sub judice*, a curative instruction to disregard the comment was given, but

that type of error could not be cured or considered harmless. In fact, with the comment being made twice, it could be said to have been intentional.[1]

Assuming (but not conceding) the prosecutor's comments indirectly referred to Tate's right not to testify, the prejudicial effect could not be cured by admonishing the jury to disregard the comment because of serious and irreparable prejudice placed before the jury. Not only was the comment made twice in closing argument, the jury was faced with a minor's testimony and only one other witness who could refute the allegations: Eric Tate. The prosecutor's repeated reference to "her word against his word," naturally caused the jury to wonder about Tate's lack of testimony and, therefore, was improper and highly prejudicial to him.

Whether intentional or not, the State's closing argument was improper and a direct comment upon Tate's right not to testify. Remember, the evidence was not overwhelmingly in favor of the State as the jury was hung up on one point in deliberations. To assure that Tate received a fair trial and that the purity of the jury verdict was not compromised, a new trial is warranted.

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[1]The State's argument that the first objection to the prosecutor's comment appeared to be overruled while the second objection to the same comment was sustained has no basis in fact. During the motion for new trial, the trial judge specifically commented that he sustained both objections.

B. STATEMENT OF TATE REGARDING FUNERAL WAS NOT A PARTY ADMISSION OR EVIDENCE OF GUILT

The State takes to task Appellant's argument that the statements of Detective Vallely and of Tate's wife regarding suicidal thoughts of Appellant were not fatally prejudicial even though the trial court instructed the jury to disregard the statements. This Court has held, as the State points out, that it is presumed that a jury follows the trial court's instruction to disregard testimony after it sustains an objection. Walker v.Tate, 671 So.2d 581,621-622 (Miss. 1995) The problem here is that the trial court actually sustained Tate's objection to Detective Valley's comments of suicide and gave a corrective instruction, (T. 178), but later allowed the State to question Tate's wife about the same issue. T. 293. Then, the prosecution used the wife's comment (i.e., specifically, where he said to not bring his sons to his funeral) against Mr. Tate in its closing argument. T.293, 315. In other words, the trial court reversed whatever corrective action it had taken.

The State, also, claims that the alleged suicide comments were relevant and properly used for impeachment purposes. This claim has already been addressed by Appellant. However, the position of the State that Tate admitted to the alleged molestation simply has no basis in fact nor did the State illustrate specifically what language constituted the party admission.

As to the last argument by the State that the comment about Tate's funeral was admissible because it demonstrated that Tate did not want to spend the rest of his life in prison was essentially what the Appellant had argued earlier. [2] See Appellant's Brief, pp. 14-15. To be clear, even if the Court finds that a threat of suicide generally is admissible to show "consciousness of guilt," it would not be admissible here given that Tate's comment of "not going back to prison" (which was in the original unedited version) placed his other comments that the jury actually heard in their proper context. Tate was not suggesting that he was trying to evade arrest or prosecution. As pointed out in Appellant's Brief, Tate had been incarcerated previously for another charge. Therefore, the State's argument here must fail because of the distortion of the facts by the State.

CONCLUSION

Unless oral argument is granted, Eric Tate will no longer have another opportunity to convince this Court that he is entitled to an acquittal, or in the alternative, a new trial. Eric Tate received, essentially, a life sentence for committing acts that he strenuously denied and continues to deny. When his life is balanced with the costs of a new trial, justice favors granting, at a minimum, a new

[2] Of course, Tate had at all times denied fondling or committing a sexual battery upon the minor.

trial since the State could and can not show or even allege that the purity of jury verdict was not compromised. The proof at trial must have been such that it convinced the jury beyond a reasonable doubt of Tate's guilt. The trial court abused its discretion when, despite the curative instructions, the jury was left with tainted evidence.

RESPECTFULLY SUBMITTED this the 29th day of June, 2009.

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CERTIFICATE OF SERVICE

I, Sanford E. Knott, attorney for Appellant Eric Tate, do hereby certify that I have on this date mailed via, United States Postal Services, postage prepaid, a true and correct copy of the foregoing **Appellant's Reply Brief** to the following:

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So, this the 29th day of June, 2009.

Sanford E. Knott, Esquire