BEFORE THE SUPREME COURT OF MISSISSIPPI
2008-KA-01318-SCT

ERIC TATE — APPELLANT

V.

STATE OF MISSISSIPPI — APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that Justices in this Court may evaluate possible disqualifications or recusal:

1. Eric Tate, Appellant;
2. Sanford Knott, Counsel for Appellant;
3. Ronnie Harper, District Attorney of Amite County, Mississippi;
4. Debra W. Blackwell, Assistant District Attorney of Amite County, Mississippi, counsel for State; and
5. Forrest Johnson, Circuit Judge.

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STATEMENT OF ISSUES

AND NOW the Appellant, Eric Tate puts forth the following issues for review:

ISSUE NO. 1: WHETHER THE TRIAL ERRED BY NOT GRANTING A MISTRIAL WHEN THE PROSECUTION COMMENTED ON APPELLANT'S RIGHT NOT TO TESTIFY.

ISSUE NO. 2: WHETHER THE TRIAL COURT ERRED BY PERMITTING PREJUDICIAL EVIDENCE TO SHOW "CONSCIOUSNESS OF GUILT."

ISSUE NO. 3: WHETHER THE TRIAL COURT'S FAILURE TO EXAMINE INDIVIDUAL JURORS OR GRANT MISTRIAL WAS ERROR WHEN JURY PANEL WAS EXPOSED TO PREJUDICIAL INFORMATION.

ISSUE NO. 4: WHETHER THE EVIDENCE WAS NOT LEGALLY SUFFICIENT TO SUPPORT THE VERDICT.

ISSUE NO. 5: WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR NEW TRIAL GIVEN THAT THE OVERWHELMING OF THE EVIDENCE FAVORED APPELLANT.

STATEMENT OF THE CASE

BEFORE THE COURT is Eric Tate who, in May of 2008, was convicted of one (1) count of sexual battery and two (2) counts of child fondling in the Circuit Court of Amite County, Mississippi and sentenced to fifty (50) years imprisonment. After having had a hearing on Tate's motion for judgment notwithstanding the verdict and for new trial, the lower court denied said motion on or about July 28, 2008. Eric Tate, the Appellant herein, now appeals to this Court from the order denying him relief arguing that the evidence was, *inter alia*, tainted by prosecutorial misconduct, insufficient to sustain a conviction, and against the overwhelming weight of the evidence. Because of the combined errors at trial, this Court must reverse the conviction and either discharged Appellant or remand the case for a new trial.

STATEMENT OF FACTS

On or about July 27, 2007, Curtileniea Tate, the wife of Appellant visited the Amite County Sheriff's Department with her minor daughter, Q.H., and filed charges against Eric Tate for fondling Q.H. in June, 2006. R. 55. Some days earlier, Q.H.'s grandmother, Rosie Holloway, with whom she lived, confronted Q.H. about any inappropriate contact between the two after overhearing a telephone conversation between Tate and Q.H. one evening concerning how Q.H.

was dressed. T. 210. Q.H. told Ms. Holloway of the allegations which lead to the visit to the sheriff's department. Eric Tate was later indicted for two (2) counts of child fondling and one (1) count of sexual battery during November of 2007. The indictment indicated that the period of time of the abuse was from June, 2006 to July 27, 2007. R. 2-3.

During the trial, Q. H. testified that Tate fondled her over a period of time beginning when she was about seven (7), that he inserted a wiggle toy in her private part on more than one occasion, and attempted to penetrate her vaginal area with his private part, but failed. T. 95-102. Dr. Leigh Gray, an obstetrician and gynecologist, testified that when she examined Q.H., she had to give her anesthesia because she was too uncomfortable with the pelvic examination, but after doing so, she had tears of the hymen consistent with penetration or evidence of trauma. T. 148-149.

Deputy William Vallely testified that he conducted the initial interview with Q.H. at the sheriff's office and that she was accompanied by her mother and grandmother. T. 173. The minor was referred to D.H.S., he prepared the affidavit against Tate, T. 175, and perfected the arrest of Tate who turned himself in with assistance of counsel. T.178. Vallely, also, stated that there was no evidence that sexual abuse of Q.H. occurred after June, 2006.

Rosie Holloway also testified for the prosecution and established that Q.H. lived with her and that she was the first one to confront Q.H. about the allegations. Ms. Holloway, too, questioned Tate about the allegations, but did not give him a chance to respond. According to Ms. Holloway, Q.H. claimed that the allegations occurred when her grandfather was sick. Ms. Holloway testified that in May of 2006, her husband was hospitalized and was in rehabilitation therapy in June of 2006.

On behalf of the defense, M.G., a student, testified that she was familiar with Tate and Q.H. and Q.H. accused Tate of molesting her. M.G. testified that the allegation was false. Finally, Curtileniea Tate, Appellant's wife, testified that Mr. Tate worked for Sonoco Catering Company, an offshore company as a cook. He worked two weeks at a time and would return home one (1) week. Although she originally believed Q.H. over her husband, she later determined that the allegations were not true and informed Investigator Vallely of such. T. 245-247. Appellant Tate did not testify. Later, the jury returned a verdict of guilty on all counts.

SUMMARY OF ARGUMENTS

When the prosecutor, in closing arguments, tactically pitted the

victim's testimony against the Appellant's when he did not testify, a mistrial was warranted. The prosecutor said specifically in closing that it was the victim's word against Tate's word. Such argument was a direct comment upon Appellant's right not to testify and was reversible error.

The witness's statement that Tate had contemplated suicide after being notified of the molestation allegations, was more prejudicial than probative and, therefore, should not have been placed before the jury. The prosecution, here, again committed error given that the comment was taken out of context. What Tate was referring to was something other than any feelings of guilt. Therefore, the jury was improperly allowed to infer guilt by this evidence.

When a prospective juror commented that she was familiar with Tate's "other case" during voir dire which was later discussed by other jurors, a mistrial, or at least an examination of jurors individually, should have been granted. The lower court was faced with not only one juror's comments, but with other jurors discussing the matter outside during a break. Not granting a mistrial on reopening voir dire denied Tate of a fair trial.

Because Q.H.'s testimony was discredited, contradictory, and allegations of molestation were not timely made, the evidence was not legally insufficient to support the verdict. Q.H. not only made inconsistent and contradictory statements

about, *inter alia*, the molestation charges, she falsely accused Tate of molesting another child which was clearly proven not true at trial. By the same token, the overwhelming weight of the evidence favored Appellant who was entitled to a new trial. Therefore, the lower court erred in denying Appellant relief below.

By the same token, Appellant believes that the overwhelming weight of the evidence favored the Appellant who was entitled to a new trial. Therefore, the lower court erred in denying Appellant relief below.

ARGUMENT

THE TRIAL ERRED BY NOT GRANTING A MISTRIAL WHEN THE PROSECUTION COMMENTED ON APPELLANT'S RIGHT NOT TO TESTIFY.

When the prosecutor, in closing arguments, tactically pitted the victim's testimony against the Appellant's when he did not testify, a mistrial was warranted.

A criminal defendant has a constitutional right to determine if he will testify at trial. U.S. Constitution Amendment V; Miss. Constitution Art. 3§26. Therefore, any comment made directly or indirectly that the defendant's failure to testify is either improper or that is evidence of guilt is prohibited. Wright v. State, 958 So.2d 158, 161(Miss. 2007); Mitchell v State, 2007-KA01202COA (Miss. App. 2008).

While prosecutors are given wide latitude in arguing their case, they can not use tactics that inflame or prejudice the jury against the defendant. In reviewing requests for mistrial, that decision rests within the sound discretion of the trial judge. Dora v. State, (Miss. 2008). However, this Court's standard of review is whether the trial court abused its discretion. Pulphus v. State, 782 2So.2d 1220, 1222 (Miss. 2001). An abuse of discretion occurs when 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. Dora at 92. (citing Ormond v. State, 599 So. 2d 951, 961 (Miss. 1992)). Whether the "comment" can be reasonably construed to be a comment upon the failure of the defendant to take the stand, must be analyzed on a case by case basis unless there is a direct violation. Wright 958 So.2d at 166 (citing Logan v. State, 773 So.2d 338, 348 (Miss. 2000). If the prosecutor's statements were simply a reference to a Defendant's failure to put on a successful defense or the response to defense's attack of the evidence, no violation will be found. See Epps v. State, 984 So. 2d

1042 (Miss. App. 2008)[1] and Whitlock v. State, 941 So.2d 843 (Miss. App. 2006).[2]

Now turning to the case here, Eric Tate, as facts indicated, did not testify. But in the rebuttal closing argument, the prosecutor stated as follows:

> BY MR. HARPER: Ladies and gentlemen, let me make one thing crystal clear to you before I say anything else. If every one of you go back in that jury room when we get through and vote not guilty, I will go home tonight and sleep like a baby. There's absolutely no way on what he's talking about this case was going to go to trial on these facts. All this business about if they'd have known this or if they had done that, this case was going to go to trial on these facts. 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.
>
> BY MR. KNOTT: Judge, I'm going to object.
> By MR. HARPER: – it's not impossible.
> BY MR. KNOTT: We need to approach.

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[1]The Mississippi Court of Appeals found that the following comments of the prosecutor during closing argument were proper: "You take away all the evidence like they did, he'd not guilty. What you got to do, you've got to come up with single piece of evidence in this case because it's all unrefuted." The Defendant neither testified nor presented any witnesses at trial.

[2]The prosecutor's indirect comments upon defendant's right not to testify were in rebuttal of the defense's comments. The Mississippi Court of Appeals ruled that the State was commenting upon the weight of the evidence rather than the defendant's failure to testify. Id.

(After a bench conference out of the hearing of the court reporter and the jury, the following was made of record, to-wit:)
BY THE COURT: Let's go ahead and proceed.
BY MR. HARPER: So when you have a case like this, ladies and gentlemen – and don't get me wrong. Mr. Knott is a very, very talented lawyer. He's done a good job, and he's done what he's supposed to do here today, and that's to try to defend his client to the best of his ability, but what happens in this cases is you've got to make the child the bad person. That's the only way it works. **It's her word against his, and as he says –**
BY MR. KNOTT: Objection, Your Honor.
BY THE COURT: I sustain that objection, Mr. Harper.
BY MR. HARPER: I am not sure what I am doing wrong here, Judge.
BY THE COURT: Approach the bench.
(After a bench conference out of the hearing of the court reporter and the jury, the following was made of record, to–wit:)
BY THE COURT: Let the record show I sustain that objection. Ladies and gentlemen, you're to disregard that last argument and remark of the prosecutor. Let's go ahead and proceed.

After closing arguments, the defense moved for a mistrial.

Clearly then, the prosecutor's use of "her word against his word" directed the jury to compare Mr. Tate's words with the Q.H.'s words in reference to the the molestation charges. A review of record leads to one conclusion: the prosecutor directly commented upon Tate's failure to testify, because there were no other words to which he could be referring. For instance, Rosie Holloway, who first

confronted Tate concerning the alleged molestation never gave him an opportunity to deny the allegations or even to explain what happened. T. 201. Further, Investigator Vallely did not interview Tate. The only other person that confronted the Appellant was his wife, who during a telephone conversation with Tate, said he simply denied the allegations: "all the things she said I did, I did not do..." T. 272. Even then, the prosecutor, during closing, referred to that conversation as an **admission** by Tate, not a denial. T. 315-316.

In reviewing improper comments, this Court considers the context in which the statements were made. For instance, in Stubbs v. State, 878 So.2d 130, 136-137 (Miss. App. 2004), the prosecutor, during closing, argued that: "this case turns on which witness you believe you heard from Gary [Vanderslice] and you heard from Kevin [Brothers]. It is your job as jurors to decide who is telling the truth and how much is the truth." While the defendant did not testify, this Court found the argument proper, given the prosecutor's specific comments about which witnesses to which he was referring. The argument was viewed in its proper context. Id.

Similarly, this Court should analyze the prosecutor's statements, *sub judice*, in context. When the prosecutor originally pitted the victim's word against Tate's word, and later excluded the only conversation Tate had with his wife, by saying it

was not a contradiction, then the Court can deduce that the prosecution was referring to something else altogether. It is, also, apparent that the prosecutor's comments were not to refute anything the defense said nor was there a suggestion that there was a lack of successful defense. See Epps and Whitlock. The comments clearly invited the jury to decide its verdict based upon the victim's testimony (her word) and compare it with Tate's lack of testimony (his word). By doing so, the prosecutor, therefore, directed the jury to draw an adverse inference from Tate's failure to take the stand and deny the allegations. What other conclusion could there be when it was emphasized twice? See , also, Fussell v. State, 436 So.2d 434 (Fla. App. 3 Dist. 1983) (sexual battery conviction reversed when during *voir dire*, the prosecutor asked a prospective juror if it bothered him given "...it is going to be her word against his word?").

Given the "insufficiency of the evidence" as discussed later, unjust prejudice resulted from the prosecutor's comments and, therefore, this Court should find that the trial court abused his discretion when it denied the mistrial in this case.

THE TRIAL COURT ERRED BY PERMITTING PREJUDICIAL EVIDENCE TO SHOW "CONSCIOUSNESS OF GUILT."

The witness's statement that Tate had contemplated suicide after being

notified of the molestation allegations, was more prejudicial than probative and, therefore, should not have been placed before the jury.

Typically, "consciousness of guilt" evidence arises when a suspect acts in such a way to avoid apprehension such that "guilt" can be inferred. For instance, a suspect who flees from a scene is presumed to do so because of a guilty conscience. Anderson v. State, 2006-KP-00282 (Miss. App. 2008); Mask v. State, 2006-KA-01014 (Miss. App. 2008); and Shumport v. State, 2004-KA-02533 (Miss. 2006). Additionally, evidence of intimidation of witnesses (Baldwin v. State, 784, So. 2d 148, 162 (Miss. 2001), contradictory statements to police, (Wilson v. State, 797 So.2d 277 282 (Miss. App. 2001), and an attempt to disguise the appearance of vehicle involved in a crime, (Street v. State, 754 So.2d 497 (Miss. App. 1999) have all resulted in a jury instruction that "guilt" may be inferred.

In the case *sub judice*, Appellant argues that the trial court failed to grant a mistrial when the Detective Vallely testified that in searching for Tate, after charges were filed, he notified another agency "to look for him in his vehicle because of possible **suicide.**" T. 178. Then on cross-examination of Tate's wife, over the objection of Appellant, the following discourse occurred:

"Q. And it says, "To who 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, its me,' and how was I and the boys. I said how the F you thing 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." T. 272.**

The relevant nature of the testimony- according to the prosecution- was to impeach Tate's wife because she originally testified that she signed the affidavit, but did not believe that molestation occurred and that someone else put her up to signing it. R. 41. However, a review of the testimony of Tate's wife reveals that she originally believed the allegations, but later did not after reviewing the timing of the allegations and character of her daughter. T. 257-261. Given that there was no impeachment value whatsoever, then the evidence was not relevant. See Mississippi Rules of Evidence, R. 401. But even if relevant, the prejudicial value (i.e. the suggestion of guilt) far outweighed the probative value (i.e. impeachment evidence) under Rule 403 and, therefore, should not have been allowed. In fact, the real intent by the prosecution in raising the issue of suicide was illustrated at closing when the prosecutor argued, "He said he was sorry. He said tell my boys I

love them. Don't bring them to my funeral. **That's the kind of thing that guilty people write, ladies and gentleman."**

This Court, however, has never addressed whether attempted suicide or threats of possible suicide is admissible to show "guilt or consciousness of guilt." It is within the trial court's sound discretion to determine the admissibility of evidence and said decision will not be disturbed unless there is found to be an abuse of discretion. It is Appellant's position 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 apprehension or prosecution. Penalver v. State, 926 So.2d 1118, 1132-1134 (Fla. 2006). However, if there was some other purpose of the suspicious conduct, then it would not be admissible. See Gilbert v. State, 934 So.2d 330 (Miss. App. 2006) citing Banks v. State, 631 So.2d 748 (Miss. 1994). (instances of self-defense, where the suspect fled to avoid further danger, flight evidence was not admissible).

In this case, Tate's wife had written a summary of a conversation she had with Mr. Tate, via telephone, and turned it over to Investigator Vallely. The Court is asked to review the complete summary as did the lower court as follows:[3]

> It says, "To who it may concern. This is a statement about the conversation I had with Eric Tate." No problem there. "My son had the phone, and I grabbed it from him and I said hello twice, and Eric say, 'Hey, its me' and how was I and the boys. I said how the f blank, blank, blank, you think we're doing. He said he was sorry. **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, and he said he wasn't going back to prison.** Tell his boys he loved them. Told me to continue take care of his boys and don't bring them to his funeral and then he hung up the phone. Sincerely, Curtileniea Tate." All right. T. 267.

First and foremost, the wife wrote that Tate **denied** all allegations made by the victim even before being told that charges had been filed. Second, the reference to "not going back to prison" just before the comment about "not bringing his children to his funeral," clearly illustrated that Tate did not want to be reincarcerated as he once was, not that he was feeling guilty about the allegations.[4] For obvious reasons, the jury could not hear anything about Tate not wanting to go

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[3]Earlier, this summary was referred to, but it had been modified given the prejudicial nature of some of the language.

[4]Eric Tate was previously imprisoned for sexual battery in April, 1991.

back to prison. However, without it, the context of what was said was distorted and suggested that Tate was harboring guilty feelings. There was no attempt by Tate to avoid arrest or prosecution as demonstrated when Tate, with assistance of counsel, turned himself in to law enforcement.

Therefore, even if the Court finds that suicidal thoughts may be admissible to show "consciousness of guilt," it would not be under the facts of this case. Thus, trial court erred in not granting a mistrial in the case for the reasons stated herein.

THE TRIAL COURT'S FAILURE TO EXAMINE INDIVIDUAL JURORS OR GRANT MISTRIAL WAS ERROR WHEN JURY PANEL WAS EXPOSED TO PREJUDICIAL INFORMATION.

When a prospective juror commented that she was familiar with Tate's "other case" during voir dire which was later discussed by other jurors, a mistrial, or at least an examination of jurors individually, should have been granted.

As stated earlier, every defendant charged with a felony has a right to a fair trial by a fair and impartial jury as provided by the Constitution of the United States and the Constitution of the State of Mississippi. In James v. State, 912 So.2d 940, 950 (Miss. 2005), this court has stated that:

> "Where the resolution of a case comes down to factual disputes, the jury's role becomes paramount as it weighs the credibility of the witnesses and determines which factual accounts to accept or reject. Thus, it is absolutely

> imperative that the jury be unbiased, impartial, and not swayed by the consideration of improper, inadmissible information. We can not say, with any degree of certainty, that this was the case here because the fact of the matter is that the juror 'threw the proverbial skunk into the jury [room]' during the deliberations by asking about other charges against Hickson. See Dunn v. U.S., 301 F.2d 883, 886 (5th Cir. 1962) ("[I]f you throw a skunk into the jury box, you can't instruct the jury not to smell it"). "

During voir dire, the defense, *sub judice*, asked a catch all question to determine if any juror had anything they wanted to say that was not asked by the parties that could affect their ability to be fair. Juror Holmes raised her hand and stated that she was familiar with Tate, had heard about the case, and then said the following:

> "I've heard of it before now, I heard another case that involved Mr. Tate also." R. 18-19.

Outside the presence of the jury panel, a mistrial was requested, but denied. R. 22-23. However, the motion was renewed after Curtileniea Tate testified, during an evidentiary hearing, that she overheard four (4) to five (5) members of the jury panel asking about "what other case" Mr. Tate may have had; that this conversation took place outside the courthouse building near a little bench as she was coming back from her vehicle. Mrs. Tate described the clothing of at least two (2) members of the panel. T. 70-72. Even though the final twelve (12) member jury had not been selected, the trial court, after hearing arguments, denied,

once again, the requested mistrial. R. 73. But then, the defense inquired of the court if voir dire could be reopened. Id. The trial court denied said request by simply saying that voir dire had been completed, but gave a limiting instruction to the selected jury, at Appellant's request, that "it was to 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." R. 74-78.

Appellant now argues that despite the limited curative instruction, the Court erred in not granting the mistrial or at least permitting Appellant to reopen voir dire to determine to the extent the jury panel was poisoned. While it was within the discretion of the trial court to reopen voir dire, it was an abuse of discretion not to do so here, Manning v. State, 835 So.2d 94 (Miss. App. 2002) (citing Harrigill v. State, 381 So.2d 619, 623 (Miss. 1980), since there was no way to know how the jurors' conversation outside affected the panel overall. When Appellant brought sufficient evidence of jury taint to the trial court's attention, it was the trial court's duty to assure that the proverbial skunk was not thrown among the jury panel. With the skunk remaining, or at least the scent thereof, a mistrial was warranted. See James, at 950.

THE EVIDENCE WAS NOT LEGALLY SUFFICIENT TO SUPPORT THE VERDICT

Because Q.H.'s testimony was discredited, contradictory, and allegations of molestation were not timely made, the evidence was not legally insufficient to support the verdict.

The proper standard when a challenge is made to the "sufficiency of the evidence," is whether there is credible evidence consistent with guilt. In its review, this Court must, with respect to each element of the offense, consider all the evidence–not just the prosecution's evidence–in the light most favorable to the verdict. Vaughn v. State, 759 So.2d 1092, 1099 (Miss. 1999) (citing Cooper v. State, 639 So.2d 1320, 1324 (Miss. 1994); and Harreston v State, 493 So.2d 365, 370 (Miss. 1986).

Sexual battery is "sexual penetration with another person without his or her consent [or with] a child under the age of fourteen (14) years of age, if the person is twenty-four (24) or more months older than the child." Miss. Code Ann. §97-3-95 (1) (a) and (d) (Rev. 2008). The fondling of a child occurs when one seeks to gratify himself lustfully or indulge their depraved licentious sexual desires, by handling, touching or rubbing with their hands or any part of their person or any member thereof, with any child under the age of sixteen (16) years, with or without the child's consent. Miss. Code Ann. §97-5-23 (Rev. 2008).

Q.H. testified on direct examination that beginning at the age of seven (7) or eight (8) Eric Tate, her stepfather, started molesting her. At the time, Q.H. lived with her grandparents in Magnolia, Mississippi and Tate was married to her mother. Tate and her mother lived just down the street with her two (2) brothers. Q.H. testified that she would visit some weekends and that the fondling would occur at Tate's home while her mother and brothers were present in a different room watching television. T. 97. That more than once, he inserted a vibrating toy inside her, and at one point, tried to insert his private part into her. T. 102. The first person she told was her grandmother.[5]

On cross-examination, Q.H. testified that the molestation not only occurred at her mother's house when she was present, but sometimes when she was not. T. 112. However, this was not mentioned before trial, nor was it ever mentioned to prosecution. T.113. Q.H. was not afraid of Mr. Tate T. 115, but she never told Tate to stop what he was doing, T. 114, or even told her mother or her grandmother of what was happening to her. T.115. This was so even though Tate worked on the water (i.e., offshore) for several weeks at a time. However, Q.H. could have told her mother, aunt, cousin, and uncle. T. 124. Tate never threatened her in order to keep her from telling anyone. (T. 117). Q.H.'s testimony was

[5]As the proof has shown, the allegations were not alleged until July of 2007. R. 55.

impeached by her written statement to the police that she first told her mother of the allegations and that Tate committed sexual acts upon her with a toy and his private part. T 130-131.

Q.H., also, claimed that one of the earliest instance of molestation was when she took a family portrait with Tate on whom she was sitting; that Tate's hand was on her side. T.112. She later said that Tate did not touch her inappropriately. T. 136-137, 142.

Q.H. testimony further revealed that she did not like the relationship between Tate and her mother. T. 122. She was upset with her mother for a number of reasons, (T. 123), and had even left a voice mail on her telephone calling her an "ugly B." T. 127. Q.H. believed if Tate had not married her mother, their relationship would have been closer, (T. 127), and that she did not feel that her mother loved her. T. 128.

Additionally, Q.H.'s testimony was discredited when she denied accusing Tate of prior misconduct. T.137. Q.H. was asked about whether she had taken $100.00 from her mother and accused Tate of taking it. T. 124-125. She flatly denied doing either or having had any knowledge about the incident. T. 125-126. She was, further, asked as to whether she ever accused Tate of molesting another minor, "M.G." T. 126. She again denied ever doing so. But according to Rosie

Holloway, she discussed the missing money with Q.H. who should, in fact, have remembered the incident and may have taken the money from her mother. T. 225. Further, according to Ms. Holloway, Q.H. did accuse Tate of molesting "M.G." which caused her to speak with M.G.'s mother. T. 227. This, too, would be an incident that Q.H. should remember. T. 2247. In fact, M.G., too, testified that Tate did not molest her at all, but that she was aware of the false allegation started by Q.H. T. 166.

As the Court can see, the allegations about the alleged molestation was not timely made (i.e., arising more than a year after the incidents) and Q.H.'s testimony was replete with inconsistencies and contradictions. The delay in reporting the allegations suggests that the allegations did not occur at all. While Appellant is fully aware that uncorroborated testimony of a victim may be sufficient to support a guilty verdict, that is not the case where the victim's testimony has been discredited or contradicted by other evidence. Vaughan, at 1098 (citing Christian v. State, 456 So.2d 729, 734 (Miss. 1984). The facts and inferences favor Appellant Tate such that a reasonable person could not have found Tate guilty beyond a reasonable doubt. Appellant's therefore requests to be discharged.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION

FOR NEW TRIAL GIVEN THAT THE OVERWHELMING OF THE EVIDENCE FAVORED APPELLANT

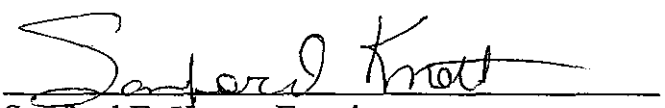
For the sake of brevity, Appellant, hereby, incorporates by reference all the facts and arguments made under the previous heading styled "The Evidence Was Not Legally Sufficient To Support The Verdict."

The overwhelming weight of the evidence supports that Appellant is entitled to a new trial and, therefore, Appellant requests the same.

CONCLUSION

Appellant Eric Tate requests that he be discharged given that the evidence was legally insufficient to support a verdict. Alternatively, Appellant requests a new trial based upon, at a minimum, cumulative error that occurred during trial and that the overwhelming weight of the evidence favored Appellant.

RESPECTFULLY SUMBITTED,

By: 

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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 Brief** to the following:

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So, this the 27th day of February, 2009.

Sanford Knott

Sanford E. Knott, Esquire