Cite as 2011 Ark. App. 373

ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR10-1331

	Opinion Delivered MAY 25, 2011
WILLIAM DOVER APPELLANT	APPEAL FROM THE LONOKE COUNTY CIRCUIT COURT, [NO. CR-10-108]
V.	HONORABLE PHILLIP T. WHITEAKER, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

LARRY D. VAUGHT, Chief Judge

William Dover was convicted by a Lonoke County jury of two counts of rape, one count of second-degree sexual assault, and one count of fourth-degree sexual assault. He was sentenced to twenty-five years' imprisonment in the Arkansas Department of Correction. On appeal, his sole argument is that the trial court erred in denying his motion for mistrial. We affirm.

A mistrial is an extreme and drastic remedy available only when the alleged error is beyond repair and cannot be corrected by any curative relief. *Bell v. State*, 2011 Ark. App. 5. An admonition to the jury generally cures a prejudicial statement, unless it is so patently inflammatory that justice could not be served by continuing the trial. *Bell*, 2011 Ark. App. 5, at 3. The decision to deny a mistrial is within the sound discretion of the trial court, and its

ruling will not be reversed in the absence of an abuse or manifest prejudice to the defendant. *Id.* at 3.

Dover was charged with raping and sexually assaulting his nieces, A.B. (then fifteen years old) and B.B. (then thirteen years old). At trial, during opening statements, the prosecutor told the jury that they would hear testimony from two witnesses employed as DNA analysts from the Arkansas State Crime Laboratory. According to the prosecutor, one of the analysts was expected to testify that he matched Dover's DNA with DNA found on B.B.'s underwear. The other analyst was expected to testify that she matched a sample of Dover's DNA with semen found in the vagina of A.B. Based upon these DNA test results, the prosecutor stated that "99.99 percent of the population can be excluded from that DNA, but William Dover cannot." The prosecutor then added, "[Dover] cannot explain away the scientific findings in this case."

Counsel for defense immediately objected, arguing that it was "improper for [the prosecutor] to be talking about what Mr. Dover can and cannot explain away." The trial court sustained the objection, stating "Dover has a constitutional right not to explain anything." Thereafter, counsel for Dover moved for a mistrial. The trial court denied the motion but offered to give a curative instruction to the jury. Defense counsel stated that he did not think that a curative instruction would be sufficient, but that "if that's all the Court's willing to do then I will ask for that." The trial court gave the jury a curative instruction, advising that opening statements are not evidence; that Dover was presumed innocent; that

the presumption of innocence continued and protected him throughout the course of his trial; and that Dover had the absolute constitutional right not to testify or to say anything on his own behalf or in his own defense.

There is a constitutional prohibition against the prosecutor commenting on the defendant's right to remain silent, and the prohibition applies to opening statements. *Meadows v. State*, 291 Ark. 105, 111, 722 S.W.2d 584, 587 (1987), *superseded by statute on other grounds by Aka v. Jefferson Hosp. Ass'n*, 344 Ark. 627, 42 S.W.3d 508 (2001). The law is settled that a comment on the failure of a defendant to testify in a criminal case is a violation of the Self-Incrimination Clause of the Fifth Amendment to the United States Constitution,[1] which is applicable to the States by the Fourteenth Amendment. *Weaver v. State*, 271 Ark. 853, 854, 612 S.W.2d 324, 325 (Ark. App. 1981), *cert. denied*, 452 U.S. 963 (1981) (citing *Griffin v. California*, 380 U.S. 609 (1969)).

On appeal, Dover claims that the prosecutor's remark during opening statement was a deliberate, prejudicial, and improper comment upon his right to remain silent. He relies upon *Clark v. State*, 256 Ark. 658, 509 S.W.2d 812 (1974) for support. In *Clark*, the defendant was charged with the stabbing death of her husband. During opening statement, the prosecutor said, "If you notice, I'm here by myself, and this vacant chair. [The victim] might be here to tell you his side but he's not here. The story then that you will have about what

[1]The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.

happened out there will come from [the defendant]." *Clark*, 256 Ark. at 658, 509 S.W.2d at 813. Following this comment, the defendant's counsel objected and moved for a mistrial, claiming that the prosecutor had no right to put the burden on the defendant to take the stand except by evidence and that it was highly prejudicial for the prosecutor to tell the jury that the story in this case is going to come from the defendant. *Id.* at 659, 509 S.W.2d at 813–14. The trial court denied the defendant's motion. On appeal, the defendant contended that the prosecutor's remark compelled her to testify when she would not otherwise have done so. *Id.*, 509 S.W.2d at 814.

Our supreme court considered the contention under the requirements of the Fifth Amendment of the United States Constitution, as well as our state constitutional equivalent[2] and statutory law,[3] noting that part of the requirements of the federal amendment demands that the prosecution not comment on the defendant's failure to testify. *Id.* at 659–60, 509 S.W.2d at 813–14 (citing *Griffin v. California*, 380 U.S. 609 (1965)). Based on these

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[2]The Arkansas Constitution provides that "nor shall any person be compelled, in any criminal case, to be a witness against himself[.]" Ark. Const. art. 2, § 8.

[3]Arkansas Code Annotated section 16-43-501 (formerly Ark. Stat. Ann. § 43-2016) provides:

> On the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors in this state, the person so charged shall, at his own request, but not otherwise, be a competent witness. The failure of the person so charged to make such a request shall not create any presumption against him.

Ark. Code Ann. § 16-43-501 (Repl. 1999).

guidelines, our supreme court held that the prosecutor's remark resulted in pre-evidentiary coercion, which is just as forbidden as is post-evidentiary comment and was "precisely the sort of coercive activity the Fifth Amendment is designed to prevent." *Id.* at 661, 509 S.W.2d at 815. The court stated that "[t]he right to testify or remain silent is an absolute and 'unfettered' right for a defendant only to exercise." *Id.*, 509 S.W.2d at 815. Based on this error, the supreme court reversed and remanded the case. *Id.* at 662, 509 S.W.2d at 815.

The objectionable statement in this case was "[Dover] cannot explain away the scientific findings in this case." Dover argues that this statement violated his unfettered right to testify or to remain silent and resulted in pre-evidentiary coercion. We disagree. Unlike the statement made by the prosecutor in *Clark*, the remark by the prosecutor in the case at bar was not a comment on Dover's right to remain silent or on his failure to testify.[4] The remark did not suggest that Dover would be testifying. The statement was nothing more than a comment on the strength of the scientific DNA evidence and the undisputed nature of such evidence. Such a remark is not improper. *Richmond v. State*, 320 Ark. 566, 572, 899 S.W.2d 64, 67 (1995) (stating that a prosecutor may mention the fact that the State's evidence has remained undisputed); *Beebe v. State*, 301 Ark. 430, 435–36, 784 S.W.2d 765, 768 (1990) (concluding that the prosecutor's statement, "I submit to you that that evidence has not been disputed" was not necessarily a comment on the defendant's failure to testify); *Davis v. State*,

[4]Also, unlike *Clark*, the comment to which Dover objects did not result in pre-evidentiary coercion because Dover did not testify.

174 Ark. 891, 893, 298 S.W. 359, 360 (1927) (holding that prosecutor's statement in closing argument—that there was no denial that there was other evidence in the case beyond the evidence presented by the State—did not constitute a comment upon the failure of the defendants' testimony, but rather was an argument that the State's evidence should be believed because it was undisputed); *Markham v. State*, 149 Ark. 507, 513, 233 S.W. 676, 679 (1921) (holding that remarks of the prosecuting attorney—that testimony tending to prove the guilt of the accused was uncontradicted—should not be construed as a comment upon the failure of the defendants to testify, but rather as an expression of the prosecutor's opinion as to the weight of the State's evidence); *Davidson v. State*, 108 Ark. 191, 211–12, 158 S.W. 1103, 1110 (1913) (rejecting the defendant's claim that the prosecutor's closing argument, which called on the defense to explain undisputed witness testimony, was a comment on the defendant's failure to testify; holding that it was the expression of the opinion of counsel that the testimony had not been rebutted and should be accepted as true).

Therefore, because we hold that the prosecutor's comment in opening statement was not a comment on Dover's right to remain silent, it was not a violation of his Fifth Amendment right. Accordingly, we hold that the trial court did not abuse its discretion in denying Dover's motion for a mistrial.

Affirmed.

PITTMAN and WYNNE, JJ., agree.