Cite as 2011 Ark. 236

SUPREME COURT OF ARKANSAS

No. CR 09-1118

JOSEPH ROUNSAVILLE
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered May 26, 2011

APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, CR 2006-4387, HON. MARION A. HUMPHREY, JUDGE

AFFIRMED.

PER CURIAM

Appellant Joseph Rounsaville previously appealed his conviction and life sentence for rape, and this court affirmed in part. *Rounsaville v. State*, 374 Ark. 356, 288 S.W.3d 213 (2008). Although we affirmed the conviction, we reversed in part because the trial court failed to provide a hearing on appellant's pro se petition for new trial under Arkansas Rule of Criminal Procedure 33.3 (2011) that raised claims of ineffective assistance of counsel. On remand, the trial court conducted the hearing as ordered and again denied the motion. Appellant brings this appeal of the order denying a new trial.

On appeal, appellant contends that the trial court erred in failing to find ineffective assistance of counsel. Because we hold that there was no error in the trial court's findings on the issue of ineffective assistance, we affirm concerning this last issue on appeal.

Appellant bases his allegations of ineffective assistance on what he contends were errors by trial counsel in failing to raise timely objections to certain statements by the prosecution

in closing arguments and in failing to investigate phone records appellant contended would have shown an ongoing relationship with the victim's mother and other witnesses. In order to prevail on any claim of ineffective assistance of counsel, a petitioner is required to demonstrate prejudice in that the alleged error would have impacted the outcome of the trial. *Wormley v. State*, 2011 Ark. 107 (per curiam). In this case, appellant did not make such a demonstration.

Trial counsel cannot be ineffective for failing to make an objection or argument that is without merit. *Mitchem v. State*, 2011 Ark. 148 (per curiam). Here, appellant asserts that he was prejudiced because counsel did not timely object to the prosecution's remarks. He contends that his argument that the comments had shifted the burden of proof by calling attention to the defendant's failure to testify should have been preserved. The remarks, however, were not improper. As a result, there was no prejudice because the proposed argument was without merit.

When a prosecutor is alleged to have made an improper comment on a defendant's failure to testify, we review the statements in a two-step process. *Jefferson v. State*, 372 Ark. 307, 276 S.W.3d 214 (2008). First, we determine whether the comment itself is an improper comment on the defendant's failure to testify. *Id.* The basic rule is that a prosecutor may not draw attention to the fact of, or comment on, the defendant's failure to testify, because this then makes the defendant testify against himself in violation of the Fifth Amendment. *Id.* A veiled reference to the defendant's failure to testify is improper as well. *Id.* If we determine

that the prosecution's remark was not proper under this analysis, then we determine whether it can be shown beyond a reasonable doubt that the error did not influence the verdict. *Id.*

The first remark by the prosecution that is at issue here follows a statement referencing the testimony of one witness. The prosecutor asks "What did this defendant say about it?" We examine the remark in context and consider both the evidence that was presented at trial and the arguments that preceded and followed the remark. *See Gates v. State*, 338 Ark. 530, 2 S.W.3d 40 (1999). In this case, the question clearly referred back to the testimony of the witness concerning a statement that appellant had made to her, not to appellant's failure to testify.

The second remark that appellant contends was improper came later in the prosecution's rebuttal to the defense's closing argument. The prosecuting attorney remarked that the defense could put on witnesses just like the prosecution. Appellant contends that this statement, particularly when coupled with the previous remark, shifted the burden of proof to the defendant. Yet, this statement was also not a comment upon, or a veiled reference to, the defendant's failure to testify. It was, instead, a response to the defense's argument that there was some motivation for the witnesses to have come forward more than three years after the event. It was a comment upon the defense's failure to offer evidence of any such motivation and not a comment about the defendant's silence.

A prosecutor may mention the fact that the State's evidence has remained undisputed. *Richmond v. State*, 320 Ark. 566, 899 S.W.2d 64 (1995). Where the defense, by adopting a particular defense strategy, has opened the door for the prosecution to respond to evidence

or statements by defense counsel, then statements such as the ones here—those that comment on the lack of evidence and are clearly directed towards rebutting the defensive strategy—do not necessarily constitute impermissible references to the defendant's failure to testify. *See Jefferson v. State*, 372 Ark. 307, 276 S.W.3d 214 (2008); *Tate v. State*, 367 Ark. 576, 242 S.W.3d 254 (2006); *Dickerson v. State*, 363 Ark. 437, 214 S.W.3d 811 (2005). In this case, the evidence of motivation could have been presented in cross-examination or through witnesses other than the defendant, and the comments were not in fact veiled references to the defendant's failure to testify.

In his brief, appellant cites *Tate* and attempts to distinguish it from the circumstances here because, unlike the situation in *Tate*, there was no admonishment given to the jury. Although this court did note in the opinion in *Tate* that there was an admonishment that would have cured any possible prejudice, the holding in *Tate* was based upon our decision that the prosecution's comments did not concern the defendant's failure to testify and did not amount to an appeal to the juror's passions.

Appellant also cites to *United States v. Durant*, 730 F.2d 1180 (8th Cir. 1984), and urges that the comments here would fail under the second prong of the two-part test outlined by the Eighth Circuit Court of Appeals. There, the court of appeals indicated that more ambiguous comments such as references to "uncontradicted testimony" may constitute error when the statements either (1) manifest the prosecutor's intention to call attention to the defendant's failure to testify, or (2) are such that the jury would naturally and necessarily take them as a comment on the defendant's failure to testify. *Durant*, 730 F.2d at 1184. Appellant

contends that the prosecutor's statement in rebuttal closing was such that the jury would naturally and necessarily take it as a comment on appellant's failure to testify.

The Third Circuit Court of Appeals applies a similar test, and that court undertakes an evaluation of a claim that a prosecutor's remark necessarily would be perceived by a jury as an adverse comment on the accused's silence by assessing the remark in the context of the summation as a whole and of the evidence introduced at trial. *United States v. Brown*, 254 F.3d 454 (3d Cir. 2001). In *Brown*, the Third Circuit held that comments more likely to have been understood as responses to impeachment attempts would not necessarily be interpreted as commentary on the defendant's silence. *Brown*, 254 F.3d at 463–64; *see also United States v. Carl*, 978 F.2d 450 (8th Cir. 1992) (jury easily could have taken remarks as comment on total lack of a defense rather than on failure to testify).

Appellant's arguments are not persuasive. Even applying the test that he urges us to adopt, when taken in context, the statement by the prosecution in the rebuttal closing was not one that would necessarily be taken by the jury as a comment on appellant's silence. The remarks here were not improper, and defense counsel was therefore not ineffective for failing to preserve an argument that those remarks were improper.

Appellant's second appealed claim of ineffective assistance concerned counsel's failure to fully investigate certain phone records that appellant contended would have demonstrated that he had more contact with the victim's mother and other witnesses after the incident than the evidence presented at trial portrayed. For a claim of ineffective assistance based on failure to investigate, a petitioner must describe how a more searching pretrial investigation would

have changed the results of his trial. *McCraney v. State*, 2010 Ark. 96, ___ S.W.3d ___ (per curiam). Appellant did not do so here.

Appellant asserts that, had the records been further investigated, the contacts between appellant and certain witnesses could have been used to impeach the credibility of the witnesses. Assuming that the records had been investigated and that those records would have shown continued and frequent contact between appellant and the witnesses as he alleged, that information would simply not have effectively impeached the witnesses in this case. The statements made by the witnesses on that issue were fleeting and insignificant in comparison to other, more damaging statements concerning the incident. Even had the information been useful to show that a witness's general credibility was lessened, the testimony concerning the incident with the victim was strong and well-bolstered by consistent testimony from a number of witnesses. Appellant's claim demonstrated no prejudice that may have resulted from any possible error alleged.

Each of appellant's claims of ineffective assistance fails. The trial court did not err in finding that trial counsel was not ineffective. Accordingly, we affirm the denial of the motion for new trial.

Affirmed.