IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 93-KA-00255 COA

TYRONE TERRELL NALLS A/K/A T.T. **APPELLANT**

v.

STATE OF MISSISSIPPI **APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	02/08/93
TRIAL JUDGE:	HON. EUGENE M. BOGEN
COURT FROM WHICH APPEALED:	CIRCUIT COURT OF WASHINGTON COUNTY
ATTORNEY FOR APPELLANT:	LORI T. BURSON
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: CHARLES W. MARIS, JR.
DISTRICT ATTORNEY:	EDWIN PITTMAN
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	CONVICTED AND SENTENCED TO SIXTEEN YEARS IN THE CUSTODY OF MDOC
DISPOSITION:	AFFIRMED-12/2/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	12/23/97

BEFORE THOMAS, P.J., HERRING, AND HINKEBEIN, JJ.

THOMAS, P.J., FOR THE COURT:

Tyrone Terrell Nalls appeals his conviction of aggravated assault raising the following issues as error:

I. WHETHER THE LOWER COURT ERRED IN DENYING TYRONE NALLS'S MOTION FOR A NEW TRIAL BASED ON IMPROPER STATEMENTS MADE BY THE PROSECUTION DURING CLOSING ARGUMENT?

II. WHETHER THE LOWER COURT ERRED IN REFUSING TO GRANT A SELF-DEFENSE JURY INSTRUCTION TO TYRONE NALLS?

Finding no error, we affirm.

FACTS

On the evening of June 8, 1992, Jabe Smith, deputy with the Washington County Sheriff's Department, received a phone call from Dwayne Betts, who was in the hospital in Greenville, Mississippi, suffering from a gunshot wound. Smith conducted his investigation concerning the shooting by interviewing Betts and his girlfriend Ruby Young. After his interview with the two, Smith concluded that Tyrone Nalls was the person that should be charged with the shooting. Later that evening, Nalls was arrested and taken to the Washington County Sheriff's Office for questioning. Smith testified that Nalls denied any involvement in the shooting.

Young testified that she and Betts had dated around two and a half years, but during the first part of April through mid-May 1992 she had a relationship with Nalls. She stated that she had ended the relationship and decided to exclusively date Betts. On June 8, 1992, Betts came over to Young's house around 9:00 p.m. While Betts was over at Young's house, Nalls called around 10:30 p.m. Young testified that while on the phone Nalls threatened to kill someone. Betts left the house around 11:30 p.m. that evening. The next time Young saw Betts was in the hospital with a gunshot wound around 1:30 to 2:00 a.m.

Dwayne Betts was the next to testify for the State. He testified that he and Young had dated for about two years or more. He stated that he did not know that she was seeing anyone else until one evening when he was over at her house she received a phone call from Nalls. Young admitted to seeing Nalls after the phone call. Thereafter, Nalls came to Young's house while Betts was there. Betts went outside to ask Nalls what he wanted, and Nalls told him that he wanted to talk to Young. Young spoke with Nalls for about fifteen minutes and then left. Betts testified that that was the only time he had ever seen Nalls before the shooting.

On June 8, 1992, Betts arrived at Young's house around 9:00 p.m. When Betts left Young's house around 11:30 p.m. he noticed a car parked across the road. He stated that he had an idea that it was Nalls's car because Young had complained to Betts about Nalls calling and coming to her house uninvited. The car followed Betts. Betts pulled off the highway and turned around at a stop sign to see who was following him. When the drivers of the cars saw each other they pulled into the Avon Store parking lot with the right side of each car beside each other. Betts rolled his window down to talk, but the other car pulled off and went around some gas tanks. It was at this point that Betts stated he was sure it was Nalls because he recognized him. Betts backed up and went around to the side of the gas tank, left his car running, and got out without a weapon in his hand. When Betts had gotten to the back of the car Nalls opened his door and fired a shot. Betts ran back to the driver's side of his car and got in the front seat. As Betts was putting his car in gear, Nalls had reached the driver's side of the car and shot through the window. The bullet hit Betts in his side and exited through his arm. As Betts was driving away, Nalls shot a third time. The third bullet did not hit its intended victim, but rather went through the back door and exited through the other side.

Tyrone Nalls did not testify and chose not to put on any evidence. Following deliberations, the jury

returned a verdict of guilty of aggravated assault.

ANALYSIS

I. WHETHER THE LOWER COURT ERRED IN DENYING TYRONE NALLS'S MOTION FOR A NEW TRIAL BASED ON IMPROPER STATEMENTS MADE BY THE PROSECUTION DURING CLOSING ARGUMENT?

Nalls argues that the assistant district attorney, during his rebuttal closing argument, made several improper remarks which rose to the level of prejudicial misconduct. In closing argument Mr. Perkins, counsel for the defense, talked about Betts being six foot-three-and-a-half inches and weighing 215 pounds. After discussing Betts's size, Mr. Perkins stated "[l]et's wonder what is going through Mr. Nalls' mind at this point. Can we rule out beyond a reasonable doubt that Mr. Nalls' did what any of us would have done under like circumstances?" Nalls now complains of a comment made by the assistant district attorney, Mr. Pittman, in his rebuttal closing argument. In this rebuttal Mr. Pittman stated, "I remember back this morning in voir dire he told you the question wasn't going to be who shot him. He said his client did it in self-defense." Defense counsel objected asking that the remark be stricken and the jury instructed that the statements of an attorney are not evidence. The court replied that he had already instructed the jury on this fact.

Nalls also cites another comment made by the prosecution, "what he says isn't evidence, but I know what I heard this morning and these things don't go according to plan. . . ." and asks that this Court find it prejudicial. However, Nalls made no objection. Due to the failure of defense counsel to properly object to this other comment by Mr. Pittman, the prejudicial effect of this statement is not properly preserved for review on appeal. ***Williams v. State,*** **512 So. 2d 666, 672 (Miss. 1987).**

Counsel is limited in his argument to facts introduced in evidence, deductions and conclusions he may reasonably draw therefrom, and the application of the law to the facts. ***Ivy v. State*****, 589 So. 2d 1263, 1266 (Miss. 1991);** ***Davis v. State*****, 530 So. 2d 694, 701-02 (Miss. 1988)**. Parties are given great latitude in making their closing arguments. ***Dunaway v. State*****, 551 So. 2d 162, 163 (Miss. 1989).**

After a close reading of the entire closing argument by both parties, we are convinced that the district attorney was replying to the argument previously made by Nalls's trial counsel. Ideally, the State should have objected to the mention of facts not in evidence, namely whether Nalls was acting in self-defense, when this defense was alluded to by trial counsel during his closing argument. The State did not do so, whether by choice or omission, but instead raised the self-defense issue during its rebuttal. While doing so bordered on being improper, from the standpoint of substantial fairness we believe that under the circumstances, the prejudice to Nalls was insufficient to render a mistrial appropriate. It appeared to the State that trial counsel had himself referred to facts not in evidence regarding self-defense, and had thereby "opened the door" on the subject. It is clear that an accused cannot complain of statements made in rebuttal by the prosecutor which were invited by remarks of the

defense counsel. Nalls cannot by his own voluntary conduct invite error and then seek to profit thereby.

Furthermore, the trial court instructed the jury that the arguments of the attorneys were not evidence in the case. We find that the statements complained of by Nalls were merely the prosecutor's replies to the closing argument of Nalls's trial attorney, and because the trial court instructed the jury that what the attorneys said during their arguments was not evidence in the case, we believe the prosecutor's statement was not so prejudicial as to require reversal. It is our view that the prosecutor's response to defense's closing argument was fair rebuttal.

II. WHETHER THE LOWER COURT ERRED IN REFUSING TO GRANT A SELF-DEFENSE JURY INSTRUCTION TO TYRONE NALLS?

Next, Nalls contends that the lower court should have granted a self-defense jury instruction to support his theory of the case. He argues that denial of such an instruction constitutes egregious error.

"Defendants are entitled to have instructions on their theory of the case presented to the jury for which there is foundation in evidence, even though the evidence might be weak, insufficient, inconsistent, or of doubtful credibility . . . ." ***Welch v. State*, 566 So. 2d 680, 684 (Miss. 1990)** (citations omitted). "It is . . . an absolute right of an accused to have every lawful defense he asserts, even though based upon meager evidence and highly unlikely . . . ." ***O'Bryant v. State*, 530 So. 2d 129, 133 (Miss. 1988).**

Nalls offered a self-defense instruction to the court; however, the court refused the instruction, stating that there was no testimony on self-defense. Nalls states that simply because he opted to exercise his Fifth Amendment right not to testify he should not be barred from the theory of self-defense. We agree that just because Nalls choose not testify he should not be precluded from offering a self-defense instruction; however, there must be some evidence of self-defense proffered in order to warrant such an instruction. While a criminal defendant has the constitutional right not to testify, Nalls had the burden of proof on any affirmative defense. ***Pearson v. State*, 254 Miss. 275, 287, 179 So. 2d 792, 797 (1965).** In this case Nalls neither testified at trial nor presented any evidence whatsoever to support his affirmative defense. Drawing all favorable inferences that can be gleaned from the record, there simply was no evidence on which a finding of the justification of self-defense could be based. Even though the evidence might be weak, insufficient, inconsistent, or of doubtful credibility, a slight amount of evidence will raise the issue of self-defense; however, where the defense is not supported by any evidence, an instruction may be properly refused.

THE JUDGMENT OF THE WASHINGTON COUNTY CIRCUIT COURT OF CONVICTION OF AGGRAVATED ASSAULT WITH A DEADLY WEAPON AND SENTENCE OF SIXTEEN YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO WASHINGTON COUNTY.

BRIDGES, C.J., McMILLIN, P.J., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.