

**IN THE COURT OF APPEALS  
OF THE  
STATE OF MISSISSIPPI  
NO. 97-KA-00853 COA**

**MAURICE HAYES**

**APPELLANT**

**v.**

**STATE OF MISSISSIPPI**

**APPELLEE**

DATE OF JUDGMENT: 03/07/97  
TRIAL JUDGE: HON. FORREST A. JOHNSON, JR.  
COURT FROM WHICH APPEALED: ADAMS COUNTY CIRCUIT COURT  
ATTORNEY FOR APPELLANT: PATRICIA F. DUNMORE  
ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL  
BY: PAT FLYNN  
DISTRICT ATTORNEY: RONNIE L. HARPER  
NATURE OF THE CASE: CRIMINAL - FELONY  
TRIAL COURT DISPOSITION: CONVICTED OF TOUCHING A CHILD FOR LUSTFUL  
PURPOSES; SENTENCED TO TEN YEARS IN MDOC TO  
RUN CONSECUTIVELY WITH PRIOR SENTENCES  
DISPOSITION: AFFIRMED - 11/24/98  
MOTION FOR REHEARING FILED: 1/22/99  
CERTIORARI FILED:  
MANDATE ISSUED: 4/27/99

BEFORE THOMAS, P.J., DIAZ, AND SOUTHWICK, JJ.

THOMAS, P.J., FOR THE COURT:

¶1. Maurice Hayes appeals his conviction of touching a child for lustful purposes, raising the following issues as error:

**I. THE COURT COMMITTED REVERSIBLE ERROR BY DENYING DEFENDANT A**

**CONTINUANCE AND DENIED THE DEFENDANT A FAIR AND IMPARTIAL TRIAL.**

**II. SEVERAL ERRORS OF DEFENDANT'S TRIAL ATTORNEY CONSTITUTED INEFFECTIVE ASSISTANT OF COUNSEL THEREBY DEPRIVING DEFENDANT OF HIS RIGHT TO COUNSEL GUARANTEED BY THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION.**

**III. THE DEFENDANT WAS DEPRIVED OF A FAIR AND IMPARTIAL TRIAL DUE TO THE NUMEROUS IMPROPER ARGUMENTS IN CLOSING.**

¶2. Finding no error, we affirm.

**FACTS**

¶3. In May 1995, C.C.<sup>(1)</sup> was a thirteen-year-old girl who lived with her mother, M.M.<sup>(2)</sup>, in Adams County, Mississippi. At the time, M.M. was friends with Wonder and Maurice Hayes. M.M. met Wonder at a local church, and they eventually became friends. Not long after, M.M. met and became friends with Wonder's husband, Maurice. The two families were on friendly terms, attending the same church together, and Wonder asked M.M. to join her in a cleaning service business she had started. C.C. would often babysit for the Hayes's.

¶4. On the Friday evening of May 5, 1995, Maurice came over to M.M.'s house. He asked if C.C. could babysit as his wife was out of town, and he had to work the next morning. C.C. agreed, and it was arranged that Maurice would pick up C.C. the next morning around 7:00 a.m. M.M. saw her daughter just before she left the next morning and did not see her again until after 1:00 p.m. that same day.

¶5. Maurice drove C.C. back to his house. C.C. was then left with Maurice's two children. Nothing unusual happened until Maurice returned around lunch time. He fixed himself a sandwich and sat on the couch with C.C. Maurice told his children to go to their room. Soon thereafter, Maurice kissed C.C. C.C. tried to push him away but was unable. Maurice began feeling C.C.'s clothed breasts. He then reached under her skirt and panties and felt her vagina. The entire time C.C. was trying to push Maurice away and telling him to stop, all to no avail. Maurice used his legs to subdue C.C.'s lower body while he held her arms down with one of his hands. Maurice pulled up C.C.'s shirt, exposing her stomach. He then placed a towel on top of C.C.'s stomach and after removing his penis, he masturbated. As Maurice masturbated, he kept calling out C.C.'s name.

¶6. Maurice drove C.C. back home after the incident. She was too embarrassed to tell her mother what had happened and stayed in her room the rest of the weekend. Come Monday morning at school, C.C. finally confided in a friend about the incident. C.C. also eventually told someone who worked with her mother. This co-worker encouraged C.C. to tell her mother all that had happened. Once M.M. found out what Maurice had done to C.C., she called the police. Maurice was thereafter arrested.

¶7. Maurice was indicted for touching a child for lustful purposes on January 5, 1996. Maurice was served with the indictment on January 16, 1996, but was not arraigned until the day of trial. Trial of this matter was eventually held on March 5, 1997. Taking the stand in his own defense, Maurice denied doing anything to C.C. He further denied that Wonder was even out of town on date of the incident. Maurice testified that on the date of the alleged incident he and Wonder and their children were at his mother's house, with his nephews and his sister. However, neither Maurice's mother or sister nor his nephews testified on Maurice's

behalf. Wonder testified that she was out of town the end of April 1995. She furthered testified that she wanted M.M. to work for her in her business as a supervisor but M.M. mistakenly thought she would be a partner in the business. Wonder testified that it was her belief that the reason C.C. made these charges against her husband was because of this disagreement over the business with M.M.

¶8. Maurice was found guilty and was sentenced to ten years in the custody of the Mississippi Department of Corrections, with the sentence to run consecutively to prior sentences for which Maurice was on probation at the time of his conviction. From this decision, this appeal ensued.

## ANALYSIS

### I.

#### **THE COURT COMMITTED REVERSIBLE ERROR BY DENYING DEFENDANT A CONTINUANCE AND DENIED THE DEFENDANT A FAIR AND IMPARTIAL TRIAL.**

¶9. A motion for a continuance of this matter was filed by Maurice's trial counsel on February 27, 1997. The motion alleged that trial counsel had conflicts in the court schedule with cases which had been set in other courts, some witnesses had yet to be located and interviewed, and motions were pending that had yet to be decided or set for hearing. On the morning of trial, Maurice's trial counsel brought up her motion and told the trial judge she was not fully prepared for trial. Trial counsel told the trial judge that she thought she was trying another case and only found out the night before that she was to go forward with the instant case. The motion for a continuance was denied, and trial went forward. Maurice now complains through new counsel on appeal that his trial counsel did not have time to subpoena witnesses and present evidence of his alibi defense. Therefore, Maurice argues that it was reversible error to deny his continuance as he was deprived of a fair and impartial trial.

¶10. **Miss. Code. Ann. § 99-15-29 (Rev. 1994)** provides that a court "may grant or deny a continuance, in its discretion," and that a denial of a continuance "shall not be grounds for reversal unless the Supreme Court shall be satisfied that injustice resulted therefrom." In order for us to reverse, Maurice must show that a manifest injustice resulted from the denial of the continuance. *Lambert v. State*, **654 So. 2d 17, 22 (Miss. 1995)**.

¶11. We hold the trial court did not abuse its discretion in this instance. The record shows that trial counsel was given notice on February 20, 1997, that trial would be held on March 5, 1997. The record also reflects that trial counsel had represented Maurice since his initial appearance in justice court. Trial counsel had ample time to acquaint herself with the facts of the case and to prepare an adequate defense. Trial counsel cross-examined all witnesses presented by the State and called both Maurice and Wonder Hayes to testify for the defense. The record shows that trial counsel was prepared in her defense of Maurice.

¶12. In her motion for continuance, trial counsel alleged that witnesses had yet to be located and interviewed. However, trial counsel never proffered any evidence naming these witnesses or setting forth the nature of their testimony as required by Miss. Code Ann. § 99-15-29 (Rev. 1994), nor has counsel on appeal named any witnesses or described how Maurice was prejudiced by their failure to appear on his behalf.

¶13. Trial counsel also alleged in her motion for continuance that motions were pending that had yet to be decided or set for hearing. However, trial counsel never named these motions. The record further reflects that all pre-trial motions were properly dealt with before trial.

¶14. On appeal, Maurice makes the blanket statement that he was deprived of a fair chance to defend himself and injustices resulted from the trial court's denial of the continuance. Maurice has given us nothing demonstrating that he was prejudiced in his defense or that injustices resulted from denial of the continuance nor have we discovered any from an examination of the record. None of the reasons given in the motion for a continuance called for this trial to be continued. Under such circumstances, it was not an abuse of discretion to refuse the continuance.

## II.

### SEVERAL ERRORS OF DEFENDANT'S TRIAL ATTORNEY CONSTITUTED INEFFECTIVE ASSISTANT OF COUNSEL THEREBY DEPRIVING DEFENDANT OF HIS RIGHT TO COUNSEL GUARANTEED BY THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION.

¶15. Maurice, through new counsel on appeal, cites several reasons why his trial counsel was ineffective. The Mississippi Supreme Court adopted the *Strickland v. Washington*, 466 U.S. 668, 687-96 (1984), standard for evaluating ineffective assistance of counsel claims. *Eakes v. State*, 665 So. 2d 852, 872 (Miss. 1995). A defendant has to show that his attorney's performance was deficient, and that the deficiency was so substantial as to deprive the defendant of a fair trial. *Id.* The defendant is required to prove both elements. *Brown v. State*, 626 So. 2d 114, 115 (Miss. 1993); *Wilcher v. State*, 479 So. 2d 710, 713 (Miss. 1985). "Judicial scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 689. Furthermore, our supreme court has held:

[T]here is a strong presumption that counsel's performance falls within the range of reasonable professional assistance. To overcome this presumption, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

*Schmitt v. State*, 560 So. 2d 148, 154 (Miss. 1990) (quoting *Strickland*, 466 U.S. at 694).

¶16. Maurice complains on appeal that he was denied effective assistance of counsel by virtue of three separate transgressions. First, he argues that his trial attorney, Leslie Martin, was deficient in that she failed to investigate, subpoena witnesses, present an alibi defense, and introduce various other documents that would have supported Maurice's defense. However, Maurice has not named any new witnesses that should have been subpoenaed for trial nor has he described their testimony. Trial counsel in fact presented Maurice's alibi defense. Maurice took the stand and testified that he was at his mother's house the day of the incident with his wife, sister, and nephews. He further testified that his wife was out of town at the end of April 1995. Wonder testified that she was out of town at the end of April 1995. Maurice next suggests there might have been hotel receipts to corroborate this testimony. However, Wonder only testified that she was out of town and never testified she stayed at a hotel. Even if such receipts did exist, they would merely show that Wonder was out of town at the end of April 1995 and would not show that she was in town at

Maurice mother's house the day of the incident. Furthermore, Maurice on appeal has not offered any receipts or even named or given the address of the hotel where Wonder allegedly stayed.

¶17. Maurice complains that his trial counsel was ineffective for failing to present a proper application for a continuance. However, as already related above, trial counsel had adequate time to prepare a defense, no new witnesses have been named on appeal, and all pre-trial motions were properly dealt with before trial. The motion for a continuance was properly denied.

¶18. Maurice also complains that his trial counsel failed to fully protect his right to a speedy trial. However, trial counsel made a motion to dismiss for lack of a constitutional speedy trial on March 5, 1997, the day of trial. The trial judge in addressing pre-trial motions stated that he would take the motion "under advisement," but "on its face there appears to be that the defendant is not entitled to any relief under this." The trial judge went on to state there would be a full hearing on the motion at a later time. This full hearing never took place. However, trial counsel again brought up the alleged speedy trial violation in her motion for new trial. This was denied by the trial judge. Trial counsel fully pursued the speedy trial claim, but it failed. We hold that trial counsel fully protected Maurice's right to a speedy trial. It should also be noted that no prejudice has been shown to have resulted from the alleged speedy trial violation nor has any attempt been made to show prejudice.

¶19. There is simply no proof that Martin was deficient in her representation of Maurice. Absent any evidence of deficiency or misrepresentation, this entire argument must fail. We hold that Maurice did not show that his counsel was constitutionally ineffective.

### III.

#### THE DEFENDANT WAS DEPRIVED OF A FAIR AND IMPARTIAL TRIAL DUE TO THE NUMEROUS IMPROPER ARGUMENTS IN CLOSING.

¶20. Maurice's final assignment of error deals with alleged prosecutorial misconduct. Maurice complains of a several statements made by the prosecutors in closing arguments. The first statement protested about reads as follows:

But when the officers came to his house that early morning, so he claims, he never told them that, no, that can't be. I wasn't there. Neither was [C.C.]

¶21. Maurice also complains of the following statement:

Now, don't you think that it would be more reasonable if you were accused of a crime such as this, that you would be telling the police or somebody, your attorney or something, that I wasn't at home on the 6th and I got witnesses that can prove it.

¶22. Maurice claims that these statements are inconsistent with the evidence and give the appearance that he was silent in the face of accusations. Also, Maurice claims that these remarks constituted improper comment on the exercise of his constitutional right to silence under the Fifth Amendment of the United States Constitution. No objection to these comments were made at trial and therefore this issue is procedurally barred. *Ballenger v. State*, 667 So. 2d 1242, 1259 (Miss. 1995) (citing *Chase v. State*, 645 So. 2d 829, 835 (Miss. 1994); *Cole v. State*, 525 So. 2d 365, 369 (Miss. 1987); *Irving v. State*, 498 So. 2d 305 (Miss. 1986); *Cannaday v. State*, 455 So. 2d 713, 718-19 (Miss. 1984)). Assuming

an objection had been involved, it is obvious the comments complained of are fair comments and fully supported by the evidence.

¶23. Maurice testified on cross-examination that at the time of his arrest officers told him when the incident was suppose to have happened. Maurice then testified that he realized that he had not seen C.C. that day but only told the officers "I didn't do this incident." He then testified that he learned of the date of the incident when he reached the jail and at that time he told the police that C.C. did not babysit for him that weekend.

¶24. The prosecution's first comment refers only to what Maurice did not say when the police arrived at his house. Although this was a weak argument, the comment was nonetheless proper and supported by the evidence. The second comment, again a weak argument, was nonetheless a true statement and proper. The second comment gives an inference that Hayes failed to call witnesses for his defense. Generally, it is improper to comment on the failure of either party to call a witness equally accessible to both parties. *Ross v. State*, 603 So. 2d 857, 864 (Miss. 1992). However, when a defendant fails to call a witness more available to him and in a closer relationship to him, the prosecution is allowed to comment on the defendant's failure to call the witness. *Id.* The witnesses which were not called in Hayes's defense and which could have possibly corroborated his testimony were his mother, sister, and nephews. Such witnesses cannot be considered equally available to the State and therefore, the prosecution could comment on their absence. *Id.* Finally, the prosecution did not comment on Maurice's constitutional right to remain silent for Maurice did not remain silent. Maurice made a statement at his arrest and testified in his own defense. Since Maurice waived his right to remain silent, the prosecution had every right to comment on Maurice's testimony.

¶25. Maurice complains of another statement in which one of the prosecutors said:

Are you going to believe her or are you going to believe this defendant who obviously has everything to lose, who's obviously going to benefit the most about what you decide. No one else is going to be affected by the outcome of this verdict but him.

¶26. Maurice argues that the comment urges the jury to not believe him merely because he is the defendant, and the statement taints him as a liar. The comment was never objected to at trial and is therefore procedurally barred. But even addressing the comment on the merits, it does not constitute reversible error. Our supreme court has held that it is not improper for a prosecutor to comment that a defendant was lying when that contention is supported in the record. *Hull v. State*, 687 So. 2d 708, 721 (Miss. 1996). The argument was grounded in fact and therefore proper.

¶27. Finally, Maurice argues that the prosecution made an improper "send a message" argument. The challenged statement is:

Ladies and gentlemen, if you don't come back in this courtroom with a guilty verdict in this case, do you know what you're telling this young thirteen-year-old girl out here. You're telling her it's okay for a man to violate her, to rub on her body and to masturbate on her body. It's all right for him to do that. We're not going to do anything about it, and she's got to live with that the rest of her life. The rest of her life. I know you don't want to do that, but that's what you'll be doing if you don't come back with a guilty verdict in this case . . . .

¶28. The statement was not objected to at trial and therefore this issue is not properly before us. However, considering this issue on the merits, it is doubtful if the statement could even be considered a "send a message" argument. For argument sake, even if we were to consider this an improper statement it does not rise to such a level as to constitute reversible error.

**¶29. THE JUDGMENT OF THE CIRCUIT COURT OF ADAMS COUNTY OF CONVICTION OF TOUCHING A CHILD FOR LUSTFUL PURPOSES AND SENTENCE OF TEN YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS TO RUN CONSECUTIVELY WITH PRIOR SENTENCES IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO ADAMS COUNTY.**

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

1. Initials used to protect identity.
2. Initials used to protect identity.