IN THE COURT OF APPEALS 06/04/96

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00085 COA

GENE WILBERT EVANS A/K/A GENERAL EVANS

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

TRIAL JUDGE: HON. GEORGE C. CARLSON, JR.

COURT FROM WHICH APPEALED: PANOLA COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

ROBERT H. BROOME

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JEFFREY A. KLINGFUSS

DISTRICT ATTORNEY: ROBERT L. WILLIAMS

NATURE OF THE CASE: CRIMINAL: ARSON AND CONSPIRACY TO COMMIT ARSON

TRIAL COURT DISPOSITION: GUILTY VERDICT; SENTENCED TO 5 YRS IN PRISON ON CONSPIRACY COUNT AND 10 SUSPENDED YRS ON ARSON COUNT TO RUN CONSECUTIVELY

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

SOUTHWICK, J., FOR THE COURT:

Gene Evans was convicted of conspiracy to commit arson and arson for the burning of a Como, Mississippi grocery store in April 1992. On the separate counts he was to serve consecutive sentences of five years and ten years respectively, with the ten-year sentence suspended. Evans appeals his conviction, contending that a mistrial should have been granted following a comment made by the prosecution in closing arguments. We disagree and affirm.

The statement to which Evans objects was a rhetorical question posed to the jury. The State had presented its initial argument, the defense had given its closing, and the district attorney responded:

> And does the defendant give you reasons why you shouldn't believe Steve Bowns [the witness who said Evans paid him to burn the building.]? Here are the defendant's three reasons. He says, number one, that Steve Bowns is an admitted criminal. . . . He says, number two, Steve Bowns started hanging at R.B. Armstrong's store shortly after the fire. And he says, number three, Steve Bowns told the truth about Steve Bowns setting the fire but don't believe anything else that Steve Bowns says.

Evans argues that the first sentence, the rhetorical question to the jury, is an impermissible comment on his failure to testify under both the state and federal constitutions. Only if that sentence is read in isolation, without the three sentences after it, does any possibility arise that it is an improper comment. The "defendant" is being used loosely to refer to the defense attorney's presentation. After asking whether any reasons were given, the district attorney answers that there were three. So far from saying that the defendant has failed to testify, in context the statement is a comment that three reasons were given, but they are insubstantial.

The State may not directly or indirectly comment on a defendant's failure to take the stand in his own defense. *Ladner v. State*, 584 So. 2d 743, 753 (Miss.), *cert. denied*, 502 U.S. 660 (1991). "[A]lthough a direct reference to the defendant's failure to testify is strictly prohibited, all other statements must necessarily be looked at on a case by case basis." *Jimpson v. State*, 532 So. 2d 985, 991 (Miss. 1988).

Evans' attorney in closing argued that Bowns, who claimed Evans paid him, was unbelievable. Our disposition of this case is guided by an almost identical decision rendered by the supreme court in *Dowbak v. State*, 666 So. 2d 1377, 1386 (Miss. 1996). In *Dowbak*, a person accused of arson claimed on appeal that the State made an improper reference to his refusal to testify. *Id.* Several comments were highlighted, but the most analogous concerned the defense argument that the paid arsonist, Barnett, was a "professional crook." *Id.* at 1385. In closing the State argued "Who says that? Over and over and over again, the lawyers say that ladies and gentlemen. Yeah, he's been convicted of insurance fraud. He's on probation. . . ." *Dowbak*, 666 So. 2d at 1385. The supreme court found that this was proper argument on the absence of evidence from any source, not

specifically from the defendant himself, to undermine the State's star witness. *Id.* at 1386.

In this case, the prosecution relied on the testimony of the contract arsonist to prove its case against Evans. Evans argued to the jury that the witness' testimony was not believable. In response, in its rhetorical question to the jury, the prosecution argued Evans had not presented any credible evidence to impeach the witness' testimony. As in *Dowbak*, we conclude that the question posed in this case is not a comment on Evans' failure to take the stand, but is a comment on the paucity of evidence before the jury to support Evans' defense. *Id.* at 1386 (citation omitted).

THE JUDGMENT OF CONVICTION OF THE PANOLA COUNTY CIRCUIT COURT OF COUNT I: CONSPIRACY TO COMMIT ARSON AND SENTENCE OF FIVE (5) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND COUNT II: SECOND DEGREE ARSON AND SENTENCE OF TEN (10) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, WITH THE SENTENCE ON COUNT II TO BE SUSPENDED PENDING FUTURE GOOD BEHAVIOR AND CONSECUTIVELY TO THE SENTENCE IN COUNT I IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, AND PAYNE, JJ., CONCUR.