NO. 14-90-00246-CR

IN THE COURT OF APPEALS

FOR THE

FOURTEENTH DISTRICT OF TEXAS

AT HOUSTON

NO. 526,673

IN THE 180TH DISTRICT COURT

OF HARRIS COUNTY, TEXAS

SHIRLEY ANNETTE SOUTHERLAND	**§**	**APPELLANT**
V.	**§**	
THE STATE OF TEXAS	**§**	**APPELLEE**

STATE'S APPELLATE BRIEF

JOHN B. HOLMES, JR.
DISTRICT ATTORNEY
HARRIS COUNTY, TEXAS

J. HARVEY HUDSON
ASSISTANT DISTRICT ATTORNEY
HARRIS COUNTY, TEXAS

STEVE BALDASSANO
ASSISTANT DISTRICT ATTORNEY
HARRIS COUNTY, TEXAS

COUNSEL FOR APPELLEE

ORAL ARGUMENT WAIVED

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to TEX. R. APP. PRO. 75, the State waives oral argument herein since the facts and legal arguments are adequately presented in the record and briefs, and thus the decisional process would not be significantly aided by oral argument.

IDENTIFICATION OF THE PARTIES

Pursuant to TEX. R. APP. PRO. 74(a), a complete list of the names of all interested parties is provided below so the members of this Honorable Court may at once determine whether they are disqualified to serve or should recuse themselves from participating in the decision of the case.

Complainant, victim, or aggrieved party:

Shawnte Collins

Counsel for the State:

John B. Holmes, Jr. — District Attorney of Harris County
J. Harvey Hudson — Assistant District Attorney on appeal
Steve Baldassano — Assistant District Attorney at trial

Appellant or criminal defendant:

Shirley Annette Southerland aka Shirley Annette Stokely aka Shirley Annette Martin

Counsel for appellant:

Sandra L. Smith — Counsel on appeal
Ken Goode — Counsel at trial

Trial judge:

Hon. Patricia R. Lykos — Judge of the 180th District Court

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TO THE HONORABLE COURT OF APPEALS:

PRELIMINARY STATEMENT

The appellant was charged by indictment with the offense of murder (T. I-12). To this accusation the appellant entered a plea of "not guilty," and both sides proceeded to trial before a jury (T. I-68). After hearing the testimony of the witnesses, and observing their demeanor, the jury found the appellant guilty of murder, as charged in the indictment (T. I-63). Thereafter, the jury assessed the appellant's punishment at confinement in the Institution Division of the Texas Department of Criminal Justice for life and a fine of $10,000.00 (T. I-67). Whereupon, the appellant gave timely notice of appeal (T. I-72).

REPLY TO POINT OF ERROR NUMBER ONE

The appellant's first point of error reads:

> The trial court erred when it failed to allow Katy Lou Smith the [sic] testify as to substance of the conversation she had with Arnold Ramirez.

During the course of the trial, the State called the victim's stepmother, Ms. Kitty Smith, to the witness stand for the purpose of identifying a photograph of the deceased (S.F. II- 86-87). Ms. Smith testified that she first learned of her stepdaughter's death at approximately 12:30 a.m. on a Monday morning when a representative of Alief Funeral Home came to her house (S.F. II-88). Thereafter, Ms. Smith said she gained some information about her stepdaughter from Arnold Ramirez, and that she passed that information on to the Harris County Sheriff's Department:

Q. (BY MR. BALDASSANO [the State's attorney]) Ma'am, did you ever receive any information from — and I am not asking you what the information was, but from a person named Arnold Ramirez, regarding what happened to Sissy?

A. Would you please repeat that question to me?

Q. Did you receive any information from a Arnold Ramirez about what happened to Sissy [the complainant]?

A. Yes, sir, I did.

Q. Okay. And what action, if any, did you take regarding that information?

A. I contacted Harris County Sheriff's Department Homicide Division and I contacted Stevens with the Houston Police Department, first, because at that time I didn't know who was taking — who was taking care of things.

Q. Okay.

A. And I was referred to Harris County Sheriff's Department.

Q. Okay. Do you remember approximately when that was?

A. Any information that I had or when I talked to them was the weekend following Sissy's burial on Thursday.

Q. Okay. And what date? Do you remember the date that she was buried?

A. Sissy was buried February 23rd.

Q. And did you tell the deputy sheriffs the information that you had learned?

A. Yes, sir, I did.

Q. Okay. And did they handle the investigation after that?

A. Yes, sir, they did.

(S.F. II-89). On cross-examination, appellant's counsel restricted his questions solely to whether the witness had previously made a statement to police.

Thereafter, Mr. Arnulfo Ramirez, a friend of the deceased, and apparently the same person who first passed information to Kitty Smith was called as a witness by the State (S.F. II-129). Mr. Ramirez identified an autopsy photograph of the deceased (S.F.II-130). Mr. Ramirez was asked no questions on direct or cross-examination about the "information" which was passed to Kitty Smith.

After the State had rested its case, the jury was retired and the appellant recalled Kitty Smith to the witness stand to make a proffer of evidence (S.F. III-293). Ms. Smith testified that she told the police that the victim had gotten into some trouble about a year prior to her death with a Columbian named Pablo, and that she had "ripped" him off in a drug deal (S.F. III- 294-95). Ms. Smith further testified that she had gained this information from the decedent (S.F. III- 295-96).

The appellant sought to have this testimony elicited before the jury, but the prosecutor objected to the evidence and the trial court sustained the objection. The appellant contends in her first point of error that the testimony was admissible under the rule of optional completeness found in TEX. R. CRIM. EVID. 107. It seems to be the appellant's position that knowledge gleaned by Ms. Smith from her stepdaughter, a year prior to her murder, should have been

admitted to show the whole topic of conversation which she had with Arnulfo Ramirez.

The State is at a loss to know how to respond! The record plainly demonstrates that the conversations are separated by a year in time and are with two different people. How can the rule of optional completeness ever be applicable? Moreover, the State never offered any portion of the contents of the conversation which Ms. Smith had with Arnulfo Ramirez. Where no part of the conversation has been admitted into evidence, there can be no "completion" of that evidence with the remainder of the conversation. Compare **Allridge v. State**, 762 S.W.2d 146, 153 (Tex. Crim. App. 1988).

Accordingly, the appellant's first point of error is utterly without merit and should be overruled.

REPLY TO POINT OF ERROR NUMBER TWO

The appellant's second point of error reads:

> During his final argument, the State's attorney improperly commented on the failure to [sic] appellant's spouse to testify.

Several witnesses testified that the appellant was convinced, and had loudly proclaimed, that the victim had "slept" with her husband. In his closing argument, the prosecutor observed that there were no witnesses to this event if it occurred other than the deceased and the appellant's husband (S.F. IV- 37-38). Although there was no objection to this argument at trial, the appellant complains on appeal that the argument was improper.

Every prosecutor is aware that he or she...

> ...is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.

Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633 (1935). "In order to be appropriate, jury argument must fall within the categories of (1) summation of the evidence; (2) reasonable deduction from the evidence; (3) answer to argument of opposing counsel; or (4) a plea for law enforcement." **Hightower v. State**, 629 S.W.2d 920, 926 (Tex. Crim. App. 1981).

In the instant case, the State's attorney did no more than sum up the evidence, or lack thereof, namely, he stated that there was no evidence to support the allegation that the victim had slept with the appellant's husband. Moreover, he intimated that if this fact could be proved, and if it was important to the appellant's defense, the appellant could have called her husband to the witness stand. This, of course, is nothing more than a reasonable deduction from the evidence.

"The general rule is that the State may comment on the failure of the defendant to call a competent and material witness and may also argue that the reason for such failure is that any such testimony would be unfavorable to his defense." **Bridges v. State**, 624 S.W.2d 718, 719 (Tex. App.—Houston [14th Dist.] 1981, pet.

ref'd), cert. denied, 456 U.S. 1010, 102 S.Ct. 2304, 73 L.Ed.2d 1306 (1982). As a result, it is permissible for a prosecutor to comment on the defendant's failure to call his or her spouse as a witness. Compare **King v. State**, 614 S.W.2d 165 (Tex. Crim. App. 1981); **Boles v. State**, 598 S.W.2d 274 (Tex. Crim. App. 1980).

Accordingly, the appellant's second point of error is utterly without merit and should be overruled.

CONCLUSION

It is respectfully submitted that all things are regular and the conviction should be affirmed.

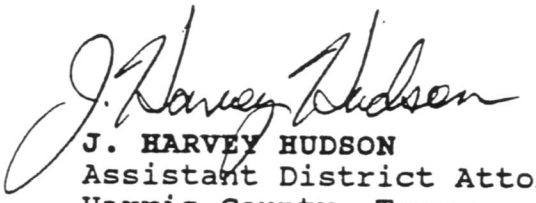
JOHN B. HOLMES, JR.
District Attorney
Harris County, Texas

J. HARVEY HUDSON
Assistant District Attorney
Harris County, Texas
201 Fannin, Suite 200
Houston, Texas 77002-1901
(713) 221-5826
TBC No. 10156700

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing instrument has been mailed to the following address(es):

Sandra L. Smith
Attorney at Law
3730 Kirby, Suite 920
Houston, Texas 77098



J. HARVEY HUDSON
Assistant District Attorney
Harris County, Texas
201 Fannin, Suite 200
Houston, Texas 77002-1901
(713) 221-5826
TBC No. 10156700

Date: February 11, 1991
jhh