

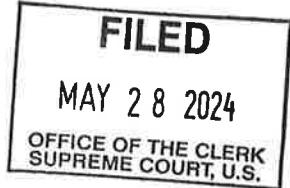
23-7619
No. 24-

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

BRANDON GIBBS,
Petitioner,



v.

STATE OF TEXAS,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

- I. Did prosecutor improperly comment on Petitioner's failure to testify during closing argument, in violation of the Fifth Amendment?

PARTIES

Petitioner: Brandon Gibbs

Respondent: The State of Texas

RELATED PROCEEDINGS

There are no related proceedings.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Brandon Gibbs respectfully petitions for a writ of certiorari to review the judgment of the Fourteenth Court of Appeals of Texas. The Texas Court of Criminal Appeals, the court of last resort in the State of Texas, denied a petition for discretionary review. *See In Re Gibbs*, 2024 Tex. Crim. App. LEXIS 177 (Tex. Crim. App., Feb. 28, 2024).

OPINION BELOW

The unpublished opinion of the Fourteenth Court of Appeals is captioned as *Gibbs v. State*, 2023 Tex. App. LEXIS 9069 (Tex. App.—Houston [14th Dist.], pet. ref'd) (mem. op., not designated for publication). A copy of the opinion is provided in Appendix A. In Appendix B, Counsel has provided a copy of the order from the Texas Court of Criminal Appeals denying his petition for discretionary review. Finally, Counsel provided in Appendix C the trial court judgment of conviction and sentence in cause number 1732158R, Criminal District Court No. 2, Tarrant County, Texas.

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(1). *See also* Sup. Ct. R. 13.1. The Texas Court of Criminal Appeals, the state court of last resort, denied discretionary review on February 28, 2024. The petition is therefore timely under Rule 13.1 of the Supreme Court Rules. *See In Re Gibbs*, 2024 Tex. Crim. App. LEXIS 177 (Tex. Crim. App., Feb. 28, 2024). *See* Sup. Ct. R. 13.1.

CONSTITUTIONAL AND PROVISION INVOLVED

The Fifth Amendment provides, in relevant part, that:

no person shall be compelled in any criminal case to be a witness against himself.

U.S. Const. amend. V.

STATEMENT OF THE CASE

Relevant Facts and Proceedings in Trial Court

A jury found Petitioner guilty of family violence assault by occlusion and family violence assault causing bodily injury. *Gibbs*, 2023 Tex. App. LEXIS 9069 at *1. The trial court sentenced Petitioner to 40 years imprisonment on each count and set the sentences to run concurrently. *Id.*

At trial the evidence revealed bizarre circumstances leading to the initial report of alleged domestic abuse. The complainant only claimed she had been assaulted after a police officer had pulled her over during a traffic stop for speeding. *Gibbs*, 2023 Tex. App. LEXIS 9069 at *3. She was driving with a suspended license, an arrestable offense. *Id.* at *3-4. She was a felon, having been convicted of tampering with a government record, forgery and credit card abuse. *Id.* Still further, she was on felony probation for fraudulent possession of a prescription and tampering with a government license. *Id.* And the complainant told the officer she had an outstanding warrant for driving with a suspending license. (3 RR 18.) Finally, she refused treatment for any of her alleged injuries, claiming she was heading to the hospital “just up the street. *Id.*

During closing argument, Defense counsel argued the complainant “fraud . . . a thief . . . and a liar.” (3 RR 103.) He argued it was reasonable to believe that someone in her position might have drugs in her vehicle, particularly in light of the fact that she had recently committed the offense of fraudulent possession of a controlled substance. (3 RR 99.) He further pointed out that she had an outstanding warrant and this alone would have given the police a basis to conduct an inventory search of the vehicle. (3 RR 100.) *See Gibbs*, 2023 Tex. App. LEXIS 9069 at *4. Defense counsel argued it was suspicious that Barnett did not know the address of the alleged offense location. (3 RR 101.) He also found it puzzling that the complainant refused EMT assistance even though she had insisted that she was rushing off to the hospital. (3 RR 100.); *see id.*

During its closing, the State argued that the defense had offered no explanation as to the source of the injuries:

Now, I'm trying to unpack what the Defense wants you to believe, right? Because they want you to leave your common sense at that door. Because what is it? Where did the injuries come from? Right? Where did they come from? Because she gets pulled over. She's sobbing hysterically. Listen to it, please. Ask for that video and listen to it again. She's crying. She's immediately gesturing to her face. There is blood on her. There's a lump on her head. And what does she tell the officer? I've been assaulted. What's the theory? She did that to herself? She rearranged her own teeth to the point that they're still messed up to get out of a ticket? . . . Give me a break. She makes herself bleed on her car to get out of a ticket that no one's talked to her about? She volunteers that information [about her license being suspended], right? The officer told you, I didn't have to ask her. She told me.

Where did those injuries come from? Do you think she did those to herself as she pulls over for 30 seconds to get out of a ticket? No. No. Listen to

her on that audio. Look at these injuries and ask yourself, where did they come from. *Because the Defense hasn't given you an answer, right ? They want you to believe that this is a mistake.*

Gibbs, 2023 Tex. App. LEXIS 9069 at *5-6 (emphasis added).

Petitioner was found guilty of both counts and sentenced to concurrent terms of 40 years imprisonment in the Texas Department of Criminal Justice. *Id.* at *1.

Appeal

Petitioner appealed. The case was transferred from the Second to the Fourteenth Court of Appeals in Texas. *Gibbs*, 2023 Tex. App. LEXIS 9069 at n.3. The court of appeals affirmed the judgment of conviction and sentence in an unpublished opinion. *See Gibbs*, 2023 Tex. App. LEXIS 9069 at *9. The Texas appellate court concluded that the prosecutor had not commented on Petitioner's decision not to testify; instead it had responded to counsel's suggestion that the complainant had fabricated her claims of abuse:

We disagree with appellant's interpretation of the prosecutor's words and the context in which they were used. The cited language is not a clear reference to appellant's failure to testify but instead appears [*8] to be part of a response to defense counsel's argument that complainant had somehow fabricated or caused her own injuries in order to avoid a search of her vehicle when she was pulled over for speeding and was driving without a valid license. The prosecutor appears to be suggesting that it made no sense that complainant would cause herself to splatter blood in her own car and loosen her own teeth in order to avoid a search and that the defense's explanation for the injuries was really no answer at all to the question of how she got injured. The comment challenges defense counsel's hypothesis; it does not comment on appellant's decision not to testify or call attention to the absence of evidence that only appellant could provide.

The prosecutor's statement certainly was not a direct comment on the

absence of testimony by appellant, and given the context in which the statement occurred, we do not believe that it was manifestly intended or was of such character that the jury would necessarily and naturally take it as a comment on the accused's failure to testify. See *Canales*, 98 S.W.3d at 695 (holding, given the context in which it was made, prosecutor's comment was a response to defense counsel's argument and [*9] not a reference to defendant's failure to testify); *Ochoa v. State*, 675 S.W.3d 793, 2023 Tex. App. LEXIS 5320, 2023 WL 4630637, at *13 (Tex. App.—Fort Worth July 20, 2023, no pet.) (holding prosecutor's comment that the defendant "knows he's guilty of this" was a response to defense that the case had not been properly investigated and was a comment on the evidence in the case, including the evidence that the defendant had confessed). Accordingly, we overrule appellant's sole issue.

Gibbs, 2023 Tex. App. LEXIS 9069, at *7-9.

Petitioner sought review from the Texas Court of Criminal Appeals, the court of last resort in Texas for criminal cases. The Court refused to exercise discretionary review. *See In Re Gibbs*, 2024 Tex. Crim. App. LEXIS 177 (Tex. Crim. App., Feb. 28, 2024).

This petition follows.

REASONS FOR GRANTING THE PETITION

I. There is a division of authority on the circumstances for which a prosecutor's argument amounts to an improper comment on a defendant's decision not to testify.

This Court has held that it is improper for a prosecutor to comment on a defendant's decision not to testify. *Griffin v. California*, 380 U.S. 609, 615 (1965). However argument may be improper even if they are indirect. The Ninth Circuit has found that a comment is improper if "the jury would naturally and necessarily take it to be a comment on the defendant's failure to testify." *United States v. Preston*, 873 F.3d 829, 842 (9th Cir. 2017). The Fifth Circuit has formulated a similar test and asked whether "the character of the remark was such that the jury would naturally and necessarily construe it as a comment on the defendant's silence." *Rhoades v. Davis*, 852 F.3d 422, 432-33 (5th Cir. 2017).

In this case, the prosecutor argued to the jury that the defense "hasn't given you an answer" as to the source of the injuries found on the complainant during the traffic stop. *Gibbs*, 2023 Tex. App. 9069 at *5. The court of appeals below gave short shrift to the crucial fact that complainant and Petitioner would have been the only witnesses to the alleged crime; this magnifies the significance of a putatively indirect statement that the defense has provided no answer.

Contrary to the decision below, other appellate courts within Texas and another federal appellate court have found this fact critical in concluding that a prosecutor's argument violated the Fifth Amendment. *See Crocker v. State*, 248 S.W. 3d 299, 305

(Tex. App.—Houston [1st Dist.] 2007 pet. ref'd) (reversible error where prosecutor commented that the jury had heard from “the State’s witnesses only;” because the complainant and the defendant were allegedly the only people present during the robbery, the comment “drew the jury’s attention to the absence of evidence that only appellant’s testimony could supply.”); *Trevino v. State*, 979 S.W. 2d 78, 79-80 (Tex. App.—Austin 1998, pet. ref'd) (reversible error where prosecutor commented that “[t]wo people were there that night that know what happened” in reference to the defendant and the complainant); *Norton v. State*, 851 S.W. 2d 341, 346 (Tex. App.—Dallas 1993, pet. ref'd) (reversible error where prosecutor commented “[t]here were only two people out there and we heard from one of them.”); *United States v. Preston*, 873 F.3d 829, 842 (9th Cir. 2017) (error where prosecutor stated “[t]here’s no evidence, there’s no testimony in this case that contradicts [the complainant’s] testimony.”). Such statements in two-witness cases “only cause the jury to naturally look to the only other evidence there is—the defendant—and hence, this could be a prohibited comment on a defendant’s failure to testify.” *Preston*, 873 F.3d at 842.

Preston is instructive. In *Preston*, the defendant had been convicted of aggravated sexual assault of a child. *Preston*, 873 F.3d at 833. Like this case, the complaining witness and the defendant were the only possible witnesses to the purported crime. *Id.* at 843. The Ninth Circuit found this fact critical in concluding that the prosecutor had commented on the defendant’s failure to testify when he stated “[t]here’s no evidence, there’s no testimony in this case that contradicts [the

complainant's] testimony." *Id.* The court reasoned that the jury "would have immediately inferred that they did not hear from [the defendant], the only witness who could have directly contradicted [the victim's] allegations." *Preston*, 873 F.3d at 843. The Ninth Circuit concluded that the prosecutor had impermissibly commented on the defendant's failure to testify. *Id.* It did not matter that defendant had not been specifically mentioned, because he was the only possible witness who could have provided any contradictory evidence to the complainant's assertions.

Similarly in *Crocker*, another court of appeals in Texas found it important that the complainant "and appellant were, allegedly, the only two people present" during the robbery. *Crocker*, 248 S.W. 3d at 305. Consequently, the prosecutor's comment to the jury that it had heard from "State's witnesses only" was impermissible even though the defendant was not expressly mentioned. *Id.* Because the complainant and Appellant were the only two potential witnesses, the comment "drew the jury's attention to the absence of evidence that only appellant's testimony could supply." *Id.*

This case presents more egregious comments than both *Preston* and *Crocker*. Unlike in those cases, the prosecutor here specifically identified the "Defense" as the party who has failed to provide evidence regarding the source of the injuries. (3 RR 106.) And the particular verbiage used that the "Defense hasn't given you *an answer*" could be taken as a strongly suggestive reference to the absence of testimony from Petitioner. This comment should have been found to be reversible error, because the "the jury would naturally and necessarily" take it to be a comment on the defendant's

failure to testify. *Preston*, 873 F.3d at 842; *Rhoades*, 852 F.3d at 432-33.

This Court should provide further guidance on the circumstances when a prosecutor's putatively indirect statements still amount to a constitutionally impermissible comment on a defendant's failure to testify in violation of the Fifth Amendment.

CONCLUSION

Petitioner respectfully requests that the Court grant his petition for a writ of certiorari.

DATE: May 28, 2024

Respectfully Submitted,



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