IN THE COURT OF APPEALS 10/01/96

OF THE

STATE OF MISSISSIPPI

NO. 93-KA-00536 COA

LAMONT EVANS AND KENNETH A. RAMSEY

APPELLANTS

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. MELVIN KEITH STARRETT

COURT FROM WHICH APPEALED: PIKE COUNTY CIRCUIT COURT

ATTORNEY(S) FOR APPELLANT: WILLIAM E. GOODWIN, JOHN P. PRICE

ATTORNEY(S) FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JOLENE M. LOWRY

DISTRICT ATTORNEY(S): DANNY SMITH, JERRY RUSHING

NATURE OF THE CASE: CRIMINAL - ARMED ROBBERY

TRIAL COURT DISPOSITION: EVANS CONVICTED AND SENTENCED TO SERVE TWENTY (20) YEARS IN THE MISSISSIPPI DEPARTMENT OF CORRECTIONS; RAMSEY CONVICTED AND SENTENCED TO TWENTY-FIVE (25) YEARS IN THE MISSISSIPPI DEPARTMENT OF CORRECTIONS.

BEFORE THOMAS, P.J., BARBER, AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

Lamont Evans and Kenneth A. Ramsey were indicted for the armed robbery of a convenience store. The jury subsequently convicted both men of armed robbery, and the court sentenced them to serve twenty and twenty-five years, respectively, in the custody of the Mississippi Department of Corrections. We find that their issues on appeal have no merit and therefore affirm.

FACTS

Gloria Taylor, a clerk at a McComb convenience store, became the victim of an armed robbery on the evening of January 5, 1993. Evans and Ramsey were arrested, indicted, and tried for the crime. Taylor identified both men from a photograph lineup prior to trial. She also testified for the State and again identified both men as they sat in the trial audience. Darrin Bahm testified that he saw two black men run out of the store and jump into a car, which he then chased at high speed until he turned around because he thought his own car would run out of gas. Jennifer Wilkinson testified that she knew both Evans and Ramsey. She said that the two men visited her house unexpectedly that evening and parked their car behind her house. She testified that they both sat at her living room table and counted money. She stated that she then went with them to another house to call a cab because the men said that their car was "running hot." Robert Gatlin testified that Jennifer and two men came to his home that evening. He identified Evans and Ramsey as the two men who accompanied her. Gatlin said that Jennifer asked if he would take her two friends back to McComb. He stated that he told her that he did not know them and would not take them, but that she could use his telephone to call a cab. He said that she made a telephone call, left his house, and walked back down the street with the two men.

Perry Ashley of the McComb Police Department testified that he received good physical descriptions of the men who robbed Taylor and of the getaway car. He also received information that led him and other officers to the Continental Motel. The motel clerk sent them to Room 121 where, after knocking and identifying themselves, they heard people shuffling and moving around inside. The officers subsequently entered the room with a pass key and talked with a woman named Katrina Perkins. They asked her where the man was that had been with her, and she responded that he had gone into an adjoining room. The officers then knocked on that door, did not get a response, and subsequently entered with a pass key. There they found Terrance Ramsey, Sanovia Isaac, and Lamont Evans, who was under a bed. The officers found a tile missing in the ceiling above and, after searching above the ceiling, discovered a .25-caliber automatic handgun. They also found a picture of Vanessa Miller, who was Kenneth Ramsey’s girlfriend, in plain view on the furniture in the room. Ramsey himself was later apprehended at Vanessa Miller’s apartment.

Both men presented alibi defenses through friends who testified as to where the men were that evening around the time of the robbery. Evans did not testify in his defense, while Ramsey did testify. Both were found guilty--Evans was sentenced to twenty years, and Ramsey was sentenced to twenty-five years, both in the custody of the Mississippi Department of Corrections. Their motions for JNOV or, in the alternative, a new trial were subsequently denied, and both men appeal on the issues below.

Issue IV is only applicable to Evans, while Issues I through III apply to both Appellants.

ISSUES AND ANALYSIS

I. DID THE TRIAL COURT ERR IN ITS RULING ON THE MOTION TO SUPPRESS EVIDENCE FOUND AS A RESULT OF THE SEARCH OF THE MOTEL ROOM?

Evans and Ramsey contend that the court erred by denying their motion to suppress the evidence, i.e, the gun, found in the motel room where Evans was arrested. They argue that the officers' entry was improper without a warrant, and that the search was unreasonable.

Regarding admissibility of evidence issues within a criminal case, the Mississippi Supreme Court has stated that admissibility rests within the sound discretion of the trial court, and reversal of a conviction is appropriate only when the trial court abused that discretion. *Peterson v. State*, 671 So. 2d 647, 655 (Miss. 1996) (citations omitted). However, an appellate court must determine if the trial court utilized the proper legal standards in its fact findings regarding the admissibility of evidence. *Id.* at 656 (citation omitted). Finally, any trial court error regarding this issue must have affected a substantial right of the defendant to warrant reversal on this point. *Id.*; *see also Johnson v. State*, 655 So. 2d 37, 42 (Miss. 1995) (relevancy and admissibility of evidence issues are within the discretion of the trial court, and reversal may only be based on abuse of that discretion). The court has also stated that an appellate court must determine from the entire record, i.e., the suppression hearing as well as the trial itself, whether the fact finding is supported by substantial evidence. *Holland v. State*, 587 So. 2d 848, 855 (Miss. 1991) (citations omitted); *see also Nathan v. State*, 552 So. 2d 99, 103 (Miss. 1989) (court will not reverse a finding of fact unless it is clearly erroneous).

ENTRY INTO THE MOTEL ROOM

A warrantless search or seizure is per se unreasonable unless the arresting officer can show that either falls within an exception to the warrant requirement which is based on the existence of exigent circumstances. *Coolidge v. New Hampshire*, 403 U.S. 443, 474-75 (1981). The Mississippi Supreme Court has held that officers may make a warrantless premises search under the exigent circumstances exception to the warrant requirement. *Smith v. State*, 419 So. 2d 563, 570 (Miss. 1982), *vacated on other grounds, Smith v. Black*, 503 U.S. 930 (1992). The elements of this exception are: (1) the officers must have reasonable grounds to believe an emergency exists, and that an immediate need for assistance for protection of life of property exists; (2) the search must not be primarily motivated by intent to arrest and seize evidence; and (3) some reasonable basis approximating probable cause to connect the emergency with the premises to be searched must exist. *Id.*

In the present case, the trial court found that the entry into the motel room was properly based on exigent circumstances. We believe that finding was correct because the officers clearly had reasonable grounds to believe either one or both men were inside the motel room. They had received information that the men frequented the motel, and the clerk ultimately led them to the room in which he believed they were staying. The officers announced themselves at the door, and they heard shuffling and moving around inside. Once inside, they found one of the two men they were looking for underneath a bed. The trial court found that the officers had a reasonable belief that at least one of the men who

had robbed the convenience store was inside the room. It also correctly found that the officers were justified in entering the room after hearing shuffling around that indicated possible attempts to either escape or hide themselves, or to secure or destroy evidence.

ARREST AND SEARCH AND SEIZURE OF EVIDENCE

The Mississippi Supreme Court has held that "[t]he existence of 'probable cause' or 'reasonable grounds' justifying an arrest without a warrant is determined by factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act." *Abram v. State*, 606 So. 2d 1015, 1026 (Miss. 1992); *see also Gandy v. State*, 438 So. 2d 279, 283 (Miss. 1983) (to justify warrantless arrest, officers must only entertain a reasonable belief, which rises above mere unfounded suspicion, that a suspect is involved in an offense). Probable cause or reasonable grounds that justify an arrest without a warrant exists where the facts and circumstances within an arresting officer's knowledge and of which the officer had reasonable trustworthy information are justification enough to warrant a person of reasonable caution to believe that an offense has been committed. *Florence v. State*, 397 So. 2d 1105, 1107 (Miss. 1981) (citation omitted). A combination of information and personal knowledge may raise the inference beyond suspicion to reasonable grounds. *Id.* Finally, an officer or private person may arrest any person without a warrant when that person has committed a felony not in the arrestor's presence if the arrestor has reasonable ground to suspect that the arrestee committed the offense. Miss. Code Ann. § 99-3-7(1) (1972).

The Mississippi Supreme Court has also held that, in a case of a search incident to arrest, "the exception to the warrant requirement is founded upon the reasonable concern that the arrestee might have a weapon on his person or within reach, and that he may attempt to destroy evidence which is within his grasp." *Ferrell v. State*, 649 So. 2d 831, 833 (Miss. 1995) (citation omitted). Police officers may search an arrestee and any area in his or her immediate control, following a lawful arrest, without a search warrant to protect themselves and others from danger and to prevent the destruction of evidence. *Chimel v. California*, 395 U.S. 752, 768 (1969). The search must be contemporaneous with the arrest, conducted to prevent the use of a weapon or the destruction of evidence, and limited to the area immediately within the arrestee's control. *Id.* Moreover, officers cannot be expected to have perfect judgment regarding what is within and what is beyond an arrestee's grasp while making a dangerous arrest. *United States v. Bennett*, 908 F.2d 189, 192-94 (7th Cir. 1990).

In the present case, after finding Evans under the bed, probable cause existed to arrest him based on the information given to them. Moreover, they clearly were able to utilize the description they had of Evans and Ramsey, and the fact that Evans appeared to be hiding under the bed. Probable cause also existed to search for evidence of the felony, particularly due to an obvious missing ceiling tile within the same room, and the fact that the offense had been committed using an automatic handgun. The officers were clearly justified in searching above the ceiling for evidence of the armed robbery and in seizing the gun which they ultimately found. The trial court found that the officers seized the evidence under the search incident to arrest exception to the warrant requirement. We believe that the search of the room was proper as a search incident to an arrest. The trial court's admission into evidence of the weapon seized was based on substantial evidence. It clearly employed the proper legal standards regarding admissibility and did not abuse its discretion.

STANDING OF Ramsey

Ramsey's counsel stated at trial that Ramsey was not present at the motel where Evans was arrested and where the gun was found. He contended that, if the court determined that Ramsey had standing to challenge the use against him of the weapon seized at the motel, he wanted the jury to be instructed that evidence of the gun could not be used against him but only against the persons against whom the search was made. He argued that if Ramsey did not have standing, then he would join Evan's counsel's motion to suppress the evidence of the search and seizure.

The Mississippi Supreme Court has stated that a presumption exists that a jury follows a judge's instructions and ignores comments that have been objected to and sustained by the judge. *Davis v. State*, 660 So. 2d 1228, 1253 (Miss. 1995) (citations omitted); *see also Collins v. State*, 594 So. 2d 29, 35 (Miss. 1992) (an instructional error does not justify reversal if the jury was fully and fairly instructed by other instructions; an appellate court assumes that the jury followed the instructions given to them).

In the present case, the trial court determined that Ramsey did not have standing because he was not present when the gun was seized. The court instructed the jury that evidence of the gun was only to be considered against Evans, and not against Ramsey. We believe that the trial court properly instructed the jury on this issue, and that Ramsey requested and received a limiting instruction. He cannot now complain because the jury is presumed to have considered the evidence of the gun only against Evans, and he has failed to rebut that presumption.

OTHER PREJUDICIAL COMMENTS AGAINST Ramsey

REGARDING EVIDENCE OF THE GUN

Ramsey contends that other witnesses' comments that tied him with the gun seized at the motel were prejudicial to his defense.

The Mississippi Supreme Court has held that a trial judge cannot be put in error if not given the opportunity to address an issue. *Robinson v. State*, 662 So. 2d 1100, 1104 (Miss. 1995) (citation omitted); *Ballenger v. State*, 667 So. 2d 1242, 1256, 1266 (Miss. 1995) (trial judge cannot be found to be in error on issue not presented for decision, and defendant is procedurally barred where objection at trial was based on different grounds than those asserted on appeal). A complaining party must make a contemporaneous objection at trial in order to preserve an alleged error for appellate review. *King v. State*, 615 So. 2d 1202, 1205 (Miss. 1993) (citation omitted).

Here, Ramsey failed to object to any error, if any, committed at trial regarding this issue and has therefore waived it for purposes of appeal.

II. DID THE TRIAL COURT ERR IN REFUSING THE DEFENDANTS' REQUEST

TO BE ABSENT FROM THE TRIAL COURTROOM DURING THE IDENTIFICATION TESTIMONY OF THE STORE CLERK, GLORIA TAYLOR?

Evans and Ramsey contend that the court improperly denied their right to be absent from the identification portion of the trial. The court allowed them to sit in the courtroom separate from their counsel, but did not allow them to completely leave the courtroom.

The Mississippi Supreme Court has held that "where a defendant is to be identified at trial, and he requests that he be seated among other people in the courtroom, the trial judge should exercise broad discretion in determining whether the request should be granted." *Scott v. State*, 602 So. 2d 830, 833 (Miss. 1992). Factors to be considered by the judge include: (1) any danger presented to the public; (2) the danger of misidentification; (3) the facilities available within the courtroom; and (4) any other pertinent factors known by the judge. *Id.* In *Scott*, the defendant Scott complained of an improper pre-trial identification, the evidence of which the court ruled was inadmissible. *Id.* at 832. At trial Scott requested to be seated among the general public, and not next to his attorney, when a witness was to make an in-court identification of him. *Id.* at 833. The trial court had previously conducted voir dire of the identification witness and had ruled that the pre-trial identification had not impermissibly tainted the witness' ability to identify Scott in court. *Id.* The *Scott* court held that the trial judge thoroughly conducted voir dire of the identification witness before allowing his in-court identification, and that Scott had previously been convicted for prison escape. *Id.* It determined that the trial judge did not abuse his discretion in denying Scott's request to be seated among the general public. *Id.*; *see also Mackbee v. State*, 575 So. 2d 16, 37 (Miss. 1990) (when confronted with the issue of defendant's request to either remove him from the courtroom or to place him in the audience among persons of his race when a trial witness was to identify him, the court held that denial of request was proper since several witnesses had sufficient opportunity to observe the defendant on the day of the crime and prior photographic line-ups resulted in several witnesses positively identifying defendant, the propriety and suggestiv eness of which had never been questioned).

In the present case, Evans and Ramsey first challenged the initial photograph lineup as unduly suggestive. The court held a pretrial hearing in which both Defendants moved that they be allowed to remain outside the courtroom. At the pretrial hearing, witness Taylor positively identified both men as the armed robbers again from a photographic lineup. The court ruled that the initial lineup was not unduly suggestive. The trial court ruled that, upon their motion to remain outside the courtroom during Taylor's identification testimony at trial, Evans and Ramsey could sit in the courtroom and away from defense counsel. Taylor again identified both Evans and Ramsey from the audience.

We believe that the trial judge properly denied Evans and Ramsey their request to be absent from the courtroom during in-court identification by Taylor. The record reveals that the court determined that the pretrial photographic lineup was valid and proper. Although under no requirement to do so, the judge did allow both men to sit in the general courtroom audience and away from counsel. Taylor clearly identified both men twice before trial and once at trial. We do not find that the judge abused his discretion in not allowing Evans and Ramsey to be completely absent from the courtroom during the witness identification phase of their trial.

III. DID THE TRIAL COURT ERR IN DENYING EVANS'S AND Ramsey'S

MOTIONS FOR NEW TRIAL BASED ON THE WEIGHT OF THE EVIDENCE?

Evans and Ramsey argue that the jury verdict was against the overwhelming weight of the evidence. They request a reversal and a new trial on this ground.

The Mississippi Supreme Court has stated that when an appellate court considers whether a jury verdict is against the overwhelming weight of the evidence, it must accept as true all evidence favorable to the State and supportive of the verdict. *Ellis v. State*, 667 So. 2d 599, 611 (Miss. 1995) (citing *Isaac v. State*, 645 So. 2d 903, 907 (Miss. 1994)). Reversal is justified when the appellate court determines that an abuse of discretion existed in the lower court's denial of a new trial. *Id.*; *see also Eakes v. State*, 665 So. 2d 852, 872 (Miss. 1995) (citations omitted). The court has also held that "[t]he jury is charged with the responsibility of weighing and considering the conflicting evidence and credibility of the witnesses and determining whose testimony should be believed." *McClain v. State*, 625 So. 2d 774, 781 (Miss. 1993) (citations omitted); *see also Burrell v. State*, 613 So. 2d 1186, 1192 (Miss. 1993) (witness credibility and weight of conflicting testimony is left to the jury); *Kelly v. State*, 553 So. 2d 517, 522 (Miss. 1989) (witness credibility issues are to be left solely to the province of the jury). Furthermore, "the challenge to the weight of the evidence via motion for a new trial implicates the trial court's sound discretion." *McClain*, 625 So. 2d at 781 (citing *Wetz v. State*, 503 So. 2d 803, 807-08 (Miss. 1987)). The decision to grant a new trial "rest[s] in the sound discretion of the trial court, and the motion [for a new trial based on the weight of the evidence] should not be granted except to prevent an unconscionable injustice." *Id.*

In the present case, the jury heard the witnesses for, and the evidence presented by both the State and the defense. The State's evidence showed that Evans and Ramsey were in fact the individuals who had robbed Taylor at the convenience store. Ramsey testified that he did not commit the robbery. Testimony presented on behalf of both the State and the Defendants was clearly for the jury to evaluate. The jury's decision to believe the State's evidence and witnesses was well within its discretion. Moreover, the jury was clearly within its power to weigh the evidence and the credibility of the witnesses' testimony and to convict both Evans and Ramsey. The trial court did not abuse its discretion by refusing to grant Evans and Ramsey a new trial based on the weight of the evidence. The jury verdict was not so contrary to the overwhelming weight of the evidence that, to allow it to stand, would have been to promote an unconscionable injustice. The trial court properly denied Evans's and Ramsey's motions for a new trial.

IV. DID THE TRIAL COURT ERR IN DENYING EVANS'S MOTION FOR MISTRIAL, JNOV, AND NEW TRIAL BASED ON Ramsey'S COUNSEL MAKING AN ALLEGED INDIRECT COMMENT ON EVANS'S DECISION NOT TO TESTIFY IN HIS OWN DEFENSE?

Evans additionally contends that the court erred by not declaring a mistrial when Ramsey's counsel said during closing argument that his client, Ramsey, testified on his own behalf and told the jury that he did not commit the armed robbery. He believes that Ramsey's counsel therefore indirectly commented on Evans's decision not to take the stand and not to tell the jury himself that he too did

not commit the armed robbery, thereby violating Evans's Fifth Amendment right not to testify. Evans frames this issue in terms of an alleged failure to grant him a mistrial, JNOV, and new trial based on the closing comment. However, he fails to cite any authority regarding this issue in relation to sufficiency (JNOV) or weight (new trial), and ultimately requests a reversal and a new trial. Therefore, we will address his argument on the basis of a request for a mistrial only.

The State argues that Evans is procedurally barred on appeal from arguing this issue because he failed to contemporaneously object to Ramsey's counsel's comment. Although the record indicates that Evans did object, he did so after Ramsey concluded his closing argument, *and* after the State concluded its rebuttal closing argument. We do not address the procedural bar but rather focus on the merits of Evans's argument.

Uniform Circuit and County Court Rule 3.12 states that "the court may declare a mistrial if there occurs during the trial . . . misconduct . . . resulting in substantial and irreparable prejudice to the movant's case." URCCC 3.12. Upon motion of a party or on its own motion, the court may declare a mistrial if the trial cannot proceed in conformity with the law. *Id.*

The Mississippi Supreme Court has on numerous occasions addressed the question of whether an error or misconduct may warrant a mistrial. The court has held that "[w]hen the trial judge determines that the error [or misconduct] does not reach the level of prejudice warranting a mistrial, the judge should admonish the jury to disregard the impropriety in order to cure its prejudicial effect." *Holly v. State*, 671 So. 2d 32, 38-39 (Miss. 1996) (citations omitted) (court found that overall prejudicial effect of improper hearsay testimony at trial was minimal, and that any prejudicial effect was cured by the court's admonitions to the jury). Such action is sufficient to remove any prejudice resulting from improper testimony. *Id.* (citing *Baine v. State*, 604 So. 2d 249, 256 (Miss. 1992)). Moreover, the trial judge is permitted considerable discretion in determining if a mistrial is justified because the judge is in the best position to weigh any prejudicial effect. *Id.* (citing *Roundtree v. State*, 568 So. 2d 1173, 1178 (Miss. 1990)); *see also Johnson v. State*, 666 So. 2d 784, 794 (Miss. 1995) (decision to grant mistrial is within the sound discretion of trial court and failure to grant motion for mistrial will not be reversed on appeal unless trial court abused its discretion).

In the present case, counsel for Ramsey made the following statement in closing argument:

> Another thing that you saw, this man right there, Kenneth Ramsey, when it came time to put up or shut up he got up there and he testified to you. He told you, looked you in the eye and said I didn't do it, Perry Ashley has been out to get me for years, and looks like he's finally got me.

Evans objected to this comment following both Ramsey's closing argument and the State's rebuttal closing argument. The judge overruled Evans's motion for mistrial. Evans then requested the judge to provide the jury with an additional instruction informing them that his silence at trial was not to be considered as evidence against him, and that he had a constitutional right not to testify. The judge granted the request and instructed the jury. We believe that the trial judge properly exercised his discretion in denying the motion for mistrial *and* properly instructed the jury through the additional instruction. We believe that the judge cured any prejudice to Evans that may have resulted from

Ramsey's counsel's comment.

Finally, the court has consistently held that any comment by a *prosecutor* regarding a defendant's failure to testify is incurable, reversible error. *Livingston v. State*, 525 So. 2d 1300, 1308 (Miss. 1988) (citations omitted); *see also Bridgeforth v. State*, 498 So. 2d 796, 798 (Miss. 1986) (any comment by prosecutor on accused's failure to testify is reversible error). Here, Evans's co-defendant's counsel, not the State or trial judge, made the comment. Therefore, we find that Ramsey's counsel's comment did not impinge upon Evans's Fifth Amendment right to decline to testify in his own defense.

CONCLUSION

We find that the trial court did not err and therefore affirm the jury's verdict and the court's sentence.

THE JUDGMENT OF THE CIRCUIT COURT OF PIKE COUNTY OF CONVICTION OF LAMONT EVANS OF ARMED ROBBERY AND SENTENCE OF TWENTY (20) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, AND TO PAY RESTITUTION TO THE VICTIM AND CRADDOCK OIL COMPANY IS AFFIRMED.

THE JUDGMENT OF THE CIRCUIT COURT OF PIKE COUNTY OF CONVICTION OF KENNETH A. RAMSEY OF ARMED ROBBERY AND SENTENCE OF TWENTY-FIVE (25) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, AND TO PAY RESTITUTION TO THE VICTIM AND CRADDOCK OIL COMPANY IS AFFIRMED.

ALL COSTS OF THIS APPEAL ARE TAXED TO PIKE COUNTY.

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