IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-KA-00069 COA

KENNETH WARREN VANCE **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

DATE OF JUDGMENT:	12/11/95
TRIAL JUDGE:	HON. ANDREW CLEVELAND BAKER
COURT FROM WHICH APPEALED:	TALLAHATCHIE COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	WILLIAM R. SANDERS JR.
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL
DISTRICT ATTORNEY:	ROBERT L. WILLIAMS
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	SHOOTING INTO AN OCCUPIED DWELLING: SENTENCED TO SERVE 10 YRS IN THE MDOC; DEFENDANT SHALL PAY ALL COSTS OF COURT
DISPOSITION:	AFFIRMED - 12/16/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	2/4/98

BEFORE THOMAS, P.J., HERRING, AND HINKEBEIN, JJ.

THOMAS, P.J., FOR THE COURT:

Kenneth Warren Vance appeals his conviction of shooting into an occupied dwelling raising the following issues as error:

I. THE COURT ERRED IN OVERRULING THE DEFENDANT'S MOTION FOR A DIRECTED VERDICT OF ACQUITTAL AT THE CLOSE OF THE STATE'S CASE IN CHIEF AND IN DENYING DEFENDANT'S POST-TRIAL MOTIONS.

II. THE COURT ERRED IN DENYING JURY INSTRUCTION C-10, AND IN GIVING C-9 SINCE THEY DID NOT FOLLOW THE ALLEGATIONS CONTAINED IN THE INDICTMENT.

III. THE COURT ERRED IN NOT GRANTING A MISTRIAL WHEN ONE OF THE ALLEGED VICTIMS, AFTER TESTIFYING, LEFT THE WITNESS CHAIR, WALKED OVER TO THE DEFENDANT, AND, IN A LOUD VOICE AND IN FRONT OF THE JURY, STATED "YOU'RE GUILTY AND YOU KNOW YOU'RE GUILTY. IF YOU GET OUT OF THIS, I WILL GET YOU."

Finding no error, we affirm.

FACTS

In the late evening hours of August 1 and early morning hours of August 2, 1995, a house owned by Effie Berry and occupied by Effie and her two daughters, Sandy Kay Berry and Mildred Berry, and Effie's five grandchildren, was riddled by gunfire. All the occupants were there that evening, including a boyfriend of one of Sandy's daughters, Sandy's nephew, and this nephew's girlfriend.

Kenneth Warren Vance was the ex-boyfriend of Sandy Kay Berry. On the evening of August 1, 1995, Kenneth and Sandy had a conversation on the yard. Kenneth also had some words with Effie. These conversations took place around 11:00 p.m. After Kenneth left, shots were fired into the house. No one saw who fired the shots, but three persons that were in the house testified that they heard Kenneth yelling. Sandy testified that she heard Kenneth shouting, "If I can't get you bitch, I'll get your daughter." Sandy stated that she had no doubt that it was Kenneth making these threats while he was firing the gun. Effie testified that she heard Kenneth shouting, "Come on out of there. I bet you if I set that goddamn house afire, you'll come out." Effie stated that it was Kenneth's voice that she heard that evening. Mildred testified that she was familiar with Kenneth's voice and it was the same voice that she heard that night. The house had been shot in a front bedroom window and bullet holes were in the wall of this bedroom.

Kenneth Vance did not testify in his defense. Following deliberation, the jury returned a verdict of guilty.

ANALYSIS

I.

THE COURT ERRED IN OVERRULING THE DEFENDANT'S MOTION FOR A DIRECTED VERDICT OF ACQUITTAL AT THE CLOSE OF THE STATE'S CASE IN CHIEF AND IN DENYING DEFENDANT'S POST-TRIAL MOTIONS.

Kenneth contends that when this case is viewed in the light most consistent with the verdict, the evidence here does not support the jury's verdict. He opines that the circumstantial evidence only of the actual commission of the shooting and his identity means that the State could not meet their burden of proof beyond a reasonable doubt. Kenneth argues that the court erred in denying his motion for a directed verdict at the end of the State's case and his post-trial motions, motions for a judgment notwithstanding the verdict and a new trial motion.

A motion for judgment notwithstanding the verdict tests the sufficiency of the evidence supporting a guilty verdict. ***Butler v. State*, 544 So. 2d 816, 818 (Miss. 1989)**. To test the sufficiency of the evidence of a crime:

> [W]e must, with respect to each element of the offense, consider all of the evidence - not just the evidence which supports the case for the prosecution - in the light most favorable to the verdict. The credible evidence which is consistent with guilt must be accepted as true. The prosecution must be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. Matters regarding the weight and credibility to be accorded the evidence are to be resolved by the jury. We may reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair minded jurors could only find the accused not guilty.

***Wetz v. State*, 503 So. 2d 803, 808 (Miss. 1987)** (citations omitted).

The trial court also denied Kenneth's motion for a new trial which he brought with his motion for judgment of acquittal notwithstanding the verdict. A motion for new trial tests the weight of the evidence rather than its sufficiency. ***Butler*, 544 So. 2d at 819**. The Mississippi Supreme Court has stated:

> As to a motion for a new trial, the trial judge should set aside the jury's verdict only when, in the exercise of his sound discretion, he is convinced that the verdict is contrary to the substantial weight of the evidence; this Court will not reverse unless convinced the verdict is against the substantial weight of the evidence.

Id. (quoting *Russell v. State*, 506 So. 2d 974, 977 (Miss. 1987)).

Testimony of a person having heard a voice is competent and legitimate evidence to establish identity in both civil and criminal cases. ***Gray v. State*, 549 So. 2d 1316, 1319 (Miss. 1989); *Hurst v. State*, 240 So. 2d 273, 276 (Miss. 1970)).** "Circumstantial evidence is entitled to the same weight and effect as direct evidence and this Court has upheld convictions based solely on circumstantial evidence." ***Sherrell v. State*, 622 So. 2d 1233, 1238 (Miss. 1993)** (citation omitted).

Based on the evidence within the record there is ample credible evidence supporting this conviction. Kenneth's first assignment of error is without merit.

II.

THE COURT ERRED IN DENYING JURY INSTRUCTION C-10, AND IN GIVING C-9 SINCE THEY DID NOT FOLLOW THE ALLEGATIONS CONTAINED IN THE INDICTMENT.

In Kenneth's second assignment of error he alleges two things: first, that it was error to deny his peremptory instruction and second, that the instruction giving the elements of the crime, instruction C-9, was defective.

First, we must note that Kenneth fails to cite any authority in support of his argument. Consequently,

this Court is under no obligation to consider the assigned error. ***McClain v. State*,625 So. 2d 774, 781 (Miss. 1993).** Even if Kenneth was not procedurally barred from asserting this issue, the denial of the peremptory instruction and the granting of instruction C-9 did not harm his case, considering that the trial court adequately instructed the jury as to the law.

In passing upon a motion for directed verdict or peremptory instruction, courts must assume that all evidence for the State is true and that all reasonable inferences that may be drawn from the evidence are true and, if from all the testimony there is enough in the record to support a verdict, the motion should be overruled.

***Barker v. State*, 463 So. 2d 1080, 1082 (Miss. 1985)** (citing *Warn v. State*, 349 So. 2d 1055 (Miss. 1977); ***Rich v. State*, 322 So. 2d 468 (Miss. 1975); *Roberson v. State*, 257 So. 2d 505 (Miss. 1972)).**

This argument is the same as the above issue. There was ample legally sufficient testimony of all the elements of the crime to support the conviction. There was no error in the denial of Kenneth's peremptory instruction.

Kenneth argues that is was error to allow jury instruction C-9 because the instruction as written did comply with the proof presented in the trial as well as the indictment and even when read in conjunction with all the other instructions. Instruction C-9 reads as follows:

> Kenneth Vance is charged with the crime of shooting or discharging a firearm into a dwelling house usually occupied by Effie Berry, or other persons.
>
> If the Jury finds from the evidence in this case beyond a reasonable doubt that:
>
> 1.) On or about August 2, 1995, Effie Berry was in her home; and
>
> 2.) That said home was usually occupied by Effie Berry or other persons; and
>
> 3.) KENNETH VANCE wilfully and unlawfully shot or discharged a firearm into that home, then the Jury shall find KENNETH VANCE guilty as charged.
>
> If the State has failed to prove any one or more of these elements beyond a reasonable doubt, then you shall find the Defendant not guilty.
>
> For the purpose of the Jury to determine guilt or innocent, it does not matter that no one was physically injured by the shot(s).

At trial defense counsel argued that because the indictment and the instruction specifically named some of the individuals that were in the house the instruction did not conform to the indictment. The State argues that since naming any of the people who were in the house was not necessary and the house could have been empty at the time Kenneth shot he could still be convicted, any such inclusion in the indictment or jury instruction was surplusage and harmless beyond all measure. We agree that the inclusion of all the individuals that were there that evening would have been merely surplusage. Therefore, there is no error here.

III.

THE COURT ERRED IN NOT GRANTING A MISTRIAL WHEN ONE OF THE ALLEGED VICTIMS, AFTER TESTIFYING, LEFT THE WITNESS CHAIR, WALKED OVER TO THE DEFENDANT, AND, IN A LOUD VOICE AND IN FRONT OF THE JURY, STATED "YOU'RE GUILTY AND YOU KNOW YOU'RE GUILTY. IF YOU GET OUT OF THIS, I WILL GET YOU."

Kenneth maintains that it was error for the trial court to deny a mistrial alleging that comments made by a witness after leaving the stand inflamed the jury. Defense counsel approached the bench after the testimony of witness Effie Berry and said, "Your Honor, if the prosecution can't control his witness, we're going to have to ask for a mistrial. That was done deliberately in front of the jury." The trial judge responded that he had not heard because the prosecution had approached the bench to discuss the possibility of a recess. After telling the judge what Effie said, "you're lying, you did this, I'm going to get you," the judge responded that he did not " think this witness said or has done anything . . . that could have been any more adamant [then] she was on the witness stand, and that was all before the jury. . . ."

"Whether to declare a mistrial is committed to the sound discretion of the trial court." ***Johnson v. State*, 666 So. 2d 784, 794 (Miss. 1995)** (citing *Brent v. State*, 632 So. 2d 936, 941 (Miss. 1994)). "The failure of the court to grant a motion for mistrial will not be overturned on appeal unless the trial court abused its discretion." ***Johnson*, 666 So. 2d at 794** (citing *Bass v. State*, 597 So. 2d 182, 191 (Miss. 1992)). "The general rule is that it is the duty of the trial court to maintain order in the courtroom and to take appropriate action when disturbances occur." ***Bass*, 597 So. 2d at 191.** "[T] rial judges are peculiarly situated so as to decide (better and more logically than anyone else) when a trial should be discontinued." ***Id.*** (citations omitted).

The trial judge noted that the witness' comment was essentially the same as her testimony on the stand. The trial judge was in the best position to determine if any prejudice resulted. We cannot say that any abuse of discretion occurred here. Accordingly, Kenneth's last assignment of error is without merit.

THE JUDGMENT OF THE TALLAHATCHIE COUNTY CIRCUIT COURT OF CONVICTION OF SHOOTING INTO AN OCCUPIED DWELLING AND SENTENCE OF TEN YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO TALLAHATCHIE COUNTY.

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