IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-KA-00165 COA

ROBERT EARL PAM **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:	01/08/96
TRIAL JUDGE:	HON. BETTY W. SANDERS
COURT FROM WHICH APPEALED:	WASHINGTON COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	GEORGE T. KELLY
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: BILLY L. GORE
DISTRICT ATTORNEY:	FRANK CARLTON
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	MANSLAUGHTER: SENTENCED TO LIFE IMPRISONMENT WITHOUT PAROLE, AS HABITUAL
DISPOSITION:	AFFIRMED - 12/16/97
MOTION FOR REHEARING FILED:	2/23/98
CERTIORARI FILED:	
MANDATE ISSUED:	5/12/98

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

THOMAS, P.J., FOR THE COURT:

Robert Earl Pam appeals his conviction of manslaughter, raising the following issues as error:

I. THERE WAS NO EVIDENCE TO SUPPORT THE MANSLAUGHTER INSTRUCTION WHICH WAS GIVEN OVER THE OBJECTION OF PAM.

II. IN HIS CLOSING ARGUMENT, THE PROSECUTOR MADE REFERENCE TO THE

FACT THAT PAM DID NOT TESTIFY.

III. PAM WAS UNREASONABLY RESTRICTED BY THE TRIAL JUDGE IN WHAT COULD BE SAID BY HIM TO THE JURY IN CLOSING ARGUMENTS.

IV. PAM SHOULD NOT HAVE BEEN SENTENCED AS AN HABITUAL CRIMINAL SINCE ONE OF THE PREVIOUS CONVICTIONS WAS BASED UPON A DEFECTIVE INDICTMENT.

Finding no error, we affirm.

FACTS

Robert Earl Pam shot Jim Jones in the top of his head with a .22 rifle. Jones died as a result of the gunshot. Pam, Jones, and others had been involved in an altercation earlier in the evening. The evidence presented was that Pam said he would get a gun in retaliation for the altercation. Pam left the scene of the altercation, retrieved the .22 rifle, and returned about 45 minutes to one hour later. Jones was seated in the driver's side of a car. Pam ran up to the car with the gun in hand and shot about five times, hitting Jones in the top of the head with one of the bullets. Pam's cousin, Charles Pam, testified that he saw Robert Pam shoot Jones with the gun.

Pam did not testify on his own behalf. He put on defense witnesses to argue his defense of alibi. Pam also put on the testimony from James Winters. Winters is a twice convicted felon serving time in prison. Winters testified that he, not Pam, shot and killed Jones. The jury returned a verdict of guilty of manslaughter.

ANALYSIS

I.

THERE WAS NO EVIDENCE TO SUPPORT THE MANSLAUGHTER INSTRUCTION WHICH WAS GIVEN OVER THE OBJECTION OF PAM.

Pam argues that the trial court erred by granting an instruction on manslaughter. Pam contends that the evidence presented at trial could only support a verdict of murder or one of not guilty. Pam asserts that there was no evidence to prove a killing done in the heat of passion. The State argues that the granting of the manslaughter instruction was not error. The State contends that the evidence was sufficient to support a verdict of murder, and therefore, the granting of the instruction was in accordance with proper case law.

In cases where the defendant was tried for murder but convicted under a manslaughter instruction, our supreme court has repeatedly held that "where there is in the record evidence legally sufficient to support a finding of guilty of murder, had the jury so found, the defendant will not be heard to complain that a manslaughter instruction was given." ***Fowler v. State,*** **566 So. 2d 1194, 1201 (Miss. 1990).** ***See also Jackson v. State,*** **551 So. 2d 132, 146 (Miss. 1989);** ***Crawford v. State,*** **515 So. 2d 936, 938 (Miss. 1987);** ***Cook v. State,*** **467 So. 2d 203, 209 (Miss. 1985).** "This is so even though

the manslaughter instruction was not warranted under the evidence." ***Cook*, 467 So. 2d at 209.** Pam concedes in his brief that the evidence presented during the trial either supported a verdict of murder or one of not guilty. Therefore, Pam's first assignment of error is denied.

II.

IN HIS CLOSING ARGUMENT, THE PROSECUTOR MADE REFERENCE TO THE FACT THAT PAM DID NOT TESTIFY.

Pam asked for and received permission to personally address the jury in closing arguments. At the close of the prosecutor's initial closing argument, the prosecutor, while commenting on the expected remarks that Pam was about to personally make to the jury, stated the following:

> One thing I need to make you aware of. The defendant in this case has the right to give part of his closing argument. He can do that. It's not testimony. Don't consider it as such. There's a jury instruction that says from the Court that anything we say here is not evidence. Well, that applies to Robert Earl Pam as well. When he comes up here and he gives part of the closing argument, that is not testimony, and you should not consider it as testimony. It is merely argument, and that is what you consider it as. No more than what one of the lawyers or myself says. It's just to help you make your decision based on the evidence you heard from this chair. Until he sits in that chair, it's not evidence.

Counsel for Pam immediately objected and moved for a mistrial. The trial court found that the statement did not reach the level of a comment on Pam's failure to testify.

The United States Constitution and the Mississippi Constitution provide that no person may be compelled to take the witness stand against himself. ***See* U.S. Const. amend. V; Miss. Const. art. 3, § 26.** "'Balanced against this [constitutional] interest, however, is the rule that attorneys are given wide latitude in making their closing arguments. Thus, although 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.'" ***Jones v. State*, 669 So. 2d 1383, 1390 (Miss. 1995)** (quoting *Jimpson v. State*, 532 So. 2d 985, 991 (Miss. 1988)).

"In order to protect this right, prosecutors are prohibited from making direct comments on the defendant's failure to testify; they are also precluded from referring to the defendant's failure to testify 'by innuendo and insinuation.'" ***Jones*, 669 So. 2d at 1390** (quoting *Wilson v. State*, 433 So. 2d 1142, 1146 (Miss. 1983)). The question is whether the comment of the prosecutor can reasonably be construed as a comment on the defendant's failure to take the stand. ***Ladner v. State*, 584 So. 2d 743, 754 (Miss. 1991).**

The comment made by the prosecutor was not a statement on Pam's failure to take the stand and testify in his own behalf. The prosecutor was telling the jury that when Pam, himself, made his statements to the jury during closing argument, what he was going to say could not be interpreted as testimony. Pam's remarks could only be understood as argument. We do not come to the conclusion that the prosecutor's anticipatory remarks about Pam's closing argument amounted to error.

Furthermore, in the Mississippi Supreme Court case of ***Blue v. State*, 674 So. 2d 1184, 1215 (Miss. 1996),** the court concluded that "even if the prosecutor's comment highlighted Blue's failure to testify, the jury instructions, when considered as a whole, directed the jury to ignore the fact that Blue did not testify." In the case at bar, the following jury instructions were given:

> Instruction D-3
>
> The Court instructs the jury that the fact that the defendant did not take the witness stand cannot be considered by you for any purpose, and no inference whatsoever can be drawn against the defendant by reason of his decision not to take the stand. The law gives every person charged with a crime the absolute and unqualified privilege of not testifying, and the law further requires that no inference adverse to the defendant can be drawn by you, the jury, because he chose not to testify.
>
> Instruction C-CR 1a
>
> Arguments, statements and remarks of counsel are intended to help you understand the evidence and apply the law, but are not evidence. If any argument, statement or remark has no basis in the evidence, then you should disregard the argument, statement or remark.

We therefore conclude that the prosecutor's comment was not a statement as to Pam's failure to testify, and even if so, we would find that the jury instructions taken as a whole cured any defect. This assignment of error has no merit.

III.

PAM WAS UNREASONABLY RESTRICTED BY THE TRIAL JUDGE IN WHAT COULD BE SAID BY HIM TO THE JURY IN CLOSING ARGUMENTS.

As stated previously, Pam chose not to testify at trial, but he asked for and received permission to personally address the jury during closing arguments. Pam then proceeded in his argument in this manner:

> Well, my name is Robert Earl Pam. That night -- that boy's brother know I did not kill his brother. Cause he knew for himself that they beat me up so bad how can I kill somebody? I hadn't never took a life.

The State immediately objected. The parties retired to chambers where the trial judge reminded Pam that he could not make any reference to facts not in evidence. The trial court also told Pam that he could summarize each witnesses' testimony.

Article 3, Section 26 of the Mississippi Constitution of 1890 guarantees the accused the right to argue his case to the jury. As stated previously, the accused also has the right not to testify. These two rights come into conflict when the accused wishes to argue his case to the jury and at the same time invoke his right not to testify. ***Jones v. State*, 381 So. 2d 983, 993 (Miss. 1980)**. When this occurs, the defendant "must confine his remarks to the evidence in the record." ***Id.*** "A criminal defendant who takes advantage of his right to argue his case to the jury must not be permitted to say

all the things he might have testified to had he chosen to call himself as a witness." ***Id***. "'An accused who does not intend to testify himself under oath cannot be permitted, any more than any other litigant, to have the jury consider as evidence any statements of fact not subject to rigorous cross-examination of the witness under oath.'" ***Duplantis v. State,* 644 So. 2d 1235, 1251 (Miss. 1994)** (quoting *Bevill v. State*, 556 So. 2d 699, 710-11 (Miss. 1990)).

A defendant who argues *pro se* is not exempt from following the rules of court procedure. ***Jones,* 381 So. 2d at 993**. The court should, however, grant to the defendant some leeway in arguing his case, each case necessarily resting on its own facts and circumstances. ***Id.* at 993-94.**

Pam argues that he was within his boundary because his statement that he "never took a life" was backed up by his alibi defense and the testimony of James Winters. Winters testified that he, and not Pam, killed Jones. However, we are unable to agree with Pam and conclude that the argument by Pam was improper. Pam was testifying to the jury without having to face the harshness of cross-examination. Pam had an opportunity to testify in his own behalf at trial. He rightfully refused to do so. He cannot take advantage of his personal right not to testify, and then tell the jury that he "never took a life."

Also, the trial court never ruled on the State's objection concerning Pam's remarks. The jury was never told to disregard the statement. Therefore, Pam's statement was still present before the jury throughout closing and deliberations. The jury had the opportunity to believe Pam and his statement of innocence, and as far as we can determine, the jury did not believe Pam. This assignment of error lacks merit.

IV.

PAM SHOULD NOT HAVE BEEN SENTENCED AS AN HABITUAL CRIMINAL SINCE ONE OF THE PREVIOUS CONVICTIONS WAS BASED UPON A DEFECTIVE INDICTMENT.

Pam was indicted for the charge of murder, but he was convicted of manslaughter. Pam was also indicted as an habitual offender under **Miss. Code Ann. § 99-19-83 (Rev. 1994)** based upon a bill of information which charged him with armed robbery, and a plea of guilty on an indictment for aggravated assault. Pam was sentenced as a habitual offender and received a sentence of life imprisonment without the possibility of parole. During the sentencing phase, the State introduced into evidence what is commonly known as a "pen pac." The pen pac is an official record of the Department of Corrections and is a copy of the documents that are in the record. Pam's pen pac contained pictures and fingerprints of Pam, the bill of information charging Pam with armed robbery, a document signed and sworn to by Pam waiving formal indictment and requesting that the trial court allow him to proceed on a bill of information, the order convicting and sentencing Pam for armed robbery, and the certified records showing that Pam served more than one year of his sentence.

Pam, who was duly represented by counsel, pled guilty to the armed robbery on September 27, 1991. Pam complains that his prior conviction of armed robbery should be declared a nullity because the bill of information has no day in the date, is not signed by the same assistant district attorney who is twice mentioned in the body, does not cite the charging statute, and does not cite the elements of the

crime charged. Pam raised the issue of the defective bill of information during the sentencing hearing. Pam did not contest the aggravated assault conviction.

The State argues that Pam has waived his right to appeal the previous sentence because he pled guilty to that crime. The State relies on ***Brooks v. State,* 573 So. 2d 1350 (Miss. 1990)** to argue its point. In *Brooks*, the supreme court stated "[a] valid guilty plea . . . admits all elements of a formal criminal charge and operates as a waiver of all non-jurisdictional defects contained in an indictment [or information] against a defendant." ***Id.* at 1352. *See also Drennan v. State,* 695 So. 2d 581, 584 (Miss. 1997).** "Put another way, all non-jurisdictional objections to the indictment are waived (forfeited, if you please) when an accused enters a voluntary plea of guilty." ***Brooks,* 573 So. 2d at 1353.** Pam entered a guilty plea to the bill of information, and therefore he has waived his right to argue this assignment on appeal.

Further, the State argues that Pam's status and sentence as a habitual offender was proper based on ***Phillips v. State,* 421 So. 2d 476 (Miss. 1982).** The following language is found in *Phillips*:

> At a hearing conducted by a trial court pursuant to Mississippi Uniform Criminal Rules of Circuit Court 6.04 (currently Rule 11.03 of the Uniform Circuit and County Court Practice), for determining the defendant's status as an habitual offender, the prosecution must show and the trial court must determine that the records of the prior convictions are accurate, that they fulfill the requirements of §99-19-81, . . . and that the defendant sought to be so sentenced is indeed the person who was previously convicted. . . .
>
> Once the above mentioned factors have been ascertained, the trial court is not required to go beyond the face of the prior convictions sought to be used in establishing the defendant's status as an habitual offender. If, on its face, the conviction makes a proper showing that the defendant's prior plea of guilty was both knowing and voluntary, that conviction may be used for the enhancement of the defendant's punishment under the Mississippi habitual offender act. . . .
>
> In fulfilling its mission to determine whether a prior conviction is constitutionally valid for the purpose of enhancing a defendant's sentence, the trial court must not be placed in position of "retrying" the prior case. Certainly any such frontal assault upon the constitutionality of a prior conviction should be conducted in the form of an entirely separate procedure solely concerned with attacking that conviction. This role is neither the function nor the duty of the trial judge in a hearing to determine habitual offender status.

***Id.* at 481-82.**

For Pam to be successful in invalidating his armed robbery conviction, he may attack the same by post-conviction proceedings. We hold that Pam's status as a habitual offender was properly shown by the State.

THE JUDGMENT OF THE CIRCUIT COURT OF WASHINGTON COUNTY OF CONVICTION OF MANSLAUGHTER AND SENTENCE OF LIFE IMPRISONMENT WITHOUT PAROLE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF

CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO WASHINGTON COUNTY.

BRIDGES, C.J., McMILLIN, P.J., COLEMAN, DIAZ, HERRING, HINKEBEIN, PAYNE, AND SOUTHWICK, JJ., CONCUR. KING, J., NOT PARTICIPATING.