

**IN THE COURT OF APPEALS 03/12/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 94-KA-00823 COA**

**PERRY WAYNE VANN**

**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

TRIAL JUDGE: HON. LEE J. HOWARD

COURT FROM WHICH APPEALED: CIRCUIT COURT OF LOWNDES COUNTY

ATTORNEY FOR APPELLANT:

THOMAS L. KESLER

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: PAT FLYNN

DISTRICT ATTORNEY: FOREST ALLGOOD

NATURE OF THE CASE: CRIMINAL-DRIVE BY SHOOTING

TRIAL COURT DISPOSITION: SENTENCED TO A TERM OF EIGHTEEN (18) YEARS IN  
THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS

BEFORE FRAISER, C.J., BARBER, AND DIAZ, JJ.

FRAISER, C.J., FOR THE COURT:

Vann was convicted in the Lowndes County Circuit Court of the crime of drive-by shooting. On appeal, Vann raises two issues. He contends that the trial court erred in admitting testimony about his post-arrest silence. Additionally, Vann challenges the trial court's denial of Defense Instruction D-5 which he claims was a statement of his defense theory. Finding these issues to be wholly without merit, we affirm.

## FACTS

The night of January 7, 1994, Vann and a friend got into a fight with some others outside "Big C's" nightclub. Vann and his friend flirted with other gentlemen's girlfriends and a scuffle ensued. During all of this, James Guyton, Cynthia Trimble, and Lorenzo Dukes were outside "Big C's" loading Guyton's disc jockey tapes into his car. Guyton had just finished a show at the club. They witnessed the fight, and when it was over, saw Vann and his friend leave in a white Ford Mustang. Guyton testified that the tag on the car read "Perry V." Fifteen minutes later, Guyton and his companions were still outside the club when the white Ford Mustang returned. The Mustang drove up to the mailbox outside the Trimbles' trailer residence, located next to the club, and a shot was fired from the car. Guyton testified that the driver of the Mustang was Vann. After two shots were fired into the trailer, Guyton and his companions saw the white Mustang drive away. Guyton again saw the tag on the car reading "Perry V." Cynthia Trimble recognized the car as Vann's. Clarence Trimble exited the club where he had been during the shooting in time to read the vanity plate. He called the police.

Five bullets went into the wall of Clarence Trimble's trailer. Two of the bullets pierced the trailer and lodged in the wall on the opposite side. The bullets passed a foot and a half over Trimble's sleeping wife. Vann was subsequently arrested. At trial, he exercised his right not to testify and presented no witnesses on his behalf.

### I. WHETHER THE TRIAL COURT ERRED IN ALLOWING TESTIMONY ABOUT VANN'S POST-ARREST SILENCE.

At trial, the prosecutor questioned the arresting officer about the events leading up to Vann's apprehension. The following testimony was elicited:

Q. And after Greg Wright arrived, did you and Greg Wright have the occasion to look through the glass into the vehicle of Perry Vann, that vehicle which has the personalized license plate?

A. Yes, sir. When Detective Wright first got there, uh, myself and Mr. Carl Fox told him how we came about speaking with Mr. Vann, and, uh, Greg went and spoke to Mr. Vann in the patrol car. He read him his rights and then he asked him did he have anything he wanted to say. Mr. Vann said, "No." He asked Mr. Vann did he have any objection to us

looking through his Mustang? Mr. Vann said, "No." Myself and Greg walked up to the Mustang; I was on - -

BY MR. KESLER: Your Honor, we object. Approach the bench.

BY THE COURT: You may.

BY MR. KESLER: There's no foundation of a intelligent, knowing, voluntary waiver and a giving of consent.

BY MR. ALLGOOD: If your Honor please, in any event, the State's proceeding under plain view, in any event, and I think if I'm allowed to continue the testimony that'll be the proof of that.

....

BY MR. KESLER: But it appears from the testimony that, uh- -that from the witness testimony that this is a consent to search issue, and there's no warning of the right to refuse the consent to search.

BY THE COURT: He's testifying to all that was done out of a precaution. It may not be that that's the road the district attorney is travelling, even though he's testifying to everything that they did. I'm going to over- -the objection is overruled at this time. You may proceed.

Vann raises the objection to the detective's comment on his post-arrest silence for the very first time on appeal. While Vann asserts in his brief that he objected to the comment at trial, it is clear from the record that he was only objecting to the testimony about the search of the Mustang. The law is clear that in order to preserve an error for appellate review, an objection must be made on the record at the trial court. "We have repeatedly held that a contemporaneous objection is necessary to preserve the right to raise an error on appeal. Where no objection is made, the error is deemed waived. This rule places a burden on counsel to be prepared for trial and attentive to what occurs at trial." *Roberson v. State*, 595 So. 2d 1310, 1315 (Miss. 1992) (citations omitted); *see also Williams v. State*, 512 So. 2d 666, 672 (Miss. 1987) ("The failure of an objection is fatal.") Vann argues that even without an

objection, this Court should find the trial court in error because of the egregiousness of the comment on his post-arrest silence. Vann is correct in asserting that it is error for the prosecuting attorney to comment on post-arrest silence because it is violative of the accused's right against self-incrimination. *Austin v. State*, 384 So. 2d 600, 601 (Miss. 1980) (citations omitted). However, error is determined on a case by case basis. *Ladner v. State*, 584 So. 2d 743, 753 (Miss. 1991), *cert. denied*, 502 U.S. 1015 (1991). The question to be answered is whether the prosecutor's comment can reasonably be construed as a comment on the accused's silence. *Id.*; *see also United States v. Dula*, 989 F.2d 772, 776 (5th Cir. 1993) (court must determine intent of prosecutor in making comment), *cert. denied*, 114 S. Ct. 172 (1993). In the case *sub judice*, the prosecutor himself made no comment at all on Vann's post-arrest silence. The prosecutor was simply asking the detective about the contents of Vann's car when the witness gave a non-responsive answer about reading Vann his rights. The prosecutor did not have any intention of commenting on Vann's silence nor did he attempt to point out to the jury the fact that Vann did not speak to the detectives after being read his rights. Neither the prosecutor's question nor the witnesses' answer can be construed as a comment on Vann's silence.

Additionally, in light of the overwhelming evidence of Vann's guilt, if any error had existed, it would have been harmless. *Austin*, 384 So. 2d at 601 (citing *Chapman v. California*, 386 U. S. 18, 23-24 (1967)). This issue has no merit because Vann failed to object at trial, the prosecutor was not commenting on Vann's silence, and the evidence of Vann's guilt is so overwhelming that any error would be harmless.

## II. WHETHER THE COURT ERRED IN DENYING DEFENSE INSTRUCTION

### D-5, VANN'S THEORY OF DEFENSE INSTRUCTION.

The following instruction, D-5, was offered by Vann as his theory of defense. It read as follows:

The Court instructs the jury that if you find from the evidence in this case that a person in a white vehicle fired shots from a .20 gauge shotgun; and that there are numerous white motor vehicles and .20 gauge shotguns in Lowndes County, Mississippi; but that there is no credible testimony from any witness to show that the white vehicle and shotgun were those owned by Perry Wayne Vann; and that there is no credible evidence that Perry Wayne Vann fired the shots in question; then your sworn duty is to find the Defendant not guilty.

The trial court refused the instruction on the basis that it was argumentative and repetitious. Vann claims on appeal that the trial court was required to allow him an instruction on his theory of defense. "A defendant is entitled to have an instruction on his theory of the case. There is a limitation, however, because a trial judge may refuse an instruction which incorrectly states the law, is without foundation in the evidence, or is stated elsewhere in the instructions." *Murphy v. State*, 566 So. 2d

1201, 1206 (Miss. 1990) (citations omitted). Jury instructions are not creatures of individuality. They are looked at as a whole. *Wilson v. State*, 592 So. 2d 993, 997 (Miss. 1991). Vann's instruction is to say the least, confusing. Additionally, it added nothing to the jury's knowledge. The elements of the crime and the burden of proof were contained in other instructions. For example, Instruction S-2 apprised the jury with the elements of the crime of drive-by shooting:

The Court instructs the Jury that if you find from the evidence in this case beyond a reasonable doubt that the defendant, PERRY WAYNE VANN, did on or about January 7, 1994, unlawfully, wilfully, and feloniously attempt to cause serious bodily injury to Cynthia Trimble, by shooting a firearm while in a vehicle, then you shall find the defendant guilty as charged.

Instruction D-2 disclosed the importance of reasonable doubt:

The [sic] instructs the jury that you are bound to give the Defendant the benefit of any reasonable doubt of guilt that arises either from the evidence or the lack of evidence in this case.

Mere probability of guilt will not sustain a guilty verdict. It is only when the jury is able to say on your oaths that the Defendant is guilty beyond a reasonable doubt that the law will allow you to return a verdict of guilty. You might believe that it is probable that the Defendant is guilty, but unable to say beyond a reasonable doubt that the Defendant is guilty; and in such event, your sworn duty is to return a verdict of not guilty.

Instruction D-3 disclosed the State's burden of proof:

The elements of the crime charged in this case are set out in a separate instruction. The State of Mississippi must prove each element of the criminal charge beyond a reasonable doubt. Therefore, if any single element of the crime charged has not been proved beyond a reasonable doubt, then your verdict must be "not guilty," even though the Jury may find other elements proven beyond a reasonable doubt.

Moreover, Vann's instruction was not grounded in the evidence. There were four eyewitnesses who identified Vann as the driver of the car or viewed the "Perry V" license plate on the car as it drove away. Because it was cumulative, misleading, and without foundation in the evidence, the trial court was correct in refusing instruction D-5. We affirm.

**THE JUDGMENT OF THE LOWNDES COUNTY CIRCUIT COURT OF CONVICTION OF THE CRIME OF DRIVE-BY SHOOTING AND SENTENCE OF EIGHTEEN (18) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS ARE TAXED TO LOWNDES COUNTY.**

**BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN,  
PAYNE, AND SOUTHWICK, JJ., CONCUR.**