IN THE COURT OF APPEALS 3/26/96

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00164 COA

FREDRICK GAMMAGE, A/K/A FRED GAMMAGE, A/K/A "TANK"

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. BILLY JOE LANDRUM

COURT FROM WHICH APPEALED: CIRCUIT COURT OF JONES COUNTY

ATTORNEY FOR APPELLANT:

THOMAS EUGENE CLARK

ATTORNEY FOR APPELLEES:

OFFICE OF THE ATTORNEY GENERAL BY: DEIRDRE MCCRORY

DISTRICT ATTORNEY: JEANNENE T. PACIFIC

NATURE OF THE CASE: ARMED ROBBERY

TRIAL COURT DISPOSITION: CONVICTED ON FOUR COUNTS OF ARMED ROBBERY AND SENTENCED TO FOUR CONCURRENT THIRTY (30) YEAR TERMS IN THE CUSTODY OF THE MDOC

BEFORE THOMAS, P.J., DIAZ, AND KING, JJ.

THOMAS, P.J., FOR THE COURT:

Fredrick Gammage was convicted on four counts of armed robbery. Feeling aggrieved, Gammage appeals assigning three issues as error. Finding all three without merit, this Court affirms.

FACTS

On the night of June 27, 1994, Albert Pruitt, Shelia Pruitt, Ricky Cole, Tomeka Mason, Robert Hatten and Tiffany King were playing cards at the home of Eric King in Laurel. A person identifying himself as "James" knocked on the door. As Cole attempted to answer the door, it was kicked in. Six armed men wearing bandanas over their faces burst into the room, ordered the occupants to get down on the floor, and tied them up. The victims were robbed, and the women were raped.

At trial in November 1994, three of the victims positively identified Gammage as one of the perpetrators. Another victim identified Gammage as one of the perpetrators by his voice.

ANALYSIS

I. DID THE TRIAL COURT ERR IN LIMITING THE PARTIES TO SIX PEREMPTORY CHALLENGES ?

Gammage contends that, although he failed to object at trial, he was denied a fair trial by the trial court's limiting of the parties to six peremptory challenges rather than twelve.

Uniform Criminal Rule of Circuit Court Practice 5.06, which was in effect at the time of trial, provides that "[i]n capital cases wherein the punishment may be death or life imprisonment the defendant and the state shall have twelve peremptory challenges. In cases not capital, the defendant and the state shall have six peremptory challenges." This Court notes that the current version of Rule 5.06 is contained at Rule 10.01 of the Uniform Rules of Circuit and County Court Practice, however the current version of the rule is inapplicable to the instant case.

Section 1-3-4 of the Mississippi Code provides that "[t]he terms 'capital case,' . . . 'capital offense' . . . and 'capital crime' when used in any statute shall denote criminal cases, offenses and crimes punishable by death or imprisonment for life in the state penitentiary." Miss. Code Ann. § 1-3-4 (Supp. 1995). Armed robbery is a capital offense in this state. Miss. Code Ann. § 97-3-79 (1972); *see also Williams v. State*, 590 So. 2d 1374, 1377-78 (Miss. 1991)*; Wilburn v. State*, 356 So. 2d 1173, 1176 (Miss. 1978). The defendant was entitled to twelve peremptory challenges. The trial court erred in failing to allow twelve challenges.

However, Gammage has waived this argument and is procedurally barred from asserting it. Failure to object to the jury before it is empaneled waives any right to complain of its composition. *Davis v. State*, 512 So. 2d 1291, 1292 (Miss. 1987); *Pickett v. State*, 443 So. 2d 796, 799 (Miss. 1983); *Watkins v. State*, 262 So. 2d 422, 423 (Miss. 1972); *Holloway v. State*, 242 So. 2d 454, 455-56 (Miss. 1970). This rule has also been held applicable to capital cases. *Thibodeaux v. State*, 652 So. 2d 153, 172 (Miss. 1995) (citations omitted).

Even if Gammage were not procedurally barred from asserting this issue, his claim is without merit. The mere fact that Gammage used all of his peremptory challenges does not constitute a violation of the right to an impartial jury. As long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean that the defendant was denied his constitutional rights. *Mettetal v. State*, 615 So. 2d 600, 603 (Miss. 1993) (citations omitted). Since Gammage has shown no prejudice and does not even argue that an incompetent juror was forced to sit on the jury, this assignment of error must fail for this reason as well.

Gammage's failure to object either verbally or in writing to being limited to six peremptory challenges at any time prior to trial, during voir dire, or even during the trial itself bars him from relief on this point. Although the trial court erred in limiting the parties to six peremptory challenges, the error was waived by the failure to object. Further, since the defendant can show no prejudice resulting from the error, the error is harmless.

II. DID THE PROSECUTOR IMPROPERLY USE A "GOLDEN RULE" ARGUMENT ?

Gammage contends that the trial court erred in allowing the prosecutor to make a "golden rule" argument during closing argument. During closing argument, the prosecutor stated: "[The victims] weren't drunk. They weren't using dope. They were doing their own thing there, legally, and this kind of intrusion happens. They are raped, their house is totally pillaged and they are put in fear for their life. That's an indictment against you and me because we live here and we are citizens here. That's an indictment against all of us." The defendant objected at this point "to the State's argument about it being an indictment against you and me and the citizens of the County." The court overruled the objection, and the prosecutor continued her closing argument.

Although he did not object at trial, Gammage contends that a second portion of the prosecutor's closing argument also violated the "golden rule" prohibition. The prosecutor concluded her argument by stating: "[t]here is nothing funny here. What is really pathetic is that we have to be trying such a case as this. And this has to have happened in your home and mine because it could have been any home, and I want you to remember that."

"Golden rule" arguments, which ask jurors to put themselves in the place of one of the parties, are not permitted in criminal cases. *Chisolm v. State*, 529 So. 2d 635, 639-40 (Miss. 1988). Attorneys are prohibited from telling a jury that the law allows the jury to depart from neutrality and make a decision based on bias or personal interest. *Id.* at 640 (quoting *Danner v. Mid-State Paving Co.*, 252 Miss. 776, 786, 173 So. 2d 608 (1965)). However, a party is given great latitude in closing argument. *Dunaway v. State*, 551 So. 2d 162, 163 (Miss. 1989); *Monk v. State*, 532 So. 2d 592, 601 (Miss. 1988).

The test for determining whether an improper argument by a prosecutor requires reversal is whether the "natural and probable effect of the prosecuting attorney's improper argument created unjust prejudice against the accused resulting in a decision influenced by prejudice." *Dunaway*, 551 So. 2d at 163 (quoting *Craft v. State*, 226 Miss. 426, 84 So. 2d 531, 535 (1956)). The Mississippi Supreme Court has upheld closing arguments that were similar to the language used in the instant case. *See Carleton v. State*, 425 So. 2d 1036, 1039 (Miss. 1983) (prosecutor's closing argument in a murder trial asking the jury to convict in order to "let people know what the people of Harrison County stand for"); *Wilson v. State*, 344 So. 2d 739, 741 (Miss. 1977) (prosecutor's closing argument that "[t]his

is your community. You live in it. You set the standards. And today you can set a standard that you can live by.").

Regarding the second statement by the prosecutor to which the defendant failed to object, Gammage is procedurally barred from raising this issue. Contemporaneous objections must be made to allegedly prejudicial comments during closing argument or the point is waived. *Davis v. State*, 660 So. 2d 1228, 1248 (Miss. 1995); *Dunaway*, 551 So. 2d at 164; *Monk*, 532 So. 2d at 600.

We find nothing improper about the above statements. The trial court properly overruled the defendant's objection to the first statement, and any claim of error as to the second statement is barred from consideration on this appeal for failure to object.

III. IS THE DEFENDANT ENTITLED TO REVERSAL BECAUSE OF AN INCONSISTENT VERDICT?

Gammage asserts that he is entitled to a new trial since the jury did not find him guilty on all counts. Gammage was found guilty on the four counts of armed robbery of the four victims who were able to identify him at trial. The jury was unable to reach a verdict on the two counts of armed robbery for which Gammage was not positively identified at trial. Gammage was found not guilty on counts of aggravated assault and grand larceny.

Gammage cites no legal authority in support of this claim and, as a result, has waived this issue. *Holloman v. State*, 656 So. 2d 1134, 1141 (Miss. 1995). Even if this issue were not waived, the defendant cannot prevail. Jury verdicts will not be overturned merely because seemingly inconsistent verdicts cannot be rationalized. *See id.* (conviction on one count of DUI maiming and one count of DUI manslaughter upheld even though defendant was acquitted on a second count of DUI maiming arising from the same accident.) The *Holloman* court addressed this point by stating as follows:

Inconsistent verdicts therefore present a situation where 'error,' in the sense that the jury has not followed the court's instructions, most certainly has occurred, but it is unclear whose ox has been gored. Given this uncertainty, it is hardly satisfactory to allow the defendant to receive a new trial on the conviction as a matter of course. . . . [T]here is no reason to vacate the respondent's conviction merely because the verdicts cannot be reconciled. Respondent is given the benefit of her acquittal on the counts on which she was acquitted, and it is neither irrational nor illogical to require her to accept the burden of her conviction on the counts on which the jury convicted.

Id. (quoting *United States v. Powell*, 469 U.S. 57, 65, 69 (1984) (citations omitted)).

This issue, even if it were not procedurally barred, is without merit. There was sufficient evidence to convict Gammage on the four counts of armed robbery. Gammage's armed robbery conviction will not be reversed simply because the jury acquitted him of aggravated assault and grand larcency.

THE JUDGMENT OF THE JONES COUNTY CIRCUIT COURT OF CONVICTION ON FOUR COUNTS OF ARMED ROBBERY AND SENTENCE OF FOUR CONCURRENT THIRTY (30) YEAR TERMS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS ASSESSED TO JONES COUNTY.

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