

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-01256 COA**

DERRICK VINCENT

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:	10/13/95
TRIAL JUDGE:	HON. WILLIAM F. COLEMAN
COURT FROM WHICH APPEALED:	HINDS COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	THOMAS M. FORTNER ROBERT M. RYAN VICKI LACHNEY GILLIAM
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: DEIRDRE MCCRORY
DISTRICT ATTORNEY:	EDWARD J. PETERS
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	MURDER HABITUAL OFFENDER: SENTENCED TO SERVE A TERM OF LIFE IN THE CUSTODY OF THE MDOC; THIS CAUSE TO RUN CONSECUTIVELY TO F- 118 & D-469
DISPOSITION:	AFFIRMED - 1/27/98
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	2/27/98

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

HERRING, J., FOR THE COURT:

Derrick Vincent was convicted of murder pursuant to Mississippi Code Annotated § 97-3-19(1) (Rev. 1994), and sentenced as a habitual offender to life imprisonment, the sentence to run

consecutively with sentences imposed upon Vincent in two previous armed robbery convictions. The Appellant contends that the trial court erred in (1) allowing the jury to hear evidence of actions of misconduct by Vincent other than the misconduct described in the indictment, and (2) in failing to grant a mistrial after improper remarks by the prosecutor during final argument. After a review of the evidence and argument of counsel, we find no reversible error and affirm.

A. THE FACTS

On September 13, 1994, Donald Wash and his wife, Sharon Wash, were sitting on the patio of their home in Jackson, Mississippi, with a friend and co-worker, Clyde Adams. Mr. and Mrs. Wash, as well as Mr. Adams, had been engaged in yard work on that day and had temporarily stopped to drink glasses of tea. At approximately 6:30 P.M. on that evening, while they were sitting on the patio, an automobile stopped abruptly on the street in front of the Wash home. A loud noise was heard when the vehicle came to a halt, which apparently occurred when the driver slammed on the brakes of the vehicle. This loud noise also attracted the attention of a next-door neighbor, Sidney Stevenson, who came outside of his house to see what had happened.

The evidence established that two men were observed inside the vehicle after it came to a halt: Derry Lewis, the driver, and Derrick Vincent, the passenger. These two men, both of whom were unknown to the witnesses, were engaged in an argument and a struggle which later proved to be fatal to Lewis. Donald and Sharon Wash testified that Lewis appeared to be unarmed but that Derrick Vincent had a knife in his hand and stabbed Lewis in the neck. Lewis then rolled out of the vehicle and called for help, but Vincent followed and repeatedly stabbed Lewis while he was helpless on the ground. Donald Wash went inside his home, located his handgun and attempted to stop Vincent's assault on Lewis by firing two or three shots in the air. This effort failed. Vincent then charged at Donald Wash with his knife, at which time Wash shot Vincent in his leg. Vincent then began crawling back to the motor vehicle which had remained in gear, rolled down the street, and collided with a nearby telephone pole after Vincent and Lewis rolled out of the vehicle onto the ground.

After Wash shot Vincent in his leg, Vincent asked Wash to let him go and not to call the police. Instead, Donald Wash took the keys out of the ignition of the wrecked vehicle and held Vincent until law enforcement officers arrived on the scene. All eyewitnesses testified that Lewis was unarmed and begged Vincent for his life. Notwithstanding these pleas for mercy, Vincent continued to stab Lewis. According to Sidney Stevenson, the two men appeared to be arguing over money.

Lewis died of massive bleeding, and an autopsy revealed that he had twenty-four stab wounds, three of which could have been independently fatal. The victim was six feet tall and weighed 310 pounds. He tested positive for cocaine use. According to police officers, no drugs, weapons, or cash were found during the search of the vehicle driven by Derry Lewis. However, Vincent's knife was retrieved by the officers. According to Wash, Vincent attempted to hide the knife before the police arrived.

Vincent testified in his own defense. In his testimony, he denied attempting to attack Donald Wash with a knife and denied requesting Wash to let him go without calling the police. However, he admitted that he stabbed Lewis numerous times, which resulted in Lewis's death. Vincent contends that he did so in necessary self-defense. According to Vincent, Lewis was a drug dealer who supplied Vincent with crack cocaine. On the day in question, he owed Lewis the sum of \$100 for a previous supply of crack, and Lewis contacted Vincent on that day for payment. Vincent entered Lewis's

vehicle, and the two men drove off together. After Vincent told Lewis that he did not have any money for payment, Lewis pulled out a large knife from under the driver's seat, and according to Vincent, attacked him with it. Vincent testified that he blocked Lewis's attempts to stab him, although he sustained cuts on his hands which required stitches. At this point, he was able to take the knife from Lewis, and Lewis abruptly stopped the vehicle in front of the home of Mr. and Mrs. Wash.

As stated, Vincent admitted that he stabbed Lewis many times and intended to kill Lewis because he was certain that Lewis would eventually kill him if he did not kill Lewis first. The jury was fully instructed on the law of self-defense, and Vincent does not contend that the jury was inadequately instructed in this regard. Nonetheless, the jury convicted Vincent of murder as charged in his indictment, thereby rejecting Vincent's claim that his actions against Lewis were taken only in necessary self-defense.

B. THE ISSUES

The following issues, taken verbatim from the Appellant's brief, are presented to the court by Vincent:

I. THE TRIAL COURT COMMITTED PLAIN ERROR BY ALLOWING THE INTRODUCTION OF EVIDENCE OF OTHER CRIMES OF VINCENT IN VIOLATION OF RULES 403 AND 404, M.R.E. WITHOUT FIRST CONDUCTING AN ON THE RECORD PROBATIVE VALUE VERSUS PREJUDICIAL EFFECT ANALYSIS AND WITHOUT ANY LIMITING/CAUTIONARY INSTRUCTION.

II. THE PROSECUTOR COMMITTED PLAIN REVERSIBLE ERROR DURING CLOSING ARGUMENT BY IMPROPERLY AND UNFAIRLY PREJUDICIAL COMMENTS AND AS A RESULT, VINCENT WAS DENIED A FUNDAMENTALLY FAIR TRIAL.

C. ANALYSIS

I. DID THE TRIAL COURT ERR IN ADMITTING EVIDENCE THAT VINCENT MAY HAVE COMMITTED OTHER CRIMES DURING HIS STRUGGLE WITH LEWIS?

During the course of the trial, Mr. and Mrs. Wash indicated that Vincent not only stabbed Lewis several times but also attempted to rob him. For example, in response to questions by the prosecutor, Donald Wash gave the following testimony:

Q. After you shot the defendant in the leg, what happened then, Mr. Wash?

A. Well, he still motioned toward me a little bit, and then his leg fell out from under him, and he fell on the ground. And he went back to the - - Mr. Lewis, and I don't know what he was doing with him at that time, but it looked like he was trying to get something out of his pocket.

Q. Was Mr. Lewis laying on the ground?

A. Yes. He was laying on the driveway.

Q. You said it looked like he was trying to get something out of his pocket?

A. Right.

On re-direct examination, Wash stated as follows:

Q. What did you hear Derry Lewis say to the defendant in this particular case while they were in the car?

A. "You don't have to do this."

Q. All right. And after you saw the defendant stabbing Derry Lewis, you had indicated on direct that you saw him go through his pocket; is that right?

A. Yes.

Q. You saw the defendant going through the victim's pocket?

A. That is the way it appeared to me. Yes.

Mrs. Sharon Wash also testified for the State and on re-direct examination, testified as follows:

Q. How many times do you remember him stabbing him?

A. I know it was over at least ten times.

Q. And at one point in time you left and ran into the house; is that right?

A. Yes, I did.

Q. For that brief period you didn't see what was going on; did you?

A. At that time I was on the phone with the police.

Q. But there was a time when you left; is that correct.

A. Yes.

Q. And went to use the phone?

A. Went to use the phone.

Q. All right. You indicated when Mr. Fortner was asking you questions that Mr. Vincent came up to the body of Derry Lewis and tried to do what to him?

A. He was trying to rob him.

Q. Specifically, did you see him do anything? Moving him, trying to roll him over, anything along those lines?

A. He was constantly stabbing him. He was moving him, rolling him over.

Q. Trying to roll him over?

A. Yes.

Q. Did you see Derrick Vincent trying to go through the pockets of Derry Lewis?

A. He went into his pocket. Yes.

Vincent made no objection to any of this testimony, nor did he assign the admissibility of this testimony as error in his motion following the jury verdict for a judgment notwithstanding the verdict or, in the alternative, for a new trial. Under such circumstances, we will not entertain this issue for the first time on appeal. *See Foster v. State*, 639 So. 2d 1263, 1289 (Miss. 1994) (stating that error not raised at trial or in post trial motions will not be reviewed for the first time on appeal). *See also Duplantis v. State*, 644 So. 2d 1235, 1247 (Miss. 1994) (finding that failure to object at trial to admission of certain other crimes evidence precludes an appellate court from reviewing those instances on appeal); *Chase v. State*, 645 So. 2d 829, 850 (Miss. 1994) (finding that failure to raise objection to evidence of other crimes at trial procedurally bars claim of error on appeal).

On this issue, Vincent claims that the trial court made no effort to perform the required analysis pursuant to Mississippi Rules of Evidence 403 and 404 and that the failure to do so constituted plain error. We disagree. Rule 404(b) essentially states that evidence of other crimes or bad acts is not admissible to prove the character of a person or that he acted in the present case in conformity with his previous actions. However, other wrongs or bad acts may be admissible for other purposes "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Rule 404(b) Nevertheless, even when evidence of other wrongs or crimes is considered to be admissible under Rule 404, *upon objection to such testimony or evidence*, it must still pass through the "ultimate filter" of Rule 403, which excludes otherwise admissible evidence where its probative value is substantially outweighed by the danger of, *inter alia*, unfair prejudice or confusion of issues. In this regard, and upon a timely objection, our supreme court has ruled that a trial court must consider several factors, commonly referred to as the "*Peterson* factors," to test the admissibility of evidence pursuant to Rule 403. *See Smith v. State*, 656 So. 2d 95, 99-100 (Miss. 1995); *Peterson v. State*, 518 So. 2d 632, 636-37 (Miss. 1987). In addition, once again assuming that a contemporaneous objection has been made, after conducting such a balancing analysis under Rule 403, the trial court must *sua sponte* give an instruction to the jury which limits the purposes for which evidence of other crimes can be considered. *Smith*, 656 So. 2d at 99-100. In the case *sub judice*, no such limiting instruction was given and none was requested. Nevertheless, as clearly stated in *Smith*, the right to a Rule 403 balancing analysis and a limiting instruction is only invoked upon a timely objection which is overruled by the trial court. *Id.* at 100. *See also Mississippi Rule of Evidence 103(a)*.

Although not required to do so since no objection to the testimony was raised, we specifically find that the testimony of Mr. and Mrs. Wash was otherwise admissible pursuant to Rule 404, even if an objection had been made to its admission. Moreover, the evidence of Vincent's guilt was overwhelming, particularly since he admitted to stabbing and intending to kill Lewis on the theory that Lewis might later harm him in some way if allowed to live to do so. For all of the reasons stated

above, we rule that this issue has no merit.

II. WAS VINCENT DENIED A FUNDAMENTALLY FAIR TRIAL BECAUSE OF THE CLOSING ARGUMENT OF THE PROSECUTOR?

On this issue, Vincent contends that he was denied a fundamentally fair trial as a result of prejudicial statements made by the prosecutor during closing argument as follows:

BY THE STATE: But what's Mr. Wash's reward for trying to help save Derry Lewis' life? His reward is that he gets to come here and take the stand and get browbeaten by the defense lawyer- -

BY MR. FORTNER: Objection your Honor. That's improper argument.

BY THE COURT: Sustained. Sustained, Mr. Davidson.

BY THE STATE: Mr. Wash told you nothing but the truth. What does it matter whether or not this defendant took a step towards Mr. Wash when he shot him or not? That's called a red herring. That's something that's thrown out there to direct your attention away from the actual facts of the case, that this defendant was straddling Derry Lewis, stabbing him multiple times.

T. at 239.

Look at the trail of blood that's right beside the money. That's the defendant's blood coming up from his gunshot wound to the leg. This is the money that the defendant dropped on the way to the vehicle. If he didn't have any money by his own admission, where in heck did it come from and how did it fall out on the ground?

It fell out onto the ground because it came from Derry Lewis's pocket when this defendant rummaged through them before making his way down the road. And that's how you know his story is bogus. So you go back there and decide who the victim of the case is.

T. at 241.

So, if you're going to believe all of that that you were just told- - that's not even a straight face defense. I don't even see how somebody can tell you that with a straight face.

BY MR. FORTNER: Judge, we're going to object. That's improper.

BY THE COURT: Sustained.

T. at 249.

Generally, attorneys on both sides in a criminal case are given wide latitude during closing argument. *Ahmad v. State*, 603 So. 2d 843, 846 (Miss. 1992). Some of the statements complained of in the case *sub judice* were objected to by Vincent at trial and some were not. As to those statements which were not contemporaneously objected to at trial, the defendant must rely on plain error to raise the issue on appeal. *Foster v. State*, 639 So. 2d 1263, 1289 (Miss. 1994). Moreover, Vincent did not

specifically claim that these closing remarks required reversal in his post trial motion for a judgment notwithstanding the verdict other than to say that "the prosecutor engaged in prosecutorial misconduct during closing argument of such an egregious nature as to deny the defendant a fair trial." Thus, appeal on these issues is procedurally barred. *Foster*, 639 So. 2d at 1289. Nevertheless, under the circumstances of this case, we will review the closing statements which were not objected to in order to determine if, standing alone, these statements essentially denied Vincent a fair trial. **See Mississippi Rule of Evidence 103(a).**

As shown by the transcript of the closing argument cited above, the prosecutor contended that the two dollar bills found by police officers near the victim's body were taken from the victim's pocket by Vincent, who testified that he had no money to pay his \$100 debt to Lewis at the time of the struggle. As stated, Vincent made no objection to these comments at trial. Thus, review on appeal is waived unless plain error has occurred and the remarks were so "inflammatory" that "the trial judge should have objected on his own motion . . ." *Gray v. State*, 487 So. 2d 1304, 1312 (Miss. 1986). We conclude that the prosecutor's statements regarding the two dollar bills found near the victim's body were not so inflammatory that the trial court should have suppressed the statements *sua sponte*. Thus, no plain error occurred. These statements by the prosecutor did not refer to evidence outside the record made at trial, but merely referred to Vincent's attempt to go through Lewis's pockets, a fact which was testified to by Mr. and Mrs. Wash early in the trial, without objection. Thus, we rule that Vincent's appeal in regard to the closing statements made by the prosecutor without objection is procedurally barred and otherwise without merit. *Foster*, 639 So. 2d at 1289.

Vincent did object to two other statements made by the prosecutor during closing argument: (1) a statement which criticized the tactics of defense counsel during cross-examination of Mr. Wash and (2) a statement which questioned the integrity of defense counsel by saying "I don't see how somebody can tell you that with a straight face." Objections to both statements were sustained, although no mistrial was requested on either occasion. Thus, we must presume that the jury disregarded the prosecutor's remarks in summation which were objected to by Vincent. *Lanier v. State*, 533 So. 2d 473, 482 (Miss. 1988). Moreover, since Vincent did not request a mistrial as a result of these statements, any claim by him that he was denied a substantial right by the statements is waived. *Saucier v. State*, 328 So. 2d 355, 358 (Miss. 1976).

When we consider the substantial evidence of Vincent's guilt which was presented in the case *sub judice*, and after reviewing the closing arguments by both counsel in their entirety, we cannot say that Vincent was denied a fundamentally fair trial as a result of the closing statements of the prosecutor. Vincent admitted that he stabbed Lewis several times while Lewis was defenseless and that he meant to kill him. As stated, Vincent's only defense, in fact, was no defense at all- that he acted in self-defense because he knew that Lewis would try to kill him sooner or later if Vincent did not kill him first. Thus, the evidence against Vincent was overwhelming, and the improper statements by the prosecutor in closing argument were either essentially harmless or were waived for lack of contemporaneous objection.

THE JUDGMENT OF THE CIRCUIT COURT OF HINDS COUNTY OF CONVICTION OF MURDER AS A HABITUAL OFFENDER AND SENTENCE OF LIFE IMPRISONMENT IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, IS AFFIRMED. THIS SENTENCE SHALL RUN CONSECUTIVELY TO SENTENCES

PREVIOUSLY IMPOSED IN F-118 AND D-469. ALL COSTS OF THIS APPEAL ARE TO BE TAXED TO HINDS COUNTY.

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