

IN THE COURT OF APPEALS 4/8/97

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00975 COA

RICHARD MARLYN GAVILLO, II

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. KOSTA N. VLAHOS

COURT FROM WHICH APPEALED: CIRCUIT COURT OF HANCOCK COUNTY

ATTORNEY FOR APPELLANT:

JAMES G. TUCKER, III

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: DEIDRE MCCRORY

DISTRICT ATTORNEY: CONO CARANNA

NATURE OF THE CASE: CRIMINAL - BURGLARY

TRIAL COURT DISPOSITION: CONVICTION AND SENTENCE TO TEN (10) YEARS

BEFORE BRIDGES, C.J., BARBER, AND PAYNE, JJ.

BRIDGES, C.J., FOR THE COURT:

Richard Gavillo was convicted of burglary in the Circuit Court of Hancock County and sentenced to a term of ten (10) years. Gavillo appeals to this Court arguing that his confession was not voluntarily given and that a comment made by the trial judge was reversible error. We disagree. FACTS

On June 20, 1993, Detective Tom Burleson of the Bay St. Louis Police Department was sent to the scene of a burglary in progress. When he arrived, one of the suspects was already in custody, and he was informed that the other suspect had fled out of a back window and into the woods. The officers on the scene had seen the fleeing suspect and were able to pick him out of a photographic lineup. Having identified Gavillo as the fleeing suspect, Burleson and other officers went to his last known location to arrest him. When the officers arrived at the location where they thought Gavillo would be, Burleson spotted him. When the officers approached Gavillo, he fled and jumped into a canal behind the residence where he had been staying. He was captured shortly thereafter.

While in custody, Gavillo was advised of his *Miranda* rights but refused to sign a waiver of his rights. After noticing that he was cold and wet, the officers got Gavillo some clothes, coffee and a hamburger. Gavillo was then advised of the items that had been found during the search of his residence. It was at this point that Gavillo agreed to give a statement. Gavillo never requested the presence of an attorney. At trial, Burleson testified unequivocally that Gavillo's statement was freely given and that no threats were used. Furthermore, Burleson testified that nothing was promised to Gavillo in return for his statement.

ARGUMENT AND DISCUSSION OF THE LAW

I. WHETHER THE TRIAL COURT ERRED IN OVERRULING THE DEFENDANT'S MOTION TO SUPPRESS HIS CONFESSION.

Gavillo argues on appeal that the trial court erred in overruling his Motion to Suppress his confession. Specifically, he argues that the State failed to put forth a prima facie case of voluntariness. Generally, for a confession to be admissible, it must have been given voluntarily and not as a result of promises, threats or inducements. *Morgan v. State*, 681 So. 2d 82, 86 (Miss. 1996). Furthermore, the prosecution bears the burden of proving beyond a reasonable doubt the voluntariness of the confession. *Morgan*, 681 So. 2d at 86. The court in *Morgan* went on to say that:

The burden is met and a prima facie case made out by testimony of an officer, or other persons having knowledge of the facts, that the confession was voluntarily made without threats, coercion, or offer of reward.

Id. at 87. Our standard of review is as follows:

This is essentially a fact-finding function. So long as the court applies the correct legal standards, 'we will not overturn a finding of fact made by a trial judge unless it be clearly erroneous.' Where, on conflicting evidence, the court makes such findings this Court must

generally affirm.

Id.

Burleson testified that Gavillo's statements were freely and voluntarily given, and that Gavillo was not threatened in any way. Gavillo contends that because Burleson did not testify that Gavillo was not coerced into giving his statement, the State did not make out a prima facie case of voluntariness. Gavillo directs this Court to the case of *Agee v. State*, 185 So. 2d 672 (Miss. 1966). In that case, the same definition of voluntariness was given as was later given in *Morgan. Agee v. State*, 185 So. 2d at 673. The court in *Agee* went on to say that general testimony of officers as to the voluntariness of the statement was sufficient to make out a prima facie case. *Id.* We find that Burleson's testimony about the voluntariness of Gavillo's statement was sufficient to make out a prima facie case of voluntariness. Accordingly, we find no merit in Gavillo's first issue.

II. WHETHER THE TRIAL COURT ERRED IN ITS VOIR DIRE OF THE JURY.

The trial judge said the following to the jury during voir dire:

I don't know if Mr. Gavillo is going to testify, but under the law if an accused does not testify in a criminal case the fact that he doesn't testify or she doesn't testify cannot be considered against them, and no inference of guilt can be inferred therefrom; does everybody understand that? *Now that's pretty hard to do, folks.* Those of us who have had mothers or fathers who've said where there's smoke there's fire, right. How many of y'all have heard that, where there's smoke there's fire? When you use that rule you hadn't taken an oath that you would follow the law, okay. And I'm telling you what the law is and you've got to kick that out of your mind totally. That doesn't apply in the courtroom. (italics added)

Gavillo now argues for the first time on appeal that the statement, "[n]ow that's pretty hard to do, folks," is improper and that we should reverse the conviction because the jury heard it. "The rule is well established that [sic] contemporaneous objection is necessary to preserve the right to raise an error on appeal." *Mack v. State*, 650 So. 2d 1289, 1301 (Miss. 1994). Accordingly, this issue is procedurally barred, and this Court will forgo any discussion of its merits.

THE JUDGMENT OF THE HANCOCK COUNTY CIRCUIT COURT OF CONVICTION OF BURGLARY OF A DWELLING AND SENTENCE TO TEN (10) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS HEREBY AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO HANCOCK COUNTY.

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

