

2/21/01

SUPREME COURT OF LOUISIANA

No. 00-KK-1399

STATE OF LOUISIANA

Versus

GERMAIN MITCHELL

Knoll, Justice, Concurring

Defendant filed a motion for a new trial under article 851(4) of the Louisiana Code of Criminal Procedure which provides that a court shall grant a new trial if “the defendant has discovered, *since* the verdict or judgment of guilt, a prejudicial error or defect in the proceedings that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before the verdict or judgement. LA. CODE CRIM. PROC. ANN. art 851(4). I agree with the majority’s holding that the prosecutor’s statement was not a prejudicial error infringing on defendant’s right against self-incrimination. Indeed, I find the complained of statement a weak argument. I write separately because the majority pretermitted a discussion on the contemporaneous objection issue which, in my view, is the more serious error committed by the trial court and defendant.

Article 851(4) not only mandates that an error raised in a motion for new trial be prejudicial, but also mandates that the error not be discovered *before* the verdict or judgment. See LA. CODE CRIM. PROC. ANN. art 851(4). If the error was discovered or should have been discovered through reasonable diligence *before* the verdict or judgment, defendant *cannot raise the issue post-verdict* in a motion for new trial under article 851(4). This accords with the contemporaneous objection rule found in article 841(A) that provides an “irregularity or error cannot be availed of *after verdict* unless

it was objected to at the time of occurrence.” LA. CODE CRIM. PROC. ANN. art. 841(A) (emphasis added). Article 851(4) contemplates an error to which defendant could not object because defendant did not know or could not know through reasonable diligence of its existence. Article 851(4) does not contemplate a new trial based on an error to which defendant could have objected before the judgment or verdict was returned.

The contemporaneous objection rule prevents “a defendant from gambling for a favorable verdict and then, upon conviction, resorting to appeal on errors which either could have been avoided or corrected at the time or should have put an immediate halt to the proceedings.” State v. Taylor, 93-2201 p.7 (La. 2/28/96), 669 So. 2d 364, 368-69 (citing State v. Arvie, 505 So. 2d 44, 47 (La. 1987); State v. Mart, 419 So. 2d 1216, 1218 (La. 1982); State v. Smith, 339 So. 2d 829, 834 (La. 1976), cert denied, 430 U.S. 986, 97 S. Ct. 1685, 52 L.Ed. 2d 381 (1977)). The purpose of the contemporaneous objection rule applies not only in appeals, but also in motions for a new trial. Defense counsel cannot refrain from objecting to potential prejudicial errors and then raise the error in a motion for a new trial under article 851(4) as Mitchell’s counsel did in the present case.

Mitchell’s counsel discovered the prosecutor’s statement while the jury was deliberating. Counsel did not object. Had counsel objected when he discovered the statement two things could have happened. First, the judge could have repaired the error by calling the jury into the court room and issuing proper instructions that the jury disregard the statement. Or second, the judge could have declared a mistrial. By waiting until *after* the verdict to object, defense counsel was allowed to gamble with the jury verdict, *i.e.*, take the chance that the jury return a not guilty verdict or return a verdict of a lesser included offense. When the jury convicts on a lesser included offense, the State is barred from retrying defendant on the original charge; the State

may only retry defendant on the lesser included offense. See LA. CODE CRIM. PROC. ANN. art 598(A).

This sort of keen trial tactic is not sanctioned by articles 841(A) and 851(4). It denies the State the opportunity to repair the damage of an objectionable statement through jury instructions and further denies the State the ability to retry the defendant on the original charge. A defendant cannot take a second bite of the apple by lying in wait and objecting to problematic statements through a motion for a new trial when the statements are discovered or reasonably discoverable *before* the verdict is returned.