In closing argument, the district attorney commented upon the defendant's failure to retake the stand and deny the testimony of the state's rebuttal witnesses. The defendant objected to the district attorney's commenting upon the defendant's failure to testify. The trial court overruled the objection.

The self-incrimination clause of the Fifth Amendment forbids comment by the prosecution on the defendant's silence. Comment by the prosecutor "cuts down on the privilege [against self-incrimination] by making its assertion costly." *Griffin v. California,* 380 U.S. 609, 614, 85 S.Ct. 1229, 1233, 14 L.Ed.2d 106 (1964).

However, where the defendant testifies in his own behalf, *Griffin v. California* is inapplicable and there is no violation of the Fifth Amendment when the district attorney comments upon the defendant's failure, when he testified, to explain or deny the testimony of particular witnesses. See *Coleman v. State,* 15 Ga.App. 338(2), 83 S.E. 154 (1914); *Nolen v. State,* 124 Ga.App. 593, 597, 184 S.E.2d 674 (1971).

The statutory prohibitions upon comment on the defendant's failure to testify, Code Ann. §§ 27–405, 38–415, as amended, are applicable only where the defendant fails to testify. The defendant did not fail to testify in this case and the trial court did not err in overruling the defendant's objection.

Judgment affirmed.

All the Justices concur.

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Verna Lee DREW

v.

DeKALB COUNTY.

No. 32134.

Supreme Court of Georgia.

May 13, 1977.

Landowner brought action to enjoin condemnation of portion of adjacent right of way of railroad claimed by landowner. The Superior Court, DeKalb County, Clyde Henley, J., denied injunction, and landowner appealed. The Supreme Court, Jordan, J., held that where use of adjacent right-of-way of railroad by landowner originated by permission and landowner had given no actual notice to railroad, or its predecessors in title, of any adverse claim by her to portion used, such permissive possession alone could not afford basis for a prescription.

Judgment affirmed.

1. Action ⚷**6**

Condemnation judgment did not render landowner's injunction action moot, where landowner did not seek to enjoin condemnation of properties described in condemnation complaint and issue to be decided in injunction action pertained to portion of adjacent right-of-way of railroad claimed by landowner.

2. Eminent Domain ⚷**274(3)**

Where a condemning authority takes additional property belonging to a condemnee which is not included in property described in condemnation proceedings, the condemnee is entitled to enjoin such taking without condemnation, or sue for damages.

3. Adverse Possession ⚷**60(2)**

Where use of adjacent right-of-way of railroad by landowner originated by permission and landowner had given no actual notice to railroad, or its predecessors in title, of any adverse claim by her to portion used, such permissive possession alone could not afford basis for a prescription. Code, § 85–402.

James M. McDaniel, Steven J. Edwards, Decatur, James B. Drew, Jr., Atlanta, for appellant.

Harvey, Willard & Elliott, Wendell K. Willard, William S. Olsen, Decatur, Huie, Ware, Sterne, Brown & Ide, Charles N. Pursley, Jr., Atlanta, for appellee.

JORDAN, Justice.

This appeal is from the denial of injunctive relief.

DeKalb County, on behalf of Metropolitan Atlanta Rapid Transit Authority, brought a proceeding to condemn a permanent and temporary easement in property of the appellant. The appellant filed a petition seeking to temporarily restrain the appellee from proceeding with its action, alleging that an agent of MARTA had misled her as to where the easement would run. Temporary injunction was granted. The appellant filed an amendment to her petition for injunction alleging that she claims by adverse possession a portion of the property adjacent to hers, and that the appellee is attempting to condemn this adjacent property as the right of way of the Seaboard Railroad. Permanent injunction was prayed. After a hearing, the injunction was denied.

1. The appellee has filed a motion to dismiss the appeal, citing *Fountain v. DeKalb County*, 238 Ga. 14, 231 S.E.2d 49 (1976), on the ground that the only injunctive relief prayed was to enjoin the condemnation proceeding, and that the condemnation has been completed, the award filed, and the appellee vested with full title to the interests described in the condemnation complaint.

[1] This case is distinguishable from the *Fountain* case, *supra*. The amendment praying permanent injunction was not seeking to enjoin condemnation of the property described in the condemnation complaint. The issue decided by the trial judge in the injunction action pertained to the portion of the adjacent right of way of the Seaboard Coastline Railroad claimed by the appellant. Therefore the condemnation judgment did not render the injunction action moot.

2. The amended pleading in the injunction action was incomplete. A "permanent injunction" was prayed, but there was no specification of the action of the appellee which should be enjoined. No objection was made by the appellee as to the insufficiency of the pleadings, and the issue heard and decided by the trial judge was whether the appellant had obtained title by adverse possession to a portion of the right of way of the Seaboard Coastline Railroad.

[2] Where a condemning authority takes additional property belonging to a condemnee, which is not included in the property described in the condemnation proceedings, the condemnee is entitled to enjoin such taking without condemnation, or sue for damages. *Prescott v. Barton*, 220 Ga. 313, 138 S.E.2d 651 (1964); *Owens v. State Highway Dept.*, 113 Ga.App. 608, 612, 149 S.E.2d 406 (1966).

The evidence at the hearing was without dispute that the appellant had used a portion of the right of way as a part of the premises of her residence for 40 years as a lawn, a vegetable garden, and a rose garden. She had placed a tool shed on a part of it.

[3] The evidence authorized the finding made by the trial judge that the use by the appellant of the right of way originated by permission, and that she had given no actual notice to the railroad, or its predecessors in title, of any adverse claim by her to the portion used.

"Permissive possession cannot be the foundation of a prescription, until an adverse claim and actual notice to the other party." Code § 85–402. It was not error to deny injunctive relief. *Rucker v. Rucker*, 136 Ga. 830(2), 72 S.E. 241 (1911); *Kesler v. Verner*, 161 Ga. 118(2), 123, 129 S.E. 843 (1925); *Cowart v. Strickland*, 170 Ga. 530, 536(7), 153 S.E. 415 (1930).

Judgment affirmed.

All the Justices concur.