

OCT 30 2006

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL S. RICHIE
CLERK

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| KENDALL DEWAYNE CARR, |) | |
| |) | Not for Publication |
| Appellant, |) | |
| v. |) | Case No. F-2005-1150 |
| |) | |
| THE STATE OF OKLAHOMA, |) | |
| |) | |
| Appellee. |) | |

SUMMARY OPINION

CHAPEL, PRESIDING JUDGE:

Kendall Dewayne Carr was tried by jury and convicted of Count I: First Degree Robbery by Force and Fear, After Former Conviction of Two or More Felonies, in violation of 21 O.S.2001, § 797; and Count II: False Personation, After Former Conviction of Two or More Felonies, in violation of 21 O.S.2001, § 1531.4, in the District Court of Cleveland County, Case No. CF-04-499. In accordance with the jury's recommendation, the Honorable Lori M. Walkley sentenced Carr to imprisonment for twenty (20) years and a \$1000 fine (Count I) and imprisonment for four (4) years and a \$1000 fine (Count II), to run concurrently. Carr appeals from his conviction and sentence for First Degree Robbery.

Carr raises one proposition of error in support of his appeal:

- I. The trial court's use of an unsanctioned and overtly coercive "dynamite charge" deprived Mr. Carr of his constitutional rights to trial by jury and to a fundamentally fair trial.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and briefs, we find that reversal of Count I is required by the law and evidence.

We find that the trial court's *Allen*¹ charge was coercive because it failed to admonish jurors not to abandon their honestly held beliefs.² Because defense counsel did not object to the instruction given by the court, we review for and find plain error.³ The trial judge's instruction did not conform to the uniform jury instruction, OUJI-CR (2^d) 10-11.⁴ It failed to admonish the jury not to surrender their honest convictions and not to find a fact or concur in a verdict, which in good conscience any of them did not support. Well-settled law indicates that this exhortation is necessary whenever a deadlocked jury is returned to deliberations.⁵ This Court recently found a similar omission to be reversible error.⁶ This incorrect instruction substantially violated Carr's statutory right to have his jury instructed according to the law.⁷

¹ From *Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896), this instruction encourages deadlocked juries to continue deliberations and reach a verdict.

² *Allen* instructions have previously been upheld by this Court under circumstances of an apparent deadlocked jury. However, the trial court must carefully avoid any coercion. *Drew v. State*, 1989 OK CR 1, ¶ 19, 771 P.2d 224, 229.

³ *Kamees v. State*, 1991 OK CR 91, ¶ 9, 815 P.2d 1204, 1207.

⁴ The trial court shall use the applicable uniform instruction, unless the court determines that the instruction does not accurately state the law. *Flores v. State*, 1995 OK CR 9, 896 P.2d 558, 560. OUJI-CR (2^d) 10-11 is an accurate statement of the law.

⁵ *Hooks v. State*, 2001 OK CR 1, ¶ 26, 19 P.3d 294, 310; *Mooney v. State*, 1999 OK CR 34, ¶ 66, 990 P.2d 875; *Kamees v. State*, 1991 OK CR 91, ¶ 10, 815 P.2d 1204, 1207; *Drew v. State*, 1989 OK CR 1, ¶ 19, 771 P.2d 224, 229; *Thomas v. State*, 1987 OK CR 113, ¶ 21, 741 P.2d 482, 488; *Brogie v. State*, 1985 OK CR 2, ¶ 30, 695 P.2d 538, 545.

⁶ *Mooney*, 1999 OK CR 34, ¶ 67, 990 P.2d at 893 (where last *Allen* charge was two hours previous to instruction at issue, trial court erred in failing to admonish jury to hold to conscientiously held convictions).

⁷ 20 O.S.2001, § 3001.1; *Norton v. State*, 2002 OK CR 10, 43 P.3d 404, 409. Carr's jury could not agree whether he was guilty of robbery. The trial court ordered jurors to continue deliberating, encouraged jurors in the minority to consider the majority position, and

Decision

The Judgment and Sentence of the District Court on Count I is hereby **REVERSED** and **REMANDED** for a new trial. The Judgment and Sentence of the District Court on Count II is hereby **AFFIRMED** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2006), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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OPINION BY: CHAPEL, P. J.

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| LUMPKIN, V.P.J.: | DISSENT |
| C. JOHNSON, J.: | DISSENT |
| A. JOHNSON, J.: | CONCUR |
| LEWIS, J.: | CONCUR |

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emphasized the importance of a unanimous decision. This Court cannot speculate on what might have happened had jurors also been told not to surrender their honest convictions or return a verdict they felt in good conscience to be untrue.

LUMPKIN, VICE-PRESIDING JUDGE: DISSENTING

The failure to give the uniform jury instruction in this case is subject to harmless error analysis. See *Lott v. State*, 2004 OK CR 27, ¶ 56, 98 P.3d 318, 338; *Ellis v. Ward*, 2000 OK CR 18, ¶ 4, 13 P.3d 985, 986. This Court reviews the instructions to determine whether the instruction at issue fairly and accurately states the applicable law. *Lott*, 2004 OK CR 27, at ¶ 15, 98 P.3d at 338. “Even when error is committed, reversal is not required unless such error results in a miscarriage of justice or constitutes a substantial violation of a constitutional or statutory right, citing 20 O.S. 1991, § 3001.1.” *Id.*

The instruction given in the present case informed the jury in part that they could not be forced to agree upon a verdict, that each juror must decide the case for him or herself, and that “the verdict must be the verdict of each individual juror and not a mere acquiescence of a conclusion his fellows (sic)”. Reading this instruction in its entirety, it is not coercive. In fact, it tracks the language approved in *Allen v. United States*.

Further, it is well established that jury instructions are to be read as a whole and relief is not warranted upon misinstruction of the jury if the instructions, as a whole, fairly and accurately state the applicable law. See *Dill v. State*, 2005 OK CR 20, ¶ 11, 122 P.3d 866, 869; *Mollet v. State*, 1997 OK CR 28, ¶ 48, 939 P.2d 1, 13. See also, *Flores v. State*, 1995 OK CR 31, 895 P.2d 1162, 1170-71, (Lumpkin, J. dissenting). Other instructions adequately informed the jury their verdict must be based on the law and evidence as presented during

trial. Therefore, I find any error in the court's instructions were stylistic, not substantive, and did not result in a miscarriage of justice or constitute a substantial violation of a constitutional or statutory right.