

**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**

PEGGY L. CAVES,	)	
	)	Not For Publication
Appellant,	)	
v.	)	Case No. F-2006-301
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

**FILED**  
 IN COURT OF CRIMINAL APPEALS  
 STATE OF OKLAHOMA  
 MAY 10 2007  
 MICHAEL S. RICHIE  
 CLERK

**SUMMARY OPINION**

**CHAPEL, JUDGE:**

Peggy L. Caves was tried by jury and convicted of Neglect by Caretaker in violation of 21 O.S.Supp.2002, § 843.1, in the District Court of Choctaw County, Case No. CF-2004-76. In accordance with the jury’s recommendation, the Honorable Gary L. Brock, Special Judge, sentenced Caves to a \$10,000 fine. Caves appeals from this conviction and sentence.

Caves raises ten propositions of error in support of her appeal:

- I. There was insufficient evidence to convict Caves of neglect by caretaker as charged;
- II. There was a fatal variance between the facts alleged and proved, resulting in a denial of due process;
- III. Instructional error denied the jury proper guidance for the required elements and theory of defense;
- IV. Absolute exclusion of the defense expert witness was unwarranted and denied Caves a meaningful opportunity to present a complete defense;
- V. The province of the jury was invaded by improper testimony regarding the outcome of a related civil nursing negligence proceeding, which denied Caves a fair trial;
- VI. The trial court abused its discretion in refusing defense challenges for cause of a prospective juror, thereby denying Caves a fair trial;
- VII. Prejudicial evidence of uncharged purported violations of the Nursing Practice Act prior to delivery of any patient care contributed to Caves’s conviction and the excessive fine imposed;
- VIII. Trial error and the interest of justice require favorable modification of Caves’s \$10,000 fine;

- IX. Prosecutorial misconduct denied Caves a fair trial and resulted in an excessive sentence; and
- X. The cumulative effect of all the errors addressed above deprived Caves of a fair trial.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and briefs, we find that the law and evidence require modification of Cave's sentence. We find in Proposition I that any rational trier of fact could find beyond a reasonable doubt that Caves neglected an incapacitated adult who was entrusted to her care.<sup>1</sup> We find in Proposition II that no fatal variance existed between the crime charged in the Information and the evidence presented at trial.<sup>2</sup> We further find that the Information, evidence at preliminary hearing, and discovery clearly put Caves on notice that she was also being charged with

---

<sup>1</sup> *Dodd v. State*, 2004 OK CR 31, 100 P.3d 1017, 1041-42. Caves claims she decided he was already dead when she found him, so she had no obligation to perform CPR, as Hicks was dead when she found him, and (b) she was acting in accordance with Hicks's wishes not to be revived. Taken together, the evidence showed that until a physician determines death, a first responder must perform CPR on an unresponsive patient. Caves suggests that a portion of the Oklahoma Do-Not-Resuscitate (DNR) Act gave her the authority to decide Hicks was dead and CPR was not necessary. 63 O.S.2001, § 3131.4. We conclude that, under the narrow circumstances presented by these facts, the civil statutes concerning DNRs do not apply to this criminal prosecution. The lack of a DNR is not a factor in the State's case alleging criminal caretaker neglect. A defendant may, of course, assert that the lack of a DNR does not mean she neglected a patient by failing to perform CPR; however, no citation to the DNR statutes is necessary for that argument. A defendant may also assert the existence of a DNR as a defense to a charge of neglect for failure to perform CPR. Caves's claim that she was acting in accordance with Hicks's wishes is not supported by the evidence. There was no evidence at trial that Caves knew Hicks had signed any document expressing his desire not to be revived by CPR, and the evidence was uncontroverted that no DNR was in his nursing chart.

<sup>2</sup> *Patterson v. State*, 2002 OK CR 18, 45 P.3d 925, 931 (a "fatal variance" unless deprives a defendant of adequate notice of what she must defend against, or subjects her to double jeopardy). Caves failed to preserve this issue by objecting to the Information on these grounds before entering a plea and has waived all but plain error review. *Davis v. State*, 1990 Okl.Cr. 20, 792 P.2d 76, 80. Caves did reserve the right at preliminary hearing to file motions based on the preliminary hearing transcript. However, as the State notes, she never filed a motion attacking the sufficiency of the Information.

neglect for failing to suction Hick's trachea tube.<sup>3</sup> We find in Proposition III that the trial court did not abuse its discretion in failing to instruct on the laws regarding Do Not Resuscitate Orders, Advance Directives, and terminally ill patients, where no evidence supported such instruction.<sup>4</sup>

We find in Proposition IV that the trial court did not abuse its discretion in concluding that the defense failure to provide discovery was willful, motivated by a desire to obtain tactical advantage, and denied the State an opportunity to rebut proposed expert testimony.<sup>5</sup> We find in Proposition V that Benjamin Barnes did not testify as an expert, and the substance of his testimony did not invade the province of the jury. However, his testimony regarding the civil suit against Caves's employer was both irrelevant and prejudicial, and contributes to our decision to modify Caves's sentence. We find in Proposition VI that, while the trial court should have removed juror

---

<sup>3</sup> *Parker v. State*, 1996 OK CR 19, 917 P.2d 980, 986. The record confirms our conclusion that Caves knew what she was charged with and what she must be prepared to defend against, as she did in fact present a defense against the allegations that she failed to suction Hick's trachea tube as well as against the claim that she failed to perform CPR.

<sup>4</sup> *Jones v. State*, 2006 OK CR 5, 128 P.3d 521, 539 (no abuse of discretion where instructions accurately state the applicable law). As there was no DNR in the case, and no evidence that Caves knew about any Advance Directive or based her actions upon it, such instructions would only have confused the jury. Counsel was not ineffective for failing to ask for an instruction on 63 O.S.2001, § 3131.4(C), as that civil statute does not apply here, and Caves cannot show prejudice from this omission. *Williams v. Taylor*, 529 U.S. 362, 393, 120 S.Ct. 1495, 1513, 146 L.Ed.2d 389 (2000); *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984).

<sup>5</sup> *Rojem v. State*, 2006 OK CR 7, 130 P.3d 287, 297; *White v. State*, 1998 OK CR 69, 973 P.2d 306, 312; *Allen v. State*, 1997 OK CR 44, 944 P.2d 934, 937; *Taylor v. Illinois*, 484 U.S. 400, 415, 108 S.Ct. 646, 656, 98 L.Ed.2d 798 (1988). Caves claims that counsel was ineffective for failing to complete timely discovery regarding the expert witness. Based on the indications in the record regarding his proposed testimony, Caves cannot show prejudice. The expert was a physician's assistant, not a nurse, and no showing was made that he was qualified to testify regarding the standard of practice and care for nurses. He had a personal opinion regarding the circumstances surrounding the case, but the record does not indicate that he had scientific, technical or other specialized knowledge which could assist the jury to understand

Arms for cause, Caves failed to preserve this error by showing that, as a result of this error, she was forced to use a peremptory challenge and keep an unacceptable juror.<sup>6</sup> The error does not require relief.

We find in Proposition VII that the expert testimony on nursing standard of care was appropriate and did not amount to other crimes evidence. We find in Proposition IX that some error in closing argument was cured when Caves's objection was sustained and the jury admonished.<sup>7</sup> However, we find that prejudicial argument encouraging jurors to sympathize with the victim contributes to our decision to modify Caves's sentence. We find in Proposition X that, having modified Caves's sentence, no other relief is required.

In Proposition VIII Caves argues that her sentence, a \$10,000 fine, is excessive. Caves did not receive a sentence of imprisonment, but she received the maximum fine. In Propositions V we conclude that jurors heard irrelevant testimony regarding a civil suit which stemmed from this incident, which may have influenced jurors' determination of the amount of the fine. In Proposition

---

the evidence or determine a fact in issue. As Caves fails to show she was prejudiced by counsel's action, counsel is not ineffective.

<sup>6</sup> *Rojem v. State*, 2006 OK CR 7, 130 P.3d 287, 295; *Jones v. State*, 2006 OK CR 17, 134 P.3d 150, 155; *Browning v. State*, 2006 OK CR 8, 134 P.3d 816, 829, *cert. denied*, 127 S.Ct. 406, 166 L.Ed.2d 288 (2006). Caves argues that counsel was ineffective for failing to preserve the record. Caves points to four other jurors who worked in health care or law enforcement or knew Hicks or his family. All these jurors stated that, despite their personal or professional knowledge, they could serve as fair and impartial jurors. Caves fails to show on appeal how the mere fact that jurors or their wives worked in health care is so undesirable to her position that they rise to the level of "unacceptable" jurors. As the record does not show unacceptable jurors remained on Caves's panel, counsel was not ineffective for failing to preserve the issue.

<sup>7</sup> *Browning v. State*, 2006 OK CR 8, 134 P.3d at 839. The prosecutor did not err in noting that Caves had access to the same evidence as the State and could have produced it. *McCarty v. State*, 1995 OK CR 48, 904 P.2d 110, 123 (prosecutor may comment on a defendant's ability to present evidence, where the comment is neither misleading nor draws improper conclusions from outside the record).

IX we conclude that the prosecutor's appeal to jurors' sympathy was error. These errors warrant modification of Caves's fine to \$7,500.

**Decision**

The Judgment of the District Court is **AFFIRMED**. The Sentence of the District Court is **MODIFIED** to reflect a fine of \$7,500. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2007), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

**ATTORNEYS AT TRIAL**

KYLE MCCALLUM  
MARIA BLAKELY  
P.O. BOX 826  
702 E. JACKSON  
HUGO, OKLAHOMA 74743  
ATTORNEYS FOR DEFENDANT

JOE WATKINS  
ASSISTANT DISTRICT ATTORNEY  
CHOCTAW COUNTY COURTHOUSE  
300 3. DUKE  
HUGO, OKLAHOMA 74743  
ATTORNEY FOR STATE

**OPINION BY: CHAPEL, J.**

LUMPKIN, P.J.: CONCUR IN PART/DISSENT IN PART  
C. JOHNSON, V.P.J.: CONCUR  
A. JOHNSON, J.: CONCUR  
LEWIS, J.: CONCUR

**ATTORNEYS ON APPEAL**

KIMBERLY D. HEINZE  
APPELLATE DEFENSE COUNSEL  
P.O. BOX 926  
NORMAN, OKLAHOMA 73070  
ATTORNEY FOR PETITIONER

W.A. DREW EDMONDSON  
ATTORNEY GENERAL OF OKLAHOMA  
THOMAS LEE TUCKER  
ASSISTANT ATTORNEY GENERAL  
313 N.E. 21<sup>ST</sup> STREET  
OKLAHOMA CITY, OKLAHOMA 73105  
ATTORNEYS FOR RESPONDENT

**LUMPKIN, PRESIDING JUDGE: CONCUR IN PART/DISSENT IN PART**

I concur in the Court's decision to affirm the conviction in this case, but I must dissent to the modification of the sentence. No objections were made to Barnes' testimony alluded to in Proposition V. In fact, defense counsel further addressed the issue on cross-examination. There is no error here. The Appellant got off light with just a fine and that sentence should be affirmed.