



for an unannounced visit, around 2:00 p.m. After they knocked a few times, Chiles, who was on the phone (getting instructions from EMSA) opened the door, motioned for them to come in, and then walked back to the living room. When the women followed Chiles into the home, they found her attempting to give Minton CPR. Christiano described Minton's appearance as "white and turning blue and very floppy" and that he "appeared lifeless." At that point Whitson went out to watch for the ambulance, and Christiano gathered up the other six children in the home and took them to a back playroom.

When the emergency responders arrived a few minutes later, they found Minton not breathing, with no pulse, cool skin, blue lips, eyes fixed and dilated, and "no signs of life." He had quite a bit of vomit in his airway and on his face and some kind of sticky substance on his cheeks. The emergency responders immediately began advanced pediatric life support measures and then transported Minton to St. John's Hospital. Shortly after arriving there, he was airlifted to St. Francis Hospital, where he died later that day.

Tulsa Police Officer Gene Watkins testified that he was the day-shift supervisor for the Tulsa homicide and crime scene units on May 17, 2007. Watkins testified that Chiles gave him oral permission to search her home and agreed to talk with him. When Watkins searched the southeast bedroom, he found a substantial amount of used, wadded-up masking tape under the sleep mat where Minton had been left. The tape appeared to have vomit and some blood on it. Watkins went outside and told Officer Murphy, who was interviewing Chiles, what he had found.

Officer Scott Murphy testified that he worked for the Tulsa Police Department's Child Crisis Unit and that he interviewed Vicki Chiles on the afternoon of May 17, 2007. Chiles told Murphy that when it was time for the children to nap, Minton stayed awake and was noisy, whiny, and disruptive. She explained that there were six other children in the home at the time, five in the living room and another baby napping in a separate back bedroom. Chiles stated that she put Minton in the southeast bedroom by himself and laid him down on a mat, told him to be quiet, shut the door, and went to check the other children. Chiles was telling Murphy about the events leading up to naptime when Murphy left the car to speak with Officer Watkins. Watkins told Murphy about the masking tape that he had found. When Murphy got back in the car, he asked for "100% honesty" from Chiles and told her that he knew things had happened that "are not right" and that they had found some masking tape. Chiles admitted that she put masking tape over Minton's mouth, but not over his nose, and that she also put it around his hands, so he would not be able to open the bedroom door. Chiles insisted that she had never done this before, and that she just "couldn't calm him." She stated that she closed the door, but then came back a few minutes later to check on Minton. When she found that he was not breathing she called 911.

The medical examiner testified that the cause of Minton's death was "anoxic encephalopathy due to complications of airway obstruction." Although the emergency responders were able to re-establish his heartbeat, his brain had already been too damaged due to prolonged deprivation of oxygen. There is no

dispute in this case that Minton died because he vomited while his mouth was covered up with masking tape causing him to suffocate. There was no evidence that Minton had been otherwise abused or mistreated previously.

In Proposition I, Chiles appeals the trial court's refusal to instruct the jury on the defense of excusable homicide due to "accident or misfortune" and also on Oklahoma's child discipline statute regarding "ordinary force as a means of discipline." Because trial counsel requested these instructions Chiles' Proposition I claims were properly preserved at trial. The determination of which instructions shall be given to the jury is a matter within the discretion of the trial court and absent an abuse of that discretion this Court will not interfere with the trial court's decision. *Eizember v. State*, 2007 OK CR 29, ¶ 111, 164 P.3d 208, 236. Trial courts are required to instruct on a defendant's theory of defense "when evidence has been introduced at trial that is adequate to raise that defense, *i.e.*, to establish a *prima facie* case" of that defense. *See Malone v. State*, 2007 OK CR 34, ¶ 22, 168 P.3d 185, 196.

Title 21 O.S.2001, § 731(1) provides that homicide is excusable "[w]hen committed by accident and misfortune in doing any lawful act, by lawful means, with usual and ordinary caution, and without any unlawful intent." Of this defense, this Court has held:

When the death of a human being is the result of accident or misadventure, in the true meaning of the term, no criminal responsibility attaches to the act of the slayer. When it appears that a killing was unintentional, that the perpetrator acted with no wrongful purpose in doing the homicidal act, that it was done while he was engaged in a lawful enterprise, and that it was not the result of negligence-the homicide will be excused on the score of accident.

*Mead v. State*, 65 Okl.Cr. 86, 83 P.2d 404, 410 (1938). Thus, the uniform instruction sought by Chiles states: "A homicide is excusable when committed by lawful means, with usual and ordinary caution, and without any unlawful intent, but occurs by accident and misfortune while doing some lawful act." OUJI-CR 8-28.

Regarding Chiles' request for an excusable homicide instruction due to accident/misfortune, there can be no real doubt that Minton's death was both a horrible "misfortune" and also an "accident," at least as those terms are typically and generically used.<sup>1</sup> Chiles admitted that she taped Minton's mouth and hands with masking tape and then left him alone in a bedroom and closed the door. Minton died shortly thereafter because he vomited and then suffocated. Accordingly, we find that no reasonable juror could conclude that the admitted actions of Chiles toward Minton were done "with usual and ordinary caution." The facts of the current case cannot qualify as an "excusable homicide" under Oklahoma law. Hence the trial court did not abuse its discretion in declining to instruct the jury on this defense.

Regarding Chiles' request for a special jury instruction based upon Oklahoma's child discipline statute, we likewise find that the trial court did not err in declining to give such an instruction. Title 21 O.S.2001, § 844 provides that, "nothing contained in this act shall prohibit any parent, teacher or other

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<sup>1</sup> See Webster's Third New Int'l Dictionary 11, 1443 (15th ed. 1966) (defining "accident" as a "sudden event or change occurring without intent or volition through carelessness, unawareness, ignorance, or a combination of causes and producing an unfortunate result" and "misfortune" as "bad fortune: adversity" and also "an instance of bad luck: mishap").

person from using ordinary force as a means of discipline, including but not limited to spanking, switching or paddling.” However, the circumstances of this case have nothing to do with “the use of ordinary force as a means of discipline.” The requested instruction and the statute upon which it is based were simply not relevant to the issues properly before the jury in this case. Hence the instruction was properly declined.

In her second proposition, Chiles argues that the trial court erred in declining to give the jury her requested instruction on the lesser offense of second degree murder. We review a trial court's decision on the submission of lesser included offense instructions for an abuse of discretion. *Jackson v. State*, 2006 OK CR 45, ¶ 24, 146 P.3d 1149, 1159.

The general first degree murder statute at 21 O.S.Supp.2006, § 701.7(A) provides that:

A person commits murder in the first degree when that person unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof.

Under this provision, a showing of deliberate intent to kill is an essential element of the offense. In the instant case, however, Chiles was charged with first degree murder under 21 O.S.Supp.2006, § 701.7(C) which sets out a special form of first degree murder that applies only when the victim is a child and when the death is the result of the use of unreasonable force. Specifically, Section 701.7(C) states:

A person commits murder in the first degree when the death of a child results from the willful or malicious injuring, torturing, maiming or using of unreasonable force by said person or who shall willfully cause, procure or permit any of said acts to be done upon the child pursuant to Section 843.5 of this title. It is sufficient for the crime of murder in the first degree that the person either willfully tortured or used unreasonable force upon the child or maliciously injured or maimed the child.

By enacting Section 701.7(C) for the special case of child homicide, the Legislature removed the element of deliberate intent to kill (as is found in a Section 701.7(A) homicide), and replaced it with the element of willful application of unreasonable force. Thus, the Legislature determined that when the homicide victim is a child, and the death is the result of the use of unreasonable force, the crime is first degree murder, regardless of whether the perpetrator acted without any premeditated design to effect death, or did so with reckless disregard for human life. Consequently, when, as in this case, the homicide victim is a child, and the child's death was caused by the use of unreasonable force, a jury cannot acquit of first degree murder (e.g., find that a child did not die from the use of unreasonable force), but convict of second degree murder (e.g., find that a person, not a child, died from an imminently dangerous act). Accordingly, second degree murder as defined in 21 O.S.2001, § 701.8, is not a lesser-included offense of first degree murder when the murder is charged under the child abuse murder statute at 21 O.S.2001, § 701.7(C). Thus, because second degree depraved mind murder is not a lesser-included offense of first degree child abuse murder, Chiles was not entitled to a jury instruction on second degree

murder. The district court did not abuse its discretion by denying the instruction.

In Proposition III, Chiles argues that it was reversible error not to instruct her jury on the meaning of "life without parole," particularly because of the number of questions her jury asked regarding the meaning of this term. It is apparent from the jury's questions about the meaning of the term life without parole and their instruction dealing with parole eligibility at forty-five years for a life sentence, that the jurors were confused about their sentencing options. We are not convinced, therefore, that the sentence of life without parole was imposed by a properly informed jury. Consequently, under the unique circumstances of this case, the sentence of life without parole shocks this Court's conscience. Accordingly, we modify the punishment to life imprisonment with the possibility of parole and we suspend all but the first thirty years of this sentence.

#### **DECISION**

The Judgment of the District Court is **AFFIRMED**. The matter is **REMANDED** to the District Court with instructions to **MODIFY** Appellant's sentence to life imprisonment with all but the first thirty years suspended and set the conditions of probation. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2010), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY  
THE HONORABLE CLANCY SMITH DISTRICT JUDGE**

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**OPINION BY C. JOHNSON, P.J.**

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LUMPKIN, J.: CONCUR  
LEWIS, J.: CONCUR IN RESULTS

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