

MAR 27 2007

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA
MICHAEL S. RICHIE
CLERK

TAMARA MARINE DAVIS,)
)
 Appellant,)
 v.)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION
Case No. F-2005-1193

SUMMARY OPINION

CHAPEL, JUDGE:

Tamara Marine Davis was tried by jury and convicted of Accessory to Felony Murder in the First Degree in violation of 21 O.S.2001, § 173, in the District Court of Logan County, Case No. CF-2002-167. In accordance with the jury's recommendation the Honorable Donald L. Worthington sentenced Davis to forty (40) years imprisonment. Davis appeals from this conviction and sentence.

Davis raises seven propositions of error in support of her appeal:

- I. THE EVIDENCE WAS INSUFFICIENT TO PROVE ACCESSORY AFTER THE FACT TO FELONY MURDER
- II. THE ADMISSION OF INFORMATION ABOUT PROBATION AND PAROLE WAS IMPROPER AND CAUSED THE JURY TO BE INFLAMED
- III. PROSECUTORIAL MISCONDUCT DEPRIVED DAVIS OF A FAIR TRIAL
- IV. DAVIS WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL
- V. THE TRIAL COURT COMMITTED REVERSIBLE AND PREJUDICIAL ERROR BY ALLOWING THE STATE TO INTRODUCE IRRELEVANT AND PREJUDICIAL EVIDENCE WHICH HAD NOTHING TO DO WITH THE OFFENSE IN QUESTION, IN VIOLATION OF DAVIS'S CONSTITUTIONAL RIGHTS
- VI. THE SENTENCE WAS EXCESSIVE
- VII. CUMULATIVE ERROR DEPRIVED DAVIS 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 Davis's sentence. We find in Proposition I that any rational trier of fact could find beyond a reasonable doubt that Davis knew the victim was dead when she helped her husband dispose of the victim's car and belongings, lied about his movements to law enforcement officers, and helped him flee the state.¹ We find in Proposition II that although jurors should not hear information about pardon and parole, Davis elicited that testimony in order to show the witness's bias, and we will not reverse the case on appeal as a result of Davis's decision.² We find in Proposition III that there was no plain error in the prosecutor's questioning regarding Davis's pre-arrest decision to hire an attorney, made in response to extensive testimony by a defense witness about that decision;³ the prosecutor's questioning regarding the paternity of Davis's son was irrelevant but not prejudicial, and does not require relief;⁴ the prosecutor did not err in accurately

¹ *Dodd v. State*, 2004 OK CR 31, 100 P.3d 1017, 1041-42.; *Wilson v. State*, 1976 OK CR 167, 552 P.2d 1404, 1406.; 21 O.S.2001, §173; OUJI-CR (2nd) 2-2.

² *Mayes v. State*, 1994 OK CR 44, 887 P.2d 1288, 1316 (jurors should not hear evidence about pardon and parole policies); *Livingston v. State*, 1995 OK CR 68, 907 P.2d 1088, 1093 (bias is never collateral, and witness may be cross-examined on any matter tending to show bias or prejudice); *Lynch v. State*, 1995 OK CR 65, 909 P.2d 800, 802 (defendant may not profit by invited error).

³ Davis cites cases which hold that any reference to post-arrest silence, after *Miranda* warnings are given, violates the Fifth Amendment. See *Doyle v. Ohio*, 426 U.S. 610, 617, 96 S.Ct. 2240, 2244, 49 L.Ed.2d 91 (1976). The United States Supreme Court has held that use of pre-arrest silence to impeach a defendant does not violate the Constitution. *Jenkins v. Anderson*, 447 U.S. 231, 238, 100 S.Ct. 2124, 2134, 65 L.Ed.2d 86 (1980). That Court has not ruled on whether use of pre-arrest silence may be used as substantive evidence of guilt. This Court has held that evidence of pre-arrest silence is irrelevant and should not be admitted. *Farley v. State*, 1986 OK CR 42, 717 P.2d 111, 112-113. However, Davis initially elicited all this information from her own witness, and the prosecutor's brief questions cleared up possible jury misunderstanding which that testimony may have fostered.

⁴ 12 O.S.2001, § 2401. Evidence showed that she knew Travis had killed Nelson but helped him cover up that crime and flee the state. By her own admission, she showed remarkable callousness towards Nelson, whom she assumed was robbed, injured, and (at best) stranded. She admitted regularly using marijuana and methamphetamine in front of her toddler

stating that the evidence showed Davis failed to present counseling records to the jury; there was no plain error in the prosecutor's request that jurors refrain from having sympathy for either the defendant or the victim's family;⁵ the prosecutor's isolated misstatement of evidence in closing argument was cured by the trial court's admonitions to the jury.⁶

We find in Proposition IV that trial counsel was not ineffective; Davis cannot show she was prejudiced by counsel's failure to present particular evidence,⁷ as none of the evidence would have supported her defense of duress.⁸ Davis's Motion for Evidentiary Hearing on this issue is denied. We find in Proposition V that, as Davis was not prejudiced by the testimony, there was no plain error in the introduction of irrelevant evidence of the paternity of

daughter. Given the evidence against her, the revelation that she may have had a child with someone other than her incarcerated husband was unlikely to sway the jury.

⁵ 20 O.S.2001, § 3001.1. The prosecutor's remark might have been better phrased.

⁶ *Browning v. State*, 2006 OK CR 8, 134 P.3d 816, 839, *cert. denied*, 127 S.Ct. 406, 166 L.Ed.2d 288 (2006).

⁷ *Williams v. Taylor*, 529 U.S. 362, 393, 120 S.Ct. 1495, 1513, 146 L.Ed.2d 389 (2000) (defendant prejudiced where counsel's actions deny him a substantive or procedural right to which he is entitled by law); *Strickland, v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984); *Hooks v. State*, 2001 OK CR 1, 19 P.3d 294, 317.

⁸ To prove duress, a defendant must show she committed the crime because she had a reasonable belief that there was imminent danger of death or great bodily harm from another to herself, her spouse, or her child. 21 O.S.2001, § 156. This is more than a vague or general menace – there must be a specific and explicit threat which causes the defendant to act at that particular time. *Hawkins v. State*, 2002 OK CR 12, 46 P.3d 139, 145-46 (defendant must have reasonable belief of imminent danger involving an actual threat); *Shelton v. State*, 1990 OK CR 34, 793 P.2d 866, 877 (duress requires threat made by actual force or fear); *Tully v. State*, 1986 OK CR 185, 730 P.2d 1206, 1209 (duress involves a choice of evils, where a crime is committed under the pressure of an unlawful threat of harm). A great deal of evidence was presented to show that Davis and her husband had an abusive relationship, that Davis feared him, and that the two often fought. Davis testified she didn't want to help her husband the night of the crime, but was afraid and couldn't get out of it. However, neither she nor any other witness testified that her husband made any specific threat of imminent bodily harm or death which caused her to help him. Davis specifically testified that her husband never put his hands on her in a threatening way during the time of the crime, and did not testify he explicitly threatened her in any way. The evidence Davis claims counsel omitted was similar in nature and did not go to any specific threat which would support a claim of duress.

Davis's son.⁹ We find in Proposition VI that Davis's sentence is excessive.¹⁰

We find in Proposition VII that there is no cumulative error.¹¹

Decision

The Judgment of the District Court is **AFFIRMED**. The Sentence of the District Court is **MODIFIED** to twenty-five (25) years imprisonment. The Motion for Evidentiary Hearing is **DENIED**. 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.

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OPINION BY: CHAPEL, J.

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

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⁹ 12 O.S.2001, § 2401; 20 O.S.2001, § 3001.1. As Davis does not show prejudice, counsel was not ineffective for failing to object to the testimony. *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068.

¹⁰ *Rea v. State*, 2001 OK CR 28, 34 P.3d 148, 149 (reaffirming the Court's use of the "shock the conscience" standard and noting that, as with a proportionality review, such a standard requires consideration of all the facts and circumstances of the case and the defendant's background). Davis had no prior convictions. She tried to discourage Travis from going with Nelson initially, and had no involvement in Nelson's robbery or death. She helped Travis dispose of Nelson's car and belongings, but gave police some information and allowed them to search the trailer before Travis was arrested.

¹¹ We found in Propositions III and V that evidence regarding the paternity of Davis's son was irrelevant, but not prejudicial. We found no other error. Where there is no error requiring relief, there is no cumulative error. *Alverson v. State*, 1999 OK CR 21, 983 P.2d 498, 520.

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

I concur in the Court's decision to affirm the conviction in this case, however, I can find no basis in law or fact to modify the sentence. The Court analyzes each issue, finds no error, and then out of the clear blue, says the sentence is excessive. That is nothing more than an appellate court substituting its will for that of the jury in the case. The jury actually considered each of the factors listed in fn. 10. When the record fails to show a verdict was influenced by passion, prejudice or any outside influence, the decision of the trier of fact should be affirmed. Therefore, I would affirm both the judgment and sentence.