IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

EMILY MICHELLE DOWDY,) NOT FOR PUBLICATION
)
Appellant,)
)
v.) Case No. F-2004-427
)
THE STATE OF OKLAHOMA,)
)
Appellee.)

OPINION

C. JOHNSON, VICE PRESING JUDGE:

Appellant, Emily Michelle Dowdy, was charged in Oklahoma County District Court, Case No. CF-1999-3910, with First-Degree Manslaughter (21 O.S.1991, § 711(1)) in the commission of a misdemeanor, Driving Under the Influence of Alcohol (47 O.S.Supp.1999, §11-902). In February 2001, she was convicted by a jury and sentenced to twenty-five years imprisonment. On direct appeal, this Court reversed for a new trial because the trial court barred Appellant from presenting evidence supporting her claim of involuntary intoxication. *Dowdy v. State*, Case No. F-2001-171 (Okl.Cr. May 31, 2002) (not for publication). Retrial was held before the Honorable Susan P. Caswell, District Judge. The jury found Appellant guilty and recommended a sentence of forty years imprisonment. Formal sentencing was held April 16, 2004.

Appellant's conviction arises from a fatal motor vehicle accident in the early morning hours of Sunday, May 23, 1999. Appellant's vehicle collided with a vehicle driven by Ryan Brewer on Interstate 240 in Oklahoma County. Brewer, the driver and only occupant of his vehicle, died in the collision. Appellant, the driver and only occupant of her vehicle, suffered serious trauma to her neck and back and was hospitalized. Brewer was driving eastbound when the wreck occurred; Appellant was driving westbound, but on the

eastbound side of the divided highway when she struck Brewer's car head-on. Witnesses testified that Appellant was driving at a normal highway speed, that her headlights were on, and that she never attempted to slow down or swerve before the accident. A sample of Appellant's blood drawn about an hour after the accident showed Appellant had an alcohol concentration of approximately .17 grams of alcohol per 100 milliliters of blood, well over the legal threshold for Driving Under the Influence of Alcohol. Further drug tests showed no evidence of other common intoxicants.

The uncontradicted evidence showed that on the night of the accident, Appellant and her friend, Katherine Hillin, traveled in Appellant's car to an Oklahoma City bar called the Crosswinds for drinking and dancing, arriving at approximately 11 p.m.; that the two women each ordered one mixed drink and one shot of liqueur and moved to the dance floor; that Hillin became very ill a short time later and vomited in the ladies room; that the bartender sold one more mixed drink to Appellant, but would not serve Hillin because she appeared to be intoxicated; and that Appellant escorted Hillin out to Appellant's car where she (Hillin) passed out. The bartender testified that Appellant did not appear to be intoxicated the last time he saw her, which was at approximately midnight. No one saw Appellant return to the bar, and Appellant testified that she could not recall anything after taking Hillin to the car. At approximately 1:30 a.m., a police officer removed Hillin from Appellant's car and took her to the city's detox center. Appellant's whereabouts during this time are unknown, but at some point during the next two hours, Appellant returned to her car. The fatal accident occurred several miles from where the Crosswinds bar was located.

At trial, Appellant advanced a theory that she was involuntarily intoxicated. Although there was no direct evidence to support her claim,

Appellant presented evidence, including several experts, to demonstrate that her symptoms were consistent with those of a person who has ingested GHB, rohypnol, or any of a number of related substances, commonly referred to as "date-rape" drugs because they have sometimes been used on unsuspecting persons to facilitate sexual assault.[1] The defense attempted to show, through expert testimony, that Appellant's claim of "pristine" memory loss (abrupt onset and cessation of amnesia) was consistent with GHB intoxication, and that GHB and its analogues can vanish from the bloodstream within a few hours, which could explain why no trace of these substances was found in the drug screens. In response, the State pointed out that if Appellant truly had GHB-induced amnesia until after she arrived at the hospital, as she claimed, then some trace of the drug should have shown up in the blood extracted at short time after her arrival; and that while a low dose of GHB might explain why Appellant was still able to drive her car, it was inconsistent with a claim of prolonged amnesia.

One defense expert also noted that Hillin's sudden feeling of nausea and vomiting after drinking at the bar was consistent with the possibility that she, too, had involuntarily ingested GHB. In response, the State elicited testimony from Hillin that she had not eaten since that morning, that she had several mixed drinks before she and Appellant drove to the bar, and that she was feeling intoxicated by the time Appellant arrived at her home. The defense elicited testimony that Appellant was not wearing underwear at the time of the collision, and argued that this supported the possibility that Appellant was drugged and sexually assaulted. Both parties presented testimony as to

[1] Gamma hydroxybutyrate, or GHB, is one of many related substances that have similar physiological effects. The term "GHB" will be used herein as a generic label, even though there was no chemical evidence of any particular substance besides alcohol in Appellant's bloodstream.

whether a small clot of blood, observed when hospital staff inserted a catheter into Appellant's vagina, was indicative of recent sexual intercourse.

The defense presented substantial expert testimony, including statistical and anecdotal evidence, about the "date rape drug" phenomenon. The defense even presented a confirmed victim of GHB intoxication from Tulsa to testify about her experiences. The State never denied that GHB existed, or that it is sometimes used as a "date rape" drug. Rather, the State attempted to show that the facts of this case were in fact more consistent with the voluntary consumption of alcohol.

Appellant presents six propositions of error on appeal. Several propositions include claims of ineffective assistance of counsel. We remanded the case to the district court for an evidentiary hearing on some of these claims, which are discussed below.

In Proposition 1, Appellant claims her trial was barred by the Double Jeopardy clauses of the United States and Oklahoma Constitutions. Before Appellant's first full trial, the district court granted Appellant's request for a mistrial, after a police officer familiar with the case approached the trial judge *ex parte* and made a disparaging assessment of Appellant's anticipated defense theory. Appellant claims the officer's conduct is attributable to the prosecutor, and that the prosecutor deliberately goaded the defense into seeking a mistrial. *See Oregon v. Kennedy*, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982). This issue was fully considered and rejected in Appellant's first appeal. Appellant presents no new information or authority to justify reconsideration of the issue, much less a different result.[2] Proposition 1 is therefore denied.

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[2] *Salazar v. State*, 1998 OK CR 70, ¶¶ 5-7, 973 P.2d 315, 321 (where double-jeopardy issue was raised and rejected before resentencing, it was barred under doctrine of *res judicata* from being reconsidered on appeal after resentencing).

In Proposition 2, Appellant alleges error in the admission of bad-character evidence – specifically, evidence concerning several past incidents of her voluntary alcohol intoxication, and evidence that she consumed alcohol pending trial, in violation of her bond conditions. Alternatively, Appellant claims that if defense counsel "opened the door" to such attacks on her character, then he rendered constitutionally deficient performance by doing so. We disagree on both counts. We find these subjects were legitimately opened by the theory of defense as applied to the available evidence.

While cross-examining a police witness who investigated in this case, defense counsel established that Appellant had no record of alcohol-related traffic offenses or arrests. On redirect, the prosecutor responded by asking the officer if Appellant had any history of "using" alcohol. When defense counsel objected, the trial court limited the witness's answer to any "criminal violations" the officer was aware of. The prosecutor then asked whether Appellant had "criminally consumed" alcohol since the accident, and the officer testified that she had. Appellant claims her trial counsel was unfairly forced to clear up the inference by having the officer specify, on re-cross-examination, that Appellant had a few drinks after charges were filed, in violation of her bond restrictions.

By questioning the officer on any alcohol-related "criminal" conduct committed by Appellant, the State sought to rebut the inference, created by the defense, that Appellant was a responsible drinker. We need not decide whether the insinuation of post-offense criminal conduct related to alcohol consumption was error. Not only did defense counsel clear up any improper inference, but Appellant later admitted to violating her bond conditions in this manner when she testified. Once she took the witness stand, the matter became relevant not because it involved alcohol consumption *per se*, but because it bore on

Appellant's character for truthfulness: whether she kept a promise made to the court. 12 O.S.2001, § 2608.[3]

Appellant's next complaint concerns the introduction of specific instances of her past conduct in consuming alcohol. One of the defense's experts in GHB intoxication took information from Appellant while conducting her analysis of the case. According to this witness, Appellant reported that when she drank alcohol, she usually had only one or two drinks. In rebuttal, the State called witnesses who recounted specific instances of Appellant becoming intoxicated on alcohol. We believe the defense opened the door to this rebuttal evidence by suggesting that Appellant was unlikely to have willingly become too intoxicated to operate a motor vehicle.[4]

Having found these inquiries were permissible, given the defense strategy, we now turn to whether that strategy was reasonable. A defendant may present evidence of good character traits, with the aim of showing the jury that it is unlikely she committed the offense with which she is charged. That decision comes at a price, however, because the State is then entitled to rebut the insinuation with specific instances of contradictory conduct, through both cross-examination and rebuttal. 12 O.S.2001, §§ 2404(A)(1), 2405(B); *Malicoat*

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[3] *See Hawkins v. State*, 1986 OK CR 58, ¶¶ 7-8, 717 P.2d 1156, 1158-59 (in DUI prosecution, cross-examination of defendant regarding prior DUI offenses was proper; even though convictions for these crimes were not permissible impeachment under 12 O.S. § 2609, inquiry into the incidents was permissible under § 2608 because the defendant testified he could not drink any alcohol due to health problems); *Barnhart v. State*, 1956 OK CR 105, ¶ 9, 302 P.2d 793, 796 (in DUI prosecution, any error in admitting evidence of defendant's refusal to take breath test during the State's case in chief was cured when defendant, through his own testimony, opened the door to the same inquiry).

[4] *Walters v. State*, 1993 OK CR 4, ¶ 8, 848 P.2d 20, 23 (in prosecution for child abuse, defendant opened the door to specific instances of violent episodes involving his wife, after his character witnesses testified to his peaceful disposition); *Quilliams v. State*, 1989 OK CR 55, ¶ 10-12, 779 P.2d 990, 992 (specific instances of defendant's violent tendencies were admissible in rebuttal after defendant presented evidence of a peaceful character).

v. State, 2000 OK CR 1, ¶ 40, 992 P.2d 383, 403-04; *Douglas v. State*, 1997 OK CR 79, ¶¶ 24-25, 951 P.2d 651, 663.[5]

In resolving claims of ineffective assistance of counsel, we consider two questions: (1) whether counsel's performance was professionally unreasonable, and (2) whether that performance can reasonably be said to have affected the outcome of the trial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). We must give strong deference to counsel's strategic decisions, provided they are supported by reasonable investigation. *Id.* at 689, 104 S.Ct. at 2065. If we can conscientiously conclude that no prejudice resulted from counsel's conduct, we may resolve the issue on that question alone. *Id.* at 700, 104 S.Ct. at 2071.

The defense theory of involuntary GHB intoxication depended on circumstantial inferences. The fact that Appellant was above the legal limit for alcohol intoxication at the time of the accident could not be disputed. In her effort to raise a reasonable doubt that her condition at the time of the accident was not her own doing, Appellant opened the door to some inquiry into her drinking habits. Defense counsel presented a substantial amount of expert testimony on the subject of GHB intoxication, including evidence which could explain why no trace of GHB was found in Appellant's bloodstream after the accident. One defense expert conceded that Appellant's symptoms could also be consistent with voluntary intoxication by alcohol. Given these challenges, defense counsel's strategy of pointing out Appellant's clean driving record was not unreasonable; and the fact that Appellant's drinking habits were a routine

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[5] "[C]haracter is relevant in resolving probabilities of guilt. ... The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him." *Michelson v. United States*, 335 U.S. 469, 476, 479, 69 S.Ct. 213, 219, 220, 93 L.Ed 168 (1948).

part of the defense expert's own evaluation could not legitimately be hidden from the jury. We conclude that trial counsel was not ineffective for pursuing a strategy that necessarily invited inquiry into Appellant's drinking habits.[6] *Dodd v. State*, 2004 OK CR 31, ¶ 90, 100 P.3d 1017, 1043.

Appellant also complains in this proposition about police testimony concerning the frequency and common characteristics of alcohol-related vehicle accidents in Oklahoma. The defense had already used similar types of evidence concerning the frequency and characteristics of vehicle accidents

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[6] To support her ineffective-counsel claims, Appellant relies on *Hooper v. Mullin*, 314 F.3d 1162 (10th Cir. 2002), which held that defense counsel's failure to reasonably investigate a chosen strategy can amount to ineffective assistance of counsel, when that omission opens the door to prejudicial evidence rebutting the defense theory. In *Hooper*, defense counsel called an expert witness whom he knew would not be able to support the defense theory, in the sentencing phase of a capital murder case, that the defendant had brain damage and other mitigating psychological problems. Before trial, defense counsel asked this expert to prepare a summary report based solely on another expert's evaluation. That summary suggested the defendant might have mental problems, but admitted the need for further information. Counsel did not bother to follow up with his expert until after the guilt stage of the trial, at which time the expert warned counsel that testimony about his cursory evaluation was likely to do more harm than good. Nevertheless, counsel called the expert in the punishment stage. This opened the door to rebuttal testimony from the expert who had conducted the original evaluation, confirming the absence of brain damage or special psychological problems. The appellate court found counsel's conduct "disastrous" to the mitigation strategy.

Hooper is distinguishable from this case. In *Hooper*, counsel did not bother to reasonably investigate the mitigation strategy he had chosen, opting instead to order an incomplete report based on second-hand information and leave it at that. Worse still, the damaging testimony of the expert who had actually evaluated the defendant would have been privileged and inadmissible if counsel had not opened the door to it by calling the author of the summary report. Here, Appellant does not claim that the experts retained by counsel could lend no credible evidence to support her defense theory. Rather, she claims that somehow counsel could have advanced that theory without allowing the State to rebut it. We disagree. A defense strategy is not unreasonable simply because it may be rebutted. Under the circumstances of this case, the only way to have kept Appellant's drinking habits from the jury would have been to abandon the involuntary intoxication defense entirely. "The Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth." *United States v. Nobles*, 422 U.S. 225, 241, 95 S.Ct. 2160, 2171, 45 L.Ed.2d 141 (1975). *See also Burden v. Filion*, 421 F.Supp.2d 581, 587-88 (W.D.N.Y. 2006) (counsel's decision to have defendant charged with drug crimes testify in support of agency defense was reasonable, even though it opened the door to cross-examination about defendant's prior drug conviction; defendant's testimony was essential to the chosen defense theory, and counsel essentially had no other viable defense theories to choose from).

involving GHB. Thus, each party used statistical and anecdotal evidence with the hope of making its own position more tenable. Police testimony about alcohol-related accidents simply reminded the jury of the obvious: just as alcohol is much more prevalent than GHB, traffic accidents involving alcohol more likely than traffic accidents involving GHB. We find no error here. Proposition 2 is denied.

In Proposition 3, Appellant catalogues numerous questions and comments by the prosecutor which, she claims, violated her right to remain silent and her presumption of innocence. Many of these comments were not objected to. In reviewing claims of prosecutor misconduct, were are concerned with whether the cumulative effect of the conduct deprived the accused of a fair trial.[7]

First, Appellant complains that prosecutor made unfair use of statements she made to Trooper King while she was confined to a hospital bed shortly after the accident. Because Appellant did not object to King's testimony on this point, we review for plain error. *Wilson v. State*, 1998 OK CR 73, ¶ 64, 983 P.2d 448, 464. Although Appellant was not ambulatory at the time of the interview, her condition was not due to police action. Appellant was not "in custody" when the statements were made, and therefore, no *Miranda* warnings were required. *Bryan v. State*, 1997 OK CR 15, ¶ 15, 935 P.2d 338, 351.[8] We

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[7] *Short v. State*, 1999 OK CR 15, ¶ 80, 980 P.2d 1081, 1105; *Robinson v. State*, 1995 OK CR 25, ¶ 10, 900 P.2d 389, 395-96.

[8] *Accord, Moyer v. State*, 620 S.E.2d 837, 843 (Ga.App. 2005) (no *Miranda* warnings required where police questioned defendant as he lay on a gurney in hospital awaiting treatment for wound; officer did not attempt to restrain or isolate defendant and only asked general questions); *State v. Guzman-Gomez*, 690 N.W.2d 804, 817 (Neb.App. 2005) (defendant was not in custody when he made statements to officer at hospital, and thus *Miranda* warnings were not required, where defendant was admitted to hospital for treatment, was not under formal arrest, and was questioned by officers during the routine course of investigation of a motor vehicle accident); *State v. Thomas*, 843 So.2d 834, 839-840 (Ala.Crim.App. 2002) (no *Miranda* warnings were required before police questioning of defendant in hospital, where only restraint

find no evidence that Trooper King took unfair advantage of Appellant's condition. *Colorado v. Connelly*, 479 U.S. 157, 164, 107 S.Ct. 515, 520, 93 L.Ed.2d 473 (1986). The jury was well aware that any reticence on Appellant's part could have been due to the fact that she had just been seriously injured in a motor vehicle accident. Trooper King admitted that Appellant did not appear to be "hedging" in her responses to his questions. Moreover, Appellant fails to explain how her statements to Trooper King unfairly prejudiced her. Appellant's own testimony tracked the account she gave to Trooper King, and defense counsel used that consistency to argue that Appellant was telling the truth about events preceding the accident.[9] We find no plain error here.

The remainder of Proposition 3 lists various ways in which the prosecutor attacked Appellant's credibility. Appellant claims the prosecutor improperly commented on her right to silence by suggesting her defense theory was an after-the-fact fabrication. The prosecutor did take many opportunities to challenge the credibility of Appellant's defense, but we believe these were fair comments on the evidence presented.[10] By choosing to testify, Appellant subjected herself to the same kind of credibility tests applicable to other

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on freedom of movement was due to defendant's medical condition, not actions of police). "[C]onfinement to a hospital bed is insufficient alone to constitute custody." *People v. Miller*, 829 P.2d 443, 445 (Colo.App.1991). *See also United States v. Martin*, 781 F.2d 671 (9th Cir.1985) (defendant, injured in an explosion while making bombs, was not 'in custody' when officers went to the hospital and questioned him); *State v. Clappes*, 344 N.W.2d 141, 145-46 (Wis. 1984) (accused, who was questioned by police in the hospital following automobile accident, was not "in custody" because, although he was surrounded by an 'atmosphere of restraint,' the restraint was not created by law enforcement authorities).

[9] *See Brown v. State*, 1982 OK CR 127, ¶ 7, 650 P.2d 50, 53 (no prejudice from admitting defendant's statements to police where they were cumulative to other testimony).

[10] *See Hooks v. State*, 2001 OK CR 1, ¶ 43, 19 P.3d 294, 315 (comments pointing out that a defendant has an opportunity to modify her testimony after hearing the evidence presented against her at trial are not objectionable; citing *Portuando v. Agard*, 529 U.S. 61, 120 S.Ct. 1119, 146 L.Ed.2d 47 (2000)).

witnesses. 12 O.S.2001, § 2608; *Ray v. State*, 1990 OK CR 15, ¶ 7, 788 P.2d 1384, 1386. When defense counsel objected to direct attacks on Appellant during her own cross-examination, those objections were in fact sustained. Questions to police officers about their experiences in dealing with intoxicated motorists were not improper, as they addressed matters within the officers' personal experience, and were relevant to whether aspects of this case were inconsistent with a "typical" case of alcohol intoxication, as the defense claimed.[11] We find no error here.

In Proposition 4, Appellant alleges that her Sixth Amendment right to effective assistance of counsel was violated by various acts and omissions on trial counsel's part not already discussed in the preceding propositions. In Proposition 5, Appellant alleges that improper communication with a juror denied her a fair trial. Because Proposition 5 also involves a strategic decision on trial counsel's part, we address it here as well.

In support of her ineffective-counsel claims, Appellant filed a motion to supplement the appeal record and requested an evidentiary hearing. We granted that request as to some of Appellant's claims, and the trial court held a hearing on these matters in March 2006. After receiving a considerable amount of evidence, the trial court made findings of fact and conclusions of law; the parties submitted supplemental briefs based on the evidence adduced at the hearing.

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[11] *See Hickerson v. State*, 1977 OK CR 197, ¶¶ 10-11, 565 P.2d 684, 686 (officer could testify, based on his experience, about common deficiencies in police reports). Several times, the State elicited police testimony that Appellant's claim of having had only two drinks on the night of the accident was a very common response in DUI cases. We find no unfair prejudice. Appellant's account of how many drinks she had at the bar was corroborated by the bartender, who was called by the State. Yet Appellant's blood-alcohol concentration was approximately .17 over four hours later, and declined to approximately .12 ninety minutes after that. The jury was free to accept or reject the inference that Appellant unknowingly drank more alcohol after leaving the bar.

Appellant claims trial counsel was ineffective for not reporting an improper communication between a juror on her case and an employee of the sheriff's office. At the evidentiary hearing, Appellant and several members of her family testified that during the trial, a jailer, who had become acquainted with Appellant, reported to them that he had inadvertently conversed with a female juror about Appellant's case during a recess. According to these witnesses, the jailer said he told the juror that he hoped she was not trying the case of his friend (Appellant) who had been involved in a DUI accident, and commented that Appellant had "been punished enough already" or words to similar effect. When the woman indicated that she thought she was indeed on that jury, the conversation ended. The incident was reported to defense counsel, who allegedly chose to do nothing about it, remarking that if anything, the comment would be beneficial to Appellant's cause. Trial counsel also testified at the evidentiary hearing, and corroborated Appellant's claim that an unauthorized communication was reported to him, although he could not specifically recall the details of it.

Appellant claims the jailer's comment, coupled with one witness's inadvertent reference during trial to a prior "trial," made it clear to the jury that Appellant had been convicted once before, thereby diminishing the jury's sense of responsibility. Appellant also claims that trial counsel was ineffective for not reporting the unauthorized communication to the court.

At the evidentiary hearing, the State presented testimony suggesting the conversation between the jailer and a female juror never occurred. The jailer denied any such conversation, and the female jurors from Appellant's trial testified that they had never spoken with the jailer. They also claimed they were not aware Appellant had been convicted by prior jury until after this trial was over. The trial court found these witnesses to be more credible than

Appellant's on the issue, and concluded that no improper communication occurred.[12] While we recognize that witnesses on both sides of this issue had strong motives to slant their testimony, we accept the trial court's credibility choices. Yet even assuming that such a communication occurred, we find no grounds for relief.

Because the alleged communication occurred before deliberations began, it is Appellant's burden to demonstrate prejudice therefrom. *Campbell v. State*, 1982 OK CR 164, ¶ 5, 652 P.2d 305, 306. Similarly, trial counsel cannot be deemed ineffective for failing to report the incident absent a showing of prejudice. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. References, during trial, to appeals or other proceedings are only objectionable if they are deliberately calculated to diminish the gravity of the jury's task. *See Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985); *Davis v. State*, 1999 OK CR 16, ¶ 14, 980 P.2d 1111, 1116. We do not believe that the brief, isolated reference to a prior "trial" that Appellant complains of, inadvertently made by a witness during trial, diminished the jurors' sense of responsibility, even assuming that they deduced what Appellant claims they did. *Romano v. State*, 1995 OK CR 74, ¶¶ 49-51, 909 P.2d 92, 114-15. Nor do we find prejudice in the comment, allegedly made by the jailer, that Appellant had been "punished enough already." The comment did not directly inform the jurors that Appellant had been convicted before. Furthermore, the comment was essentially a plea for mercy, and arguably beneficial to Appellant.

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[12] The trial court properly considered the testimony of jurors in determining whether they received, during trial, information about the case from a source outside the courtroom. The trial court properly refused to entertain any testimony from jurors as to whether and how evidence presented during trial might have affected their verdict. 12 O.S.2001, § 2606(B); *McDonald v. Pless*, 238 U.S. 264, 35 S.Ct. 783, 59 L.Ed. 1300 (1915); *Mattox v. United States*, 146 U.S. 140, 13 S.Ct. 50, 36 L.Ed. 917 (1892); *Oxley v. City of Tulsa*, 1989 OK 166, ¶¶ 24-26, 794 P.2d 742, 747-48.

Chatham v. State, 1986 OK CR 2, ¶¶ 7-8, 712 P.2d 69, 71. We find no reasonable possibility of prejudice from any inaction on trial counsel's part.

Appellant also contends that trial counsel was ineffective for not more fully investigating the claims of two other women concerning involuntary GHB intoxication. During trial, defense counsel was contacted by a woman who believed that she and her female companion had been drugged some five months before Appellant, and noted that they had visited the same bar as Appellant. The woman declined to divulge the name of her companion. At the evidentiary hearing, the woman testified that on New Year's Eve 1998, she and her friend went out to several establishments, had several drinks, and woke up the next morning in the home of a man they had met the night before. The witness could not recall much else about the evening, and felt her loss of memory as the evening progressed was unusual. She had no direct evidence that she had been drugged, and did not believe she had been sexually assaulted. Even though, the next day, she made a police report that her purse had been stolen, this witness never reported either a drugging incident or a possible sexual assault. The State called the woman's companion, who was even more ambivalent about what happened on the evening in question. The companion did not exclude the possibility that she had been drugged, but claimed she and her friend were both voluntarily intoxicated that night, and she denied any sexual assault.

Trial counsel testified that after speaking with the first woman, he declined to pursue the matter further because he did not feel she was assertive enough in her claim. He could not corroborate the woman's account because she declined to reveal the name of her companion. The trial court found this to be a strategic decision based on reasonable investigation, and considering the testimony at the hearing, we agree. Any claim of involuntary intoxication by

these women was speculative. The testimony of the second woman tended to undermine that of the first. Trial counsel may reasonably have concluded that any value in the first woman's testimony was outweighed by (1) its speculative nature, (2) the risk of embarrassing the woman by forcing her to recount such an incident in a public forum, and (3) the risk that the testimony of the second woman, assuming she could be found, would play even more favorably for the State.[13]

The incident in question occurred several months before Appellant's collision. Appellant does not allege that a particular person was systematically drugging women at the Crosswinds bar, or that these women would have furthered such a theory. At trial, the State never denied that involuntary GHB intoxication was a real phenomenon; it simply argued that voluntarily alcohol intoxication was more likely under the facts presented. Moreover, at trial, defense counsel effectively gave the phenomenon a human face by presenting the testimony of a confirmed victim of GHB intoxication. Like the trial court, we find counsel's investigation of the matter reasonable under the circumstances, and we discern no reasonable probability of a different outcome if the women had testified at trial.

Appellant also claims that defense counsel was ineffective for not

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[13] Appellant also faults trial counsel for having one of his expert witnesses speak to this potential witness about her experience if he did not intend to call her at trial. During an *in camera* hearing on the admissibility of this expert's testimony, the expert commented that she had been informed of other possible incidents of GHB intoxication related to the Crosswinds bar. The trial court ruled that the expert could not testify about these alleged incidents because the defense had not provided the identity of the alleged victims to the State. Nevertheless, this may have been a rather keen defense strategy. Expert witnesses are often allowed to base their opinions on information outside their personal knowledge, *e.g.* hearsay. 12 O.S.2001, § 2703. Defense counsel may have hoped to present the possibility of similar GHB incidents through his expert, without risking the embarrassment or impeachment of the possible victim. But the trial court may require the expert to disclose the information underlying her inferences and opinions. 12 O.S.2001, § 2705.

informing one of his expert witnesses that there was no evidence of GHB in Appellant's bloodstream after the accident. Dr. Smith, a physician who treated Appellant, testified that many of her reported symptoms were consistent with GHB intoxication. Dr. Smith was under the impression that GHB was not tested for. When the prosecutor confronted Smith with a drug screen report showing that GHB was in fact tested for but not found in Appellant's bloodstream, he admitted that this evidence might alter his opinions, if he had more information about the "dynamics" of the drug. In rebuttal, the State presented the testimony of the physician who actually performed the drug screen. Even assuming defense counsel should have informed Dr. Smith of this report, we find no prejudice here. Dr. Smith admitted he was no expert on GHB intoxication. The defense presented several other experts who were, and they explained that GHB can vanish from the bloodstream quite rapidly. Even the physician who conducted the test, called by the State in rebuttal, agreed that GHB can disappear from the bloodstream within a few hours.

Appellant's supplementary materials in support of her ineffective-counsel claim include an affidavit from Dr. Zvosec, a nationally-recognized expert on the subject of GHB intoxication who was retained by the defense and who testified extensively at trial. Dr. Zvosec lists numerous ways in which, in her opinion, defense counsel performed deficiently. These allegations have a common theme: that Dr. Zvosec was not qualified to conduct certain trial preparation she had to undertake, or to testify about certain matters which were critical to the defense theory. We have reviewed these allegations, but cannot find a clear and convincing evidentiary basis for them.[14] *Dodd*, 2004

[14] Dr. Zvosec claims that counsel should have retained a toxicologist or similar expert to explain to the jury that the amount of alcohol in Appellant's bloodstream was inconsistent with the number of drinks she had at the bar. Yet the inference that Appellant ingested more alcohol after leaving the bar and before the collision was not only reasonable, but never

OK CR 31, ¶ 114, 100 P.3d 1050-51. We are mindful that expert witnesses, like lawyers, may always find ways in which past performance could have been improved upon. But we cannot judge counsel's effectiveness through hindsight alone. We must consider whether, *as a whole*, counsel's performance sufficiently engaged the adversarial process. *Strickland*, 466 U.S. at 686, 104 S.Ct. at 2064; *Lott v. State*, 2004 OK CR 27, ¶ 50, 98 P.3d 318, 337; *Short v. State*, 1984 OK CR 14, ¶ 7, 674 P.2d 566, 568. In this case, we believe that it did.

Finally, we address Appellant's claim that trial counsel was ineffective for not rebutting false and misleading testimony. As noted above, the State presented several witnesses in rebuttal to relate specific instances where Appellant became intoxicated. In our discussion of Proposition 2, we found most of this evidence proper under the circumstances. However, one witness, Scott Perry, was asked to testify about the contents of a newspaper photograph that he claimed to have seen, at some unspecified time pending trial, which allegedly depicted Appellant, holding a cup of beer, at a party. Defense counsel timely objected to this testimony as inadmissible hearsay, but was overruled.

Besides renewing her hearsay claim on appeal, Appellant contends that trial counsel was ineffective for not impeaching Perry's credibility with surrebuttal testimony. The evidentiary hearing established the following facts.

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disputed. No expert testimony was necessary to emphasize it. The real issue was whether that continued ingestion of alcohol was voluntary, or accomplished while Appellant was involuntarily under the influence of GHB. Dr. Zvosec states she was qualified to give an opinion on that point, and she did.

The State points to numerous instances in the trial record where Dr. Zvosec offered opinions on matters that she now claims she was either unqualified or unprepared to address. As for interviewing witnesses, Dr. Zvosec primarily complains that she was asked to contact the State's experts and evaluate their proposed testimony relating to the central issue of possible GHB intoxication. In our view, if defense counsel had been qualified to evaluate the findings of the State's experts on his own, he would not have needed to retain Dr. Zvosec in the first place.

During the pendency of her case, Appellant received permission to attend an out-of-state college football tournament. An Oklahoma City newspaper subsequently published an article that included a color photograph of Appellant at the tournament, sitting with her boyfriend, holding a hot dog bun, not a cup of beer. Both parties were aware of this photograph, but it was not part of the evidence presented to the jury. Perry recalled someone showing him a grainy, black-and-white photograph of Appellant, in similar circumstances, holding what he believed was a beer; he saw the photo for about ten seconds. Because at trial he was unsure of his memory, Perry asked the prosecutors if he could see a copy of the photograph. They told him it was not available, but emphasized that his testimony about it would be important. Even at the evidentiary hearing, the prosecutors admitted they had never seen such a photograph, and had never bothered to determine if it really existed.

Appellant claims trial counsel should have presented her and/or her boyfriend as surrebuttal witnesses to testify that Appellant was not, in fact, drinking beer at the tournament. The State claims that such efforts would only have further damaged the defense, as the jury would likely have discounted the testimony of Appellant and her boyfriend as self-serving, and because further discussion of the subject might have simply extended the theme of bad-character evidence. Ultimately, the State claims, any impeachment of Perry through surrebuttal would have been futile, because defense counsel could never prove that a photograph of Appellant, holding a beer at the football tournament, during the pendency of her case, did *not* exist.

In its findings and conclusions on remand, the trial court concluded that defense counsel was not ineffective. We agree. But the State's arguments only underscore the fact that Perry's testimony on this issue was inadmissible, and should never have been presented to the jury in the first place.

Evidence is "hearsay" when its probative force depends on the competency and credibility of a person other than the witness. *In Re Porter's Estate*, 1953 OK 155, ¶ 13, 257 P.2d 517. Generally, a witness must have personal knowledge of the matters on which he testifies. 12 O.S.2001, § 2602. Although he was personally acquainted with Appellant, the purpose of Perry's testimony went beyond a routine photo identification. Perry was asked to relate the *content* of the photo, what the photo purported to depict, to prove the truth of the matter asserted, even though Perry had no personal knowledge of whether Appellant was drinking beer at the event in question.

To prove the content of the photograph, the State was required to produce it or demonstrate reasonable efforts to do so. 12 O.S.2001, § 3002, 3004; 2 Whinery, *Oklahoma Evidence* § 23.19. The State did neither, and attempts to place the burden of production on the defense to prove a negative. Because the photo Perry thought he had seen was never even shown to exist, his testimony about it was literally unrebuttable. This is precisely why hearsay is generally barred from the courtroom.[15] We may question whether the prosecutors' zeal overtook their duty to conduct reasonable investigation of Perry's proposed testimony. But we need not decide whether the prosecutors intentionally or recklessly sponsored false or misleading evidence, as Appellant claims. Simply put, the trial court erred in overruling defense counsel's timely objection to this testimony.[16]

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[15] *See Omalza v. State*, 1995 OK CR 80, ¶ 29, 911 P.2d 286, 298-99 ("The danger of admitting such hearsay statements lies in the accused's inability to cross-examine the declarant"). Even if the photo had been produced, it would have to be authenticated, either by the person who took it, or by someone with personal knowledge of the event itself who could attest that the photo accurately represented what the witness personally observed.

[16] *See St. Louis, I. M. & S. Railway Co. v. Carlile*, 1912 OK 819, ¶ 3, 128 P. 690, 691 (witness's testimony about contents of expense bill was inadmissible hearsay, where the bill was not introduced into evidence and witness had no personal knowledge about the matters it purported to contain); *Seay v. State*, 93 Okl.Cr. 372, 375-77, 228 P.2d 665, 666-67 (1951)

We must now consider whether admission of this evidence unfairly prejudiced Appellant. It is true that other evidence negatively affecting Appellant's character had been properly presented during the trial. Still, we cannot confidently conclude that Perry's testimony about this supposed photograph had no effect on the outcome. Both the State, and the trial court in its findings and conclusions on remand, stress that Appellant's lack of remorse played a central role in the jury's verdict and sentence. Perry's testimony only underscored the lack of remorse, and was clearly intended to end the trial on that note. Lack of remorse may be relevant to the jury's deliberations; but it may not be demonstrated with incompetent evidence deliberately calculated to charge the emotions. *See Jones v. State,* 1987 OK CR 103, ¶ 18, 738 P.2d 525, 529. The last witness the jury heard in this trial painted a vivid mental image of Appellant, beer in hand, enjoying herself at a football game, while the victim of her conduct was deceased. While we do not believe Perry's relation of hearsay affected the jury's finding of guilt, we find a reasonable possibility that it affected the sentence imposed. We therefore **MODIFY** Appellant's sentence to twenty-five years imprisonment.

Finally, in Proposition 6, Appellant alleges that the accumulation of errors deprived her of a fair trial and reliable sentence. We have found no errors which, individually or cumulatively, could reasonably have affected the verdict of guilt. As to the sentence, the preceding discussion renders this claim moot.

(telephone book entry, read into evidence by police officer, offered to prove defendant's residence, was inadmissible hearsay); *Cook v. State,* 6 Okl.Cr. 477, 479-482, 120 P. 1038, 1039-1040 (1911) (defendant's constitutional right to confront witnesses was violated, and his conviction for unlawful possession of intoxicating liquor reversed, where State's case depended on the contents of freight delivery receipts which were read into evidence, and the preparer of the documents was not called to sponsor them).

DECISION

The Judgment of the district court is **AFFIRMED**. The Sentence is **MODIFIED** to twenty-five years imprisonment. 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.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE SUSAN P. CASWELL, DISTRICT JUDGE

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

RB

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

I concur in the affirmance of the conviction but dissent to modifying the sentence. In determining that Scott Perry's testimony was inadmissible, this Court goes beyond not only the scope of the analysis necessary to resolve the issue but also beyond the allegation of error raised in the appeal brief. Further, finding there was a "reasonable possibility" the improperly admitted evidence affected the sentence is also beyond the scope of the issue raised on appeal, pure speculation, and merely an excuse to modify the sentence.

After reviewing the evidence I find the 40-year sentence is appropriate. Perry's limited testimony, so limited because of defense counsel's strategic decision, did not impact the sentence.