IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DANIEL HAWKES FEARS,	)	
	)	
Appellant,	)	
v.	)	Case No. F-2004-1279
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

ORDER DENYING PETITION FOR REHEARING

Daniel Hawkes Fears was tried by jury in the District Court of Sequoyah County, Case No. CF-2002-568, and convicted of Counts I and II, Murder in the First Degree in violation of 21 O.S.2001, § 701.7; Counts III – X, Shooting with Intent to Kill in violation of 21 O.S.2001, § 652(A); Counts XI, Discharging a Firearm with Intent to Kill in violation of 21 O.S.2001, § 652(A); Count XII, Feloniously Pointing a Firearm in violation of 21 O.S.2001, § 1289.16; and Counts XIII – XVII, Drive By Shooting in violation of 21 O.S.2001, § 652(B).[1] In accordance with the jury's recommendation the Honorable John Garrett sentenced Fears to two terms of life imprisonment without the possibility of parole, to run consecutively (Counts I and II); nine terms of life imprisonment in Counts III - XI, each to be served consecutively to Counts I and II and concurrently to one another; nine (9) years and one (1) day imprisonment in Count XII, to be served consecutive to Counts III – XI; and five terms of imprisonment for nineteen (19) years and one (1) day in Counts XIII – XVII, each to be served consecutively to Counts III – XI and concurrently with Counts

[1] The trial court sustained Fears's demurrer to the evidence on Count XVIII, Drive By Shooting.

XII – XVI. On July 7, 2006, by unpublished Opinion this Court reversed and remanded the case to the District Court of Sequoyah County for entry of a verdict of not guilty by reason of insanity, and issued the mandate in the case.[2] The State filed a Petition for Rehearing on July 19, 2006. On July 20, 2006, this Court issued an order staying the mandate in the case.

> A Petition for Rehearing shall be filed for two reasons only:
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> (1) That some question decisive of the case and duly submitted by the attorney of record has been overlooked by the Court, or
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> (2) That the decision is in conflict with an express statute or controlling decision to which the attention of this Court was not called either in the brief or in oral argument. [3]

The State's Petition for Rehearing fails to meet the criteria set forth in Rule 3.14 and is denied. In reaching its conclusions the Court thoroughly reviewed all controlling authority and the factual circumstances of the case. The state first objects to the Court's holding that in future cases, juries should be instructed on the consequences of a verdict of not guilty by reason of insanity. Contrary to the State's claim, the Court was aware of and reviewed statutory and case law precedent in reaching this conclusion. Furthermore, the State made many of these arguments, and the Court was directed to the pertinent cases, during our initial consideration of the direct appeal. The State raises nothing new for the Court's consideration.

In filing its Petition, the State does not contest this Court's unanimous conclusion that this case must be reversed for pervasive prosecutorial

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[2] *Fears v. State*, No. F-2004-1279 (Okl. Cr. July 7, 2006) (not for publication).
[3] Rule 3.14, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2006).

misconduct. The State objects to the majority's further conclusion that the evidence of Fears's sanity was insufficient, and that the conviction must be reversed and a verdict of not guilty by reason of insanity entered. The State mistakenly suggests that this Court does not have the authority to reach this decision. Again, the State's claim regarding the sufficiency of the evidence does not meet the requirements for rehearing as set forth in this Court's Rules and quoted above. However, because of the unusual nature of the sufficiency of the evidence claim in this case, we provide additional discussion of the legal basis for our conclusion.

As a general rule, a jury hears the evidence presented during a trial, determines the facts of the case, and uses those facts to decide the defendant's guilt. In deciding issues presented on appeal, this Court does not disturb the jury's finding of fact. However, an exception is made to this general rule when this Court is directly presented with a claim that the evidence presented at trial is insufficient to support a conviction. In those very narrow circumstances, it is this Court's duty to independently review the evidence and determine whether, as a matter of law, it is sufficient to support the conviction.[4] If the evidence is insufficient as a matter of law, the remedy is to dismiss the case. Because double jeopardy prohibits a second trial after an appellate court has found the evidence legally insufficient to support a conviction, the remedy is

[4] "It is well settled that this court will not disturb the verdict for lack of evidence where there is competent evidence to support it. The converse rule is equally well settled, that it is not only the province but the duty of the court to set aside the verdict when it is contrary to the evidence, or there is no competent evidence to support it." *Slaton v. State*, 97 Okla.Crim. 12, 257 P.2d 330, 332 (Okl.Cr. 1953)(citation omitted).

reversal with instructions to dismiss.[5] There is no second chance, because our criminal justice system gives the State "one fair opportunity to offer whatever proof it could assemble."[6] The State is not afforded a second opportunity to re-try the defendant with more or better evidence.

Fears's case falls squarely within this narrow exception to the general rule of appellate review. Fears raised the affirmative defense of insanity.[7] Fears was required to present evidence that he was insane at the time of the crimes, and thus not eligible to be convicted for criminal offenses as a result of his actions. Nobody contests the fact that Fears put forth ample evidence that he was insane at the time of the crimes – that is, Fears met his initial burden to raise a reasonable doubt regarding his sanity. At that point, the State had the burden to prove Fears was sane beyond a reasonable doubt. This Court determined that some of the State's evidence was inadmissible, and that the State relied on improper inference and argument for much of its proof of sanity. Reviewing, but not weighing, the admissible evidence presented, a majority of this Court found that the State did not prove beyond a reasonable doubt that

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[5] *Burks v. United States*, 437 U.S. 1, 18, 98 S.Ct. 2141, 2151, 57 L.Ed.2d 1 (1978).

[6] *Burks*, 437 U.S. at 16, 98 S.Ct. at 2150; *LaFevers v. State*, 1995 OK CR 26, 897 P.2d 292, 302; *Edwards v. State*, 1991 OK CR 71, 815 P.2d 670, 672; *Clogston v. State*, 34 Okla.Crim. 209, 245 P. 905, 906 (Okl.Cr. 1926).

[7] The affirmative defense of insanity requires a defendant to raise a reasonable doubt that he was sane at the time of the crime. In Oklahoma, if the defendant meets this initial burden, the State must prove beyond a reasonable doubt that the evidence does not support the affirmative defense. In other words, the State has the burden to prove sanity beyond a reasonable doubt once the defendant raises a reasonable doubt as to his sanity at the time of the crime. It is this interplay of burdens and evidentiary obligations which this Court reviews in determining sufficiency of the evidence.

Fears was sane at the time of the crimes.[8] This led to the conclusion that the evidence was insufficient as a matter of law to support Fears's convictions.

The State's confusion on this issue is understandable. We are rarely presented with a claim of valid insufficient evidence. A finding that evidence is legally insufficient is even rarer.[9] An insufficiency claim in the context of an affirmative defense is unusual, and this court has never before found the evidence insufficient in a case where the insanity defense was presented. However, a majority of this Court found that the admissible evidence before Fears's jury was insufficient as a matter of law to prove beyond a reasonable doubt that he was sane at the time of the crimes. Consequently, the proper remedy is that reserved for findings of insufficient evidence – reversal. The remedy for most insufficiency findings is to order the District Court to dismiss the case. However, the remedy is slightly different where the affirmative defense was insanity. If a defendant is found not guilty by reason of insanity, specific statutory procedures require his immediate indefinite commitment, with continual court oversight. For this reason, this Court directed the District Court to enter a verdict of not guilty by reason of insanity, the result the jury could legally reach based on the admissible evidence presented at trial.

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[8] The State incorrectly suggests that this Court weighed the evidence on appeal. On the contrary, this Court independently reviewed the evidence, as is our duty, after removing inadmissible evidence and improper argument which was used in lieu of evidence to support the conviction. It is this review, rather than any attempt to weigh the remaining evidence, which the opinion sets out in detail.

[9] "This court is reluctant to reverse a case on the ground of insufficiency of the evidence, and it is only where it is clearly against the weight of the evidence, appears to have been influenced by passion, prejudice, or by reason of some error or is insufficient to establish guilt beyond a reasonable doubt that a case will be reversed for this reason." *Couch v. City of Tulsa*, 96 Okla.Crim. 100, 249 P.2d 474, 475 (citation omitted) (Okl.Cr. 1952).

The Court was aware of and considered all controlling case law and factual circumstances in deciding this case. When presented with a question of insufficiency of the evidence, this Court was required to determine whether the evidence presented was legally sufficient to support the conviction. Having done so, this Court has the authority to reach the conclusion that the evidence was insufficient, and to apply the appropriate remedy. The State's Petition for Rehearing is **DENIED**. 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.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 26th day of January, 2006.

Charles S. Chapel

CHARLES S. CHAPEL, Presiding Judge

Dissent with writing attached

GARY L. LUMPKIN, Vice Presiding Judge

Charles A. Johnson C.I.R & the Order + the Original Case. CSJ

CHARLES A. JOHNSON, Judge

Arlene Johnson (Dissent, Writing attached

ARLENE JOHNSON, Judge

David B. Lewis (CIR)

DAVID B. LEWIS, Judge

ATTEST:

Michael S. Rich

(Clerk)

LUMPKIN, VICE-PRESIDING JUDGE: DISSENT

For reasons previously stated in my Concur in Part/Dissent in Part vote to the original opinion in this case and the additional reasons set forth herein, I must dissent to the Order Denying the Petition for Rehearing in this case.

As I previously stated, this Court's jurisprudence is consistent that, "If a jury has not been properly instructed on the law as to how they should apply their determination of the facts and evidence in this case, then the proper remedy is to remand the case for retrial under a proper instruction of the law". The Court has consciously disregarded that law in the decision in this case.

The State factually points out the false premise upon which the Court uses the temporal Oklahoma Truth in Sentencing Act as a basis for its original decision. As related by the state, that Act was passed and then repealed prior to this Court's decision in *Ullery v. State*, 1999 OK CR 36, 988 P.2d 352. *Ullery* stated the law was that the process of a not guilty by reason of insanity verdict was "merely a procedural statement of disposition subsequent to the verdict and [is] immaterial to the process of rendering a verdict concerning the sanity of the accused". *Id.* at ¶ 28.

The most egregious violation of our jurisprudence is in the Court's usurping of the authority of the jury verdict in this case. While giving lip service to applying the standard of review enunciated in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), and adopted by this Court in *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203, it completely

disregards that objective standard and on the purely personal view of appellate judges finds the jury verdict was not rational. There is no evidence in the record to support that finding, while there is evidence under the *Spuehler* standard to find the jury was properly instructed and there is evidence to support their verdict. The record is void of any evidence to show that decision was based on passion, prejudice or any outside influence. Instead, it was based on the law and evidence presented during the trial.

This is just the kind of unbridled discretion I expressed concerns about in my dissent in *Seabolt v. State*, 2006 OK CR 50, ___ P.3d ___. The Court, in its zeal to utilize a *de novo* review, disregards the limitations that are historically placed on that process. Rather than being bound by the decisions of fact finders at the trial court, the Court embraces the trump card of *de novo* review to allow it to do what it would have done if it had been a fact finder. The problem is this is an appellate court subject to limitations on its authority, not "philosopher kings".

I must therefore dissent to this denial of rehearing. If the Court were true to its oath and jurisprudence, the proper procedure would be to remand the case to the trial court for retrial under proper instruction as to the law, now that it has decided a change in law is being made.

JOHNSON A., JUDGE, DISSENTS:

Rehearing in *Fears v. State* is procedurally appropriate, legally sound, and should be granted.

The case as written is a legal anomaly. It is a case of first impression, purporting to overrule existing law on an important issue, but without precedential authority because it is designated "Not for Publication." This odd deviation from the standard can only create uncertainty in future cases.

Further, the potential for uncertainty exists within the *Fears* case itself. For the first time in this jurisdiction a jury verdict is reversed and the case remanded with direction to the trial court to enter a verdict of not guilty by reason of insanity. There is no further direction in this opinion, and the trial judge and parties will look in vain for guidance on how to proceed.

Finally, although I concurred in *Fears v. State*, No. F-2004-1279 (Okl. Cr. July 7, 2006) (not for publication), I would grant rehearing to reconsider whether the finding of insufficient evidence to support the jury's verdict is the result of a misapplication of the *Spuehler*[1] standard and, so, wrongly decided.

[1] *Spuehler v. State,* 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203