

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

DEC - 2 1999

JAMES W. PATTERSON
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ALEXANDER KEITH GAUT,)
)
Appellant,) NOT FOR PUBLICATION
)
v.) Case No. F 98-1279
)
THE STATE OF OKLAHOMA,)
)
Appellee.)

SUMMARY OPINION

LILE, JUDGE:

Appellant, Alexander Keith Gaut, was tried by a jury and convicted of Second Degree Murder in violation of 21 O.S.1991, § 711 (count 1), Leaving the Scene of a Personal Injury Accident in violation of 47 O.S.1991, § 10-102 (count 2), and Leaving the Scene of an Accident Involving Death in violation of 47 O.S.1991, § 10-102.1 (count 3), all After Two or More Felony Convictions, in the District Court of Tulsa County, Case No. CF-98-1165. In accordance with the jury's verdict, the Honorable Thomas C. Gillert, District Judge, sentenced Gaut to ninety years imprisonment and a \$10,000 fine on count one, forty years imprisonment and a \$5,000 fines on count two, and sixty years imprisonment and a \$5,000 fine on count three. From this judgment and sentence Gaut has perfected his appeal.

Gaut raises the following propositions in support of his appeal.

- I. Title 21 O.S.1991, § 11(a) precludes convictions for both leaving the scene of a non-fatal accident and leaving the scene of a fatal accident based on one act by the appellant.
- II. The statutes criminalizing leaving the scene of an accident of either personal injury or of death are unconstitutionally vague on their face and as applied to Mr. Gaut in counts II and III in violation of the Fourteenth Amendment right to due process.
- III. The jury was fundamentally misinstructed on the elements of the offenses of leaving the scene of an accident involving injury and fatality.
- IV. The trial court's comments impermissibly suggested a time frame for deliberations.
- V. Prosecutorial misconduct deprived Mr. Gaut of the due process right to a fair trial which should result in relief by this court.
- VI. Cumulative error requires relief.

After thorough consideration of the entire record before us on appeal including the original record, transcripts, briefs and exhibits of the parties, we have determined that Gaut's conviction for leaving the scene of an accident involving injury should be reversed and remanded with instructions to dismiss. The remaining convictions and sentences should be affirmed.

In reaching our decision, we find, in proposition one, that leaving the scene of an automobile accident is one crime with varying punishments depending upon whether there is property damage only, nonfatal injuries, or fatalities. Appellant may only be convicted for leaving the scene of the automobile accident once. The correct crime and punishment in this case is determined by the fatality involved. 47 O.S.Supp.1998, § 10-102.1. In

proposition two we find that the language of the leaving the scene of an accident involving death statute is not vague and properly sets forth a general intent crime. *See Kreijanovsky v. State*, 1985 OK CR 120, 706 P.2d 541, 544. In proposition three we find that Appellant failed to object to the instructions given, therefore he has waived all but plain error. *Douglas v. State*, 1997 OK CR 79, 951 P.2d 651, 668. There was no plain error here. In proposition four, we find that Appellant waived all but plain error by not objecting to the comments of the trial court. We find that the comments did not rise to the level of plain error.

In proposition five we find that Appellant only objected to one comment by the prosecutor. We find that this comment was properly based on the evidence. *Price v. State*, 1974 OK CR 23, 518 P.2d 1281, 1283. The other comments did not rise to the level of plain error. *Carol v. State*, 1988 OK CR 114, 756 P.2d 614, 618. In proposition six we find that there was no cumulative error in this case requiring relief. *Cummings v. State*, 1998 OK CR 45, 968 P.2d 821, 838.

DECISION

The Judgment and Sentence for the crime of leaving the scene of an accident involving nonfatal injury (count 2) is **REVERSED** and **REMANDED** with instructions to **DISMISS**. The Judgment and Sentences for the remaining counts are **AFFIRMED**.

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OPINION BY: LILE, J.

STRUBHAR, P.J.: CONCURS
LUMPKIN, V.P.J.: CONCURS
JOHNSON, J.: CONCURS
CHAPEL, J.: CONCURS IN RESULT

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