

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ROBERT DEWAYNE HAYES, III,)
)
 Appellant,)
)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. F-2007-340

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

OCT 24 2008

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

C. JOHNSON, VICE-PRESIDING JUDGE:

Appellant, Robert Dewayne Hayes, III, was convicted after jury trial in Oklahoma County District Court, Case No. CF-2004-831, of First Degree Murder Youthful Offender (Count I), Shooting with Intent to Kill (Count II) and Assault with a Dangerous Weapon (Count III). Appellant’s sentence on Count I was deemed discharged. The jury assessed punishment at fifteen years imprisonment on Count II and ten years imprisonment on Count III. The trial court sentenced Appellant accordingly ordering the sentences be served consecutively. It is from this Judgment and Sentence that Appellant appeals to this Court.

Appellant raises the following propositions of error:

1. Appellant was denied a fair trial by the trial court’s refusal to sever his trial from his co-defendant.
2. The trial court erred by failing to grant a mistrial after the prosecutor’s mother-in-law had improper contact with a juror.

3. The district court erred in refusing to grant Appellant a mistrial after his co-defendant made an outburst in front of the jury.
4. Appellant was denied a fair trial by the introduction of highly prejudicial and irrelevant other crimes evidence.
5. The district court erred in admitting statements Appellant made while in custody because they were taken in violation of *Miranda v. Arizona* and because the statements were the product of police coercion.
6. Appellant's convictions for both felony murder and the underlying felony of shooting with intent to kill violate statutory and constitutional prohibitions against multiple punishment and double jeopardy.
7. The cumulative effect of all the errors deprived Appellant of a fair trial.

After thorough consideration of the propositions, and the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we affirm Mr. Hayes's Judgment and Sentence. As to Proposition I, we find that the trial court did not abuse its discretion in denying his motion to sever and requiring that he be tried with his co-defendant. *Powell v. State*, 1995 OK CR 37, ¶ 21, 906 P.2d 765, 773.

In response to error raised in Proposition II, we note that the trial court questioned the juror about the impact that her conversation with the prosecutor's mother-in-law had upon her. The court was satisfied that the two had not spoken about the case and that the juror would remain impartial. We find that trial court did not abuse its discretion in denying Appellant's motion for a mistrial or his request to dismiss the juror. *Jackson v. State*, 2006 OK CR 45, ¶ 11, 146 P.3d 1149, 1156. *Jones v. State*, 2006 OK CR 5, ¶ 20, 128 P.3d 521, 535.

Error raised in Proposition III requires no relief as the trial court polled the

jurors and they all assured the court that they could still be fair and impartial after Appellant's co-defendant's outburst. In light of this record, we find that the trial court did not abuse its discretion in denying Appellant's motion for mistrial based upon his co-defendant's behavior. *Jackson*, 2006 OK CR 45, ¶ 11, 146 P.3d at 1156.

With regard to Proposition IV, we find that evidence of the robbery that occurred earlier the same evening was admissible as part of the *res gestae*. *Jackson v. State*, 2006 OK CR 45, ¶ 28, 146 P.3d 1149, 1160. The same cannot be found of the evidence of earlier burglaries and threats. These alleged earlier crimes and bad acts are clearly not relevant to prove any of the charged crimes nor were they part of the *res gestae*. While they were admitted for the purposes of identity and intent, this evidence seemed rather to serve the improper purpose of showing that Appellant acted in conformity with his propensity to commit these crimes. While the admission of other crimes evidence was error in this case, such error requires relief only where it results in prejudice. See *Warner v. State*, 2006 OK CR 40, ¶ 177, 144 P.3d 838, 888. Given the significant evidence properly admitted against Appellant this Court finds that the admission of improper other crimes evidence did not affect the jury's finding of guilt or sentencing decisions.

Error alleged in Proposition V requires no relief. We find that the trial court's ruling on the *Jackson v. Denno* Hearing is supported by competent evidence showing the knowing and voluntary nature of the statements admitted into evidence. Upon such a record, we will not disturb the trial

court's ruling. *Ullery v. State*, 1999 OK CR 36, ¶ 16, 988 P.2d 332, 343.

Regarding error raised in Proposition VI, we note that this Court has long held that convictions for both felony murder and a separately charged felony with the separately charged felony serving as the underlying predicate felony violate double jeopardy principles. *See Castro v. State*, 1987 OK CR 182, ¶ 32, 745 P.2d 394, 405, citing *Harris v. Oklahoma*, 433 U.S. 682, 683, 97 S.Ct. 2912, 2913, 53 L.Ed.2d 1054 (1977). The underlying felony merges into the greater crime of felony murder because proof of the separately charged felony is required to prove the felony murder charge. All elements of the underlying felony of Shooting with Intent to Kill were included within the elements of First Degree Murder. *See Selsor v. State*, 2000 OK CR 9, ¶ 20, 2 P.3d 344, 351. Any policy considerations are bested in this case by constitutional requirements. Accordingly, Appellant's conviction for Shooting with Intent to Kill in Count II must be reversed with instructions to dismiss.

Finally, we find although Appellant's trial was not error free, any errors and irregularities, even when considered in the aggregate, do not require reversal or modification because they did not render his trial fundamentally unfair or taint the jury's verdict or sentencing. *DeRosa v. State*, 2004 OK CR 19, ¶ 100, 89 P.3d 1124, 1157, quoting *Lewis v. State*, 1998 OK CR 24, ¶ 63, 970 P.2d 1158, 1176.

DECISION

Judgment and Sentence of the District Court is **AFFIRMED** as to Counts I and III. His conviction for Shooting with Intent to Kill in

Count II must be **REVERSED** with instructions to **DISMISS**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2008), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE VIRGIL C. BLACK, DISTRICT JUDGE

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

LUMPKIN, P.J.: CONCUR
CHAPEL, J.: CONCUR IN PART/DISSENT IN PART
A. JOHNSON, J.: CONCUR
LEWIS, J.: CONCUR

CHAPEL, JUDGE, CONCURS IN PART/DISSENTS IN PART:

I would take a different approach in this case and reverse the felony murder (Count I) conviction. See my dissents in *Dickens v. State*, 106 P.3d 599 (Okla.Cr.2005) and *Kinchion v. State*, 81 P.3d 681 (Okla. Cr. 2003). I would then affirm the convictions and sentences for Counts II and III.