

DEC 13 2007

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

MICHAEL S. RICHIE
CLERK

RICKY DALE HESTER,)	
)	
Appellant,)	NOT FOR PUBLICATION
)	
v.)	No. F-2006-469
)	
THE STATE OF OKLAHOMA,)	
)	
Appellee.)	

OPINION

A. JOHNSON, J.:

Appellant Ricky Dale Hester was tried by jury and convicted in the District Court of Oklahoma County, Case No. CF-2004-1564, of Count 1-First Degree Murder,¹ Count 2 – First Degree Arson,² Count 3 – Conspiracy,³ Count 4 – Robbery with a dangerous weapon,⁴ and Count 5 – Kidnapping.⁵ The jury fixed punishment at life imprisonment without the possibility of parole on Count 1, 35 years imprisonment on Count 2, and ten years imprisonment each on Counts 3, 4 and 5.⁶ The Honorable Susan P. Caswell, who presided at trial, sentenced Hester accordingly and ordered his sentences to be served consecutively. From this judgment and sentence, he appeals.

¹ 21 O.S.2001, § 701.7(A).

² 21 O.S.2001, §1401.

³ 21 O.S.2001, § 421.

⁴ 21 O.S.2001, § 801.

⁵ 21 O.S.2001, 745.

⁶ Hester was charged conjointly with Carl Myers and Charles Meredith, Jr. Their cases were severed for trial. Myers was convicted of the same five counts as Hester and his appeal was

FACTS

Sometime during the early morning hours of March 4, 2003, Richard Hooks was beaten, stabbed multiple times, and left in a burning garage. His body was discovered by the firefighters called to extinguish the fire.

Hooks had been stabbed 14 times. He died from multiple stab wounds and blunt force trauma to his head. The police found the knife used in the killing in co-defendant Carl Myers's bedroom closet.

Before the murder, Hester told his friend Christina Pierce that he was going to beat up Hooks. He told his girlfriend Rachele Hollingsworth after the murder that he robbed Hooks because Hooks had treated his mother and aunt disrespectfully.⁷ He also claimed that Hooks had tried to drug him and Hollingsworth so Hooks and another man could rape Hollingsworth.

The evening before Hooks's murder, Hester and Myers found him at a pool hall. Myers left the pool hall and made arrangements to use the back room of a vacant house occupied by drug addict Robert Black for the robbery and assault. Later, Hester and Myers picked up Hooks from his apartment and took him to the drug house. Hester enlisted the aid of Charles Meredith, another denizen of the premises, to subdue Hooks in exchange for drugs. After Hooks was tied up and gagged, Hester and Myers beat and stabbed him. Then, they dragged Hooks's body to the garage and set the garage on fire.

decided earlier this year. See *Myers v. State*, Case No. F-2005-1011, (unpublished opn)(September 6, 2007).

⁷ Hollingsworth was in Myers's car asleep when Hester and Myers killed Hooks.

Afterwards, they went to Christina Pierce's house and Hester told her what had happened. She unsuccessfully washed Hester's blood stained clothes and the clothes were ultimately thrown away in Pierce's apartment dumpster. Police arrested Hester and Myers two days later.

I. Jury Instruction No. 16

Hester claims the trial court committed reversible error when it gave a non-uniform instruction on the law of co-conspirator liability. The instruction at issue was given over defense counsel's objection that it was not an approved uniform instruction. Instruction No. 16 read:

When a conspiracy is entered into to do an unlawful act, the conspirators are responsible for all that is said and done pursuant to the conspiracy by their co-conspirators until the purpose has been fully accomplished. If two or more persons conspire to combine to commit a felony, each is criminally responsible for the act of his associates and confederates in the furtherance of the common design, if the criminal act thoroughly results from the common enterprise, or where the connection between this is reasonably apparent.

(O.R. 179)

While Hester objected to this instruction at trial, the grounds for that objection were different from the challenge he now makes on appeal. We therefore review only for plain error. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923, *cert. denied*, ___U.S. ___, 127 S.Ct. 994, 166 L.Ed.2d 751 (2007).

It is fundamental to our system of justice that, before a conviction can be had, the State must prove, beyond a reasonable doubt, the facts comprising every element of the offense. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). Instructions which force the jury to presume a

particular result from a certain set of facts can violate due process, if doing so invades the jury's province of considering the evidence and determining the existence of each particular element of the offense. *See, e.g., Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). Hester argues the complained-of instruction invaded the province of the jury by setting up a conclusive presumption on an essential element of the offense. He maintains that Instruction 16 could have been construed by the jury to require a finding of guilt for murder simply because he *conspired* to commit an armed robbery. We disagree.

The jury was correctly instructed that all persons who either commit acts constituting a crime, or who knowingly, and with criminal intent, aid and abet in the commission of the crime, are equally guilty as principals. The jury was further instructed that before it could find Hester guilty of first degree murder with malice aforethought it first had to find that Hester caused Hooks's death unlawfully and with malice aforethought. 21 O.S.2001, § 701.1 (A); OUI-CR2d 4-61, 4-62, 4-63. The court also provided the jury with instructions on the elements of robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon. The State's evidence, if believed, clearly showed that Hester not only planned the robbery, but that he actively took part in the execution of that plan and participated in the beating and stabbing of Hooks that resulted in his death.

The instruction at issue did not require the jury to presume any fact from the existence of any other fact as did the instruction condemned in

Morrisette v. United States, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952). Nor did the instruction place the burden on Hester to disprove any particular fact as did the instruction in *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975). The instruction simply stated the law of co-conspirator liability, applicable *only if* the jury were to find that Hester was a member of the alleged conspiracy – *if*, indeed, the jury found any such conspiracy existed at all. The jury was not instructed that any particular *fact* was presumed to indicate a conspiracy, or to make Hester a member of it. Every fact necessary to determine every element of the offense of conspiracy was left to the jury to determine.

The instruction at issue is not a uniform jury instruction, but that does not mean it is not an accurate statement of the law. *See Hatch v. State*, 1983 OK CR 47, ¶ 19, 662 P.2d 1377, 1382; *Fox v. State*, 1974 OK CR 120, ¶ 8, 524 P.2d 60, 63. While it may be error for the trial court to tell the jury what facts to believe, it remains the trial court's responsibility to instruct the jury on the law, including the extent of criminal liability. We presume the jury followed its instructions on what proof was required to convict Hester of murder, *see Ryder v. State*, 2004 OK CR 2, ¶ 83, 83 P.3d 856, 875; and the jury found every fact necessary to support a conviction for murder with malice aforethought beyond a reasonable doubt. On the evidence presented and instructions given, no rational trier of fact could have concluded that Hester

was a member of the conspiracy to rob Hooks, but was not *also* a principal in Hooks's murder.⁸ This claim is denied.

II. Other Instruction Errors

Hester claims the trial court committed reversible error by failing to give the uniform instructions on corroboration of confessions and accomplice corroboration. See OUJI-CR2d 9-13, 9-26, 9-27, 9-28, 9-29 and 9-30. He maintains that without these instructions, the jury's analysis of the evidence and verdict is unreliable. Hester failed to object to the omission of these instructions; review is for plain error only. *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

Hester claims that the jury should have been instructed that before considering his confessions to Rachele Hollingsworth and Christina Pierce, the jury had to first find that the confessions were corroborated by other evidence. Failure to give OUJI-CR2d 9-13 on the necessity for corroboration of a defendant's confession is harmless when the defendant's confession was made voluntarily and it is corroborated by other evidence. See *Jones v. State*, 2006 OK CR 5, ¶ 39, 128 P.3d 521, 538-39, *cert. denied*, ___U.S.____, 127 S.Ct. 404, ___L.Ed.2d___ (2006).

⁸ Even if we were to find a *Sandstrom*-type error in the instruction Hester complains of, we would still find it harmless beyond a reasonable doubt, based on evidence that Hester was an active participant in the robbery and murder. *Cf. Rose v. Clark*, 478 U.S. 570, 580, 106 S.Ct. 3101, 3107, 92 L.Ed.2d 460 (1986) (jury instructions which impermissibly shift burden of proof to defendant to disprove element of crime is subject to harmless error analysis).

The evidence was clear and uncontroverted that Hester's admissions to Hollingsworth and Pierce were voluntary. His confessions were also corroborated by other evidence introduced at trial. Any error in the omission of OUJI-CR2d 9-13 did not deny Hester a substantial right or result in a miscarriage of justice. We find no plain error and deny relief.

Nor do we find that the omission of the uniform instructions on the necessity of corroboration for accomplice testimony requires relief. Hester claims the trial court erred by omitting OUJI-CR2d 9-26 through 9-30 regarding accomplices and the need for accomplice testimony to be corroborated. He contends these instructions should have been given with regard to the testimony of Christina Pierce and Robert Black.

Christina Pierce was not an accomplice. "The test used to determine whether a witness is an accomplice is whether he or she could be indicted for the crime which the accused is being tried for." *Jones*, 2006 OK CR 5, ¶ 33, 128 P.3d at 538. Pierce was not a party to the conspiracy to rob Hooks and she neither aided nor abetted Hester in the robbery, murder and arson. Pierce helped Hester wash his clothes and dispose of them after the murder. Her actions do not make her an accomplice, but rather an accessory after the fact. Corroboration is not required for the testimony of an accessory. *Pink v. State*, 2004 OK CR 37, ¶ 11, 104 P.3d 584, 599.

Hester contends that Black was an accomplice because he knew that he and Myers were going to rob and assault someone; he knew it was happening, and he gave permission for them to use the back room to carry out their plan.

Assuming, arguendo, that Black was an accomplice, his testimony was sufficiently corroborated. Statements made by Hester corroborated Black's testimony. The physical evidence also corroborated Black's testimony and Hester's DNA was found on a cigarette butt not far from where Hooks was beaten and stabbed. Any error in the omission of the accomplice instructions was harmless. *See Bryson v. State*, 1994 OK CR 32, ¶ 39, 876 P.2d 240, 255.

III. Admission of Coconspirator Hearsay

Hester argues the trial court erred in admitting Myers's statements to Robert Black under the coconspirator hearsay exception. This claim is properly before us.

A statement offered against a party made by a coconspirator during the course and in furtherance of the conspiracy is not hearsay and is admissible. *Pink*, 2004 OK CR 37, ¶ 31, 104 P.3d at 595; 12 O.S.Supp.2002, § 2801(B)(2)(e). Before a coconspirator's statement can be admitted into evidence against a defendant, the trial court is required to hold a hearing, often referred to as a *Harjo* hearing,⁹ to determine whether a conspiracy actually existed, using a "preponderance of the evidence" standard. *Pink*, 2004 OK CR 37, ¶ 31, 104 P.3d at 595.

Rather than have a full hearing on the matter, the parties below agreed to allow the trial court to make its ruling on the existence of a conspiracy based

⁹ *See Harjo v. State*, 1990 OK CR 53, ¶ 25, 797 P.2d 338, 345 (holding that during the *in camera* hearing regarding the admissibility of statements of a coconspirator, the trial court may consider the statements of an alleged coconspirator within its determination of whether a conspiracy existed).

on the transcripts from the preliminary hearing and previous trial.¹⁰ The trial court's ruling that there was sufficient evidence of a conspiracy is supported by the evidence. Anna Franklin, Hooks's girlfriend, testified that Hester and Myers came to her apartment and convinced Hooks to go with them the night of his death and she never saw him again. Hollingsworth remembered Hester and Hooks getting in the car with her and Myers as she drifted in and out of consciousness. She also testified about Hester's statements to her after the murder about his plan and motives for robbing Hooks. Black's testimony about his personal observations the night of Hooks's death, without Myers's statements, provided further support that a conspiracy existed. Black testified that Myers and Hester brought a man (Hooks) to the back room of the house. Both Myers and Hester went back and forth from the back room to the front room. On one occasion, Hester cut a piece of cord or rope that was in the front bedroom. On another occasion, he enlisted the aid of Charles Meredith to subdue the man. Black heard scuffling and the man asking Hester and Myers, why they were doing this to him. The trial court neither erred in finding that a conspiracy existed between Myers and Hester, nor in admitting Myers's statements to Black under 12 O.S.Supp.2002, § 2801(B)(2)(e).

IV. Spousal Privilege

Hester contends that the trial court erred in admitting statements made by him to Hollingsworth because the statements were protected by spousal

¹⁰ It is unclear whether the previous trial was the trial of co-defendant Myers or one of Hester's prior trials because the prosecutor noted during the instruction conference that this was the third trial for Hester.)

privilege under 12 O.S.Supp.2002, § 2504. This claim was properly preserved for review.

A ruling admitting or excluding evidence is reviewed for an abuse of discretion. *Jackson v. State*, 2006 OK CR 45, ¶ 48, 146 P.3d 1149, 1165, *cert. denied*, ___U.S.___, ___S.Ct.___, ___L.Ed.2d___, 2007WL1408173 (Oct. 10, 2007). To invoke spousal privilege, the defendant must show by clear and convincing evidence the existence of a valid marriage. *Davis v. State*, 2004 OK CR 36, ¶ 41, 103 P.3d 70, 82. The privilege applies to both common law and ceremonial marriages. *Id.* To establish a valid common law marriage, there must be evidence of an actual mutual agreement between the spouses to be husband and wife, a permanent relationship, an exclusive relationship--proved by cohabitation as man and wife, and the parties to the marriage must hold themselves out publicly as man and wife. *Id.*

The magistrate rejected Hester's claim of spousal privilege at preliminary hearing. Rachele Hollingsworth described herself both as Hester's fiance and wife. Her preliminary hearing testimony was inconsistent on the exact nature of their relationship and her credibility was questionable since she remained in contact with Hester. The trial court agreed with the magistrate and rejected Hester's claim of spousal privilege. The trial court's ruling is supported by the record. At trial, Hollingsworth testified that she was in a dating relationship with Hester until he was arrested. Other witnesses (Anna Franklin, Jodie Pierce and Christina Pierce) confirmed that Hester and Hollingsworth were in a dating relationship and referred to them as boyfriend and girlfriend. Based on

this record, the trial court neither erred in rejecting Hester's claim of spousal privilege nor in admitting Hollingsworth's testimony.

V. Past Recollection Recorded

Hester argues the admission of Hollingsworth's written statement to police under the past recollection recorded exception to the hearsay rule violated his right to confront and cross-examine Hollingsworth. Hollingsworth testified that she had no memory of her interview with Detective Kirby. During her interview, she wrote out a statement about what Hester had told her happened to Hooks. The statement contains both Hollingsworth's and Kirby's handwriting. Defense counsel objected to the admission of the statement, but the objection was overruled and Hollingsworth read her written statement to the jury.

Hester relies on *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) to support his claim. *Crawford* held that the Confrontation Clause bars the admission of "testimonial" hearsay unless (1) the declarant testifies at trial, *id.* at 59 n. 9, 124 S.Ct. at 1369, or (2) the declarant is unavailable to testify and was previously subject to cross-examination concerning the statement, *id.* at 59, 124 S.Ct. at 1369. There was no Confrontation Clause violation here because Hollingsworth testified at trial. She acknowledged that the interview was videotaped and that she had watched the interview, but persisted that she did not remember anything about the interview or of what Hester had told her. She admitted that she told the detective the truth about the things that were contained in her statement at

the time of her interview and that the detective's handwritten notes on her statement were based on her answers. On cross-examination, defense counsel was able to attack Hollingsworth's lack of memory and credibility. He questioned Hollingsworth about her drug use prior to the interview and her feelings of fear during the interview. The jury had the relevant information to consider and evaluate Hollingsworth testimony and the trial court followed the proper procedure in admitting her statement under 12 O.S.Supp.2004, § 2803 (5). No relief is required.

VI. Sufficiency of the Evidence

Hester argues his convictions for arson, conspiracy, kidnapping and robbery with a dangerous weapon must be reversed because the State failed to prove the elements of these crimes. This Court reviews the record in the light most favorable to the State to determine whether a rational trier of fact could have found the essential elements of the crimes charged beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Coddington v. State*, 2006 OK CR 34, ¶ 66, 142 P.3d 437, 455, *cert. denied*, ___U.S.___, 127 S.Ct. 2032, 167 L.Ed.2d 804 (2007). A jury verdict will not be disturbed, when sufficient evidence supports it, as it is the jury's exclusive province to weigh the evidence and determine the facts. *Jones*, 2006 OK CR 5, ¶ 35, 128 P.3d at 538.

A. First Degree Arson

Hester contends his arson conviction must be reversed because there was no evidence connecting him to the burning of the garage. Hester overlooks

his statements to both Rachele Hollingsworth and Christina Pierce, admitting to setting fire to the garage and burning Hooks's body. It was uncontested that the garage was intentionally set ablaze with Hooks inside. Hester and Myers were the last two individuals with Hooks at the house. This evidence and Hester's statements are sufficient to justify the jury's verdict. This claim is denied.

B. Robbery with a Dangerous Weapon

Hester argues that the State failed to present sufficient evidence to support his conviction for robbery with a dangerous weapon. Specifically, he claims the State failed to prove that he took any property from Hooks prior to his death as required by *Rogers v. State*, 1995 OK CR 8, ¶ 29, 890 P.2d 959, 973. We disagree.

The evidence showed that Hester and Myers planned to rob Hooks of his drugs, money, and gun. They lured him to the drug house to carry out their plan. Hollingsworth testified that neither she nor Hester had any drugs with them that evening. Black testified that Hester offered Meredith methamphetamine and marijuana to tie up and gag Hooks. It is fair to infer from the evidence that Hester and Myers took the drugs from Hooks at knifepoint and then enlisted Meredith to help restrain him, paying Meredith with some of the drugs they took from Hooks. Hester also told Christina Pierce that the drugs he brought to her house were taken from Hooks. Viewing the trial evidence in the light most favorable to the state, it is sufficient to justify the jury's verdict.

C. Conspiracy

Hester argues his conviction for conspiracy must be reversed because the State failed to prove an agreement between him and Myers to rob Hooks. Black testified that Myers came to the house and asked if he and Hester could use the back room to rob and assault a black man. He returned a short time later with Hooks and Hester. Hester asked Meredith to tie up and gag Hooks and Black heard a scuffle and Hooks asking why they were doing this to him. As discussed above, Black's testimony was corroborated by Hester's own statements and other evidence. This claim is without merit.

D. Kidnapping

Hester argues that his kidnapping conviction must be reversed because the evidence failed to show that Hooks was forcibly confined and seized since he willingly accompanied Hester and Myers to the drug house. To show that the jury was struggling with this very issue, he points to a note from the jury asking, "Does the crime of kidnapping necessarily involve transporting to a different location involuntarily? If so, does using deceit to convince someone to consent meet the requirement of 'forcible seizure?'"

The jury was instructed that the elements of kidnapping under 21 O.S.2001, § 745 are:

First, unlawful;

Second, forcible seizure and confinement;

Third, of another;

Fourth, with the intent to extort money or property from any person.

(O.R. 182)

The trial court could have included both alternative choices contained in the uniform instruction for the second element, which would have given the jury the option of finding “inveiglement” instead of forcible seizure and confinement in this case.

What is more troubling than the alleged lack of proof on the second element is a lack of proof on the fourth element. Hester’s co-defendant (Carl Myers) argued that his extortionate kidnapping conviction had to be reversed because the State failed to prove that his intent was to extort money or property from Hooks while he was forcibly seized and confined. We agreed because the evidence showed that Myers and Hester conspired and carried out a plan to rob Hooks and that their intent was to forcibly take Hooks’s money and drugs rather than to obtain any property through the use of threats.¹¹ The conspiracy plan was always to rob Hooks and forcibly take his property, not to merely threaten him to get it. We reversed Myers’s kidnapping conviction with instructions to dismiss. This same reasoning applies to Hester as well. Accordingly, we reverse Hester’s kidnapping conviction with instructions to dismiss.

VII. Cumulative Error

Hester contends that cumulative error deprived him of a fair trial, requiring reversal of his convictions or modification of his sentence. The

¹¹ “Extort” was defined in both Myers’s and Hester’s trial as “Obtain property by the use of threat(s).”

cumulative error doctrine applies when several errors occurred at the trial court level, but none alone warrants reversal. *DeRosa v. State*, 2004 OK CR 19, ¶ 100, 89 P.3d 1124, 1157. Although each error standing alone may be of insufficient gravity to warrant reversal, the combined effect of an accumulation of errors may require a new trial. *Id.* Cumulative error does not deprive the defendant of a fair trial when the errors considered together do not affect the outcome of the proceeding. Hester's kidnapping conviction must be reversed and dismissed. All other errors, even when considered together, did not deny Hester of a fair trial. This claim is denied.

DECISION

The Judgment and Sentence of the district court on Counts 1, 2, 3 and 4 is **AFFIRMED**. The Judgment of the district court on Count 5 is **REVERSED with instructions to DISMISS**. 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.

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

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OPINION BY: A. JOHNSON, J.

LUMPKIN, P.J.: Concur in part, dissent in part

C. JOHNSON, V.P.J.: Concur

CHAPEL, J.: Concur in result

LEWIS, J.: Concur

RE

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

I concur in affirming the convictions in Counts 1 – 4. However, I dissent to reversing the conviction in Count 5 as I find the evidence sufficient to support the extortionate kidnapping conviction. Appellant lured the victim away from his home and to the drug house with the express intent of beating and robbing him. The victim was held in the back of the drug house, tied up and hit in the head with a flashlight, knocking him unconscious. Appellant assisted in getting the victim to the drug house and holding him there against his will. Appellant specifically refused the victim's request to let him go. Based on this evidence, a rational trier of fact could find Appellant guilty beyond a reasonable doubt. I find the Court's discussion of extort is more of an after the fact application of the results of the kidnapping rather than a view of the evidence as the crime developed.